

Cabrillo Pacific University
College of Law
3620 AERO COURT, SAN DIEGO, CA. 92123

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON-CIRCULATING

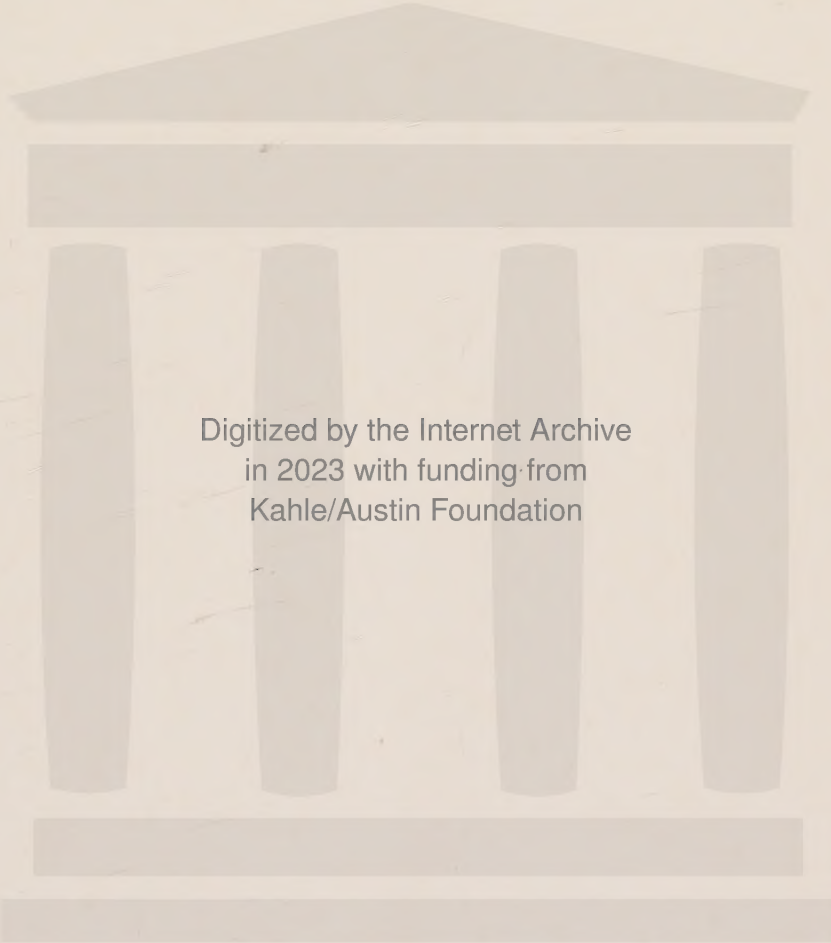
CALIFORNIA REPORTER REFERENCES

113 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page
1	247 575	277	248 155	500	248 438	712	248 810
5	247 572	280	248 59	505	248 441	717	248 783
10	247 605	286	248 117	510	248 520	720	248 947
14	247 727	295	248 171	528	248 433	724	248 962
19	247 609	309	248 123	531	248 425	729	249 336
23	247 612	319	248 482	534	248 491	741	248 959
26	247 594	335	248 447	549	248 761	746	249 63
31	247 714	339	248 510	561	248 779	751	249 332
37	247 580	356	248 193	567	248 771	759	248 949
40	247 607	363	248 39	571	248 464	763	249 54
43	247 717	365	248 130	575	248 758	768	248 992
53	247 838	374	248 427	578	248 786	773	249 45
67	247 855	383	248 41	584	248 508	780	248 971
71	248 81	389	248 74	587	248 536	783	248 977
90	247 927	392	248 101	593	248 474	789	249 49
95	247 831	397	248 466	598	248 801	795	249 58
107	248 68	404	248 471	613	248 420	799	249 38
115	247 848	409	248 534	615	248 501	804	249 35
119	247 949	413	248 94	617	248 421	808	248 984
124	247 915	416	248 444	622	248 773	813	249 66
128	247 925	421	248 35	627	248 506	823	248 954
132	247 847	428	248 450	631	248 423	824	249 318
135	247 857	439	248 96	634	248 940	833	249 291
139	247 851	443	248 106	639	248 814	840	249 29
146	248 45	447	248 32	642	248 932	842	249 307
149	248 52	451	248 25	647	248 943	857	249 60
160	247 939	453	248 122	654	248 784	861	249 72
175	247 956	455	248 477	657	248 929	873	249 301
186	247 934	459	248 27	661	248 968	880	249 298
195	248 147	460	248 502	666	248 937	881	249 299
207	248 157	465	248 31	669	248 799	885	249 52
231	247 929	468	248 461	673	248 986	890	249 329
234	248 63	472	248 103	682	248 965	895	249 348
243	248 76	476	248 479	687	248 768	899	249 306
253	248 141	481	248 27	692	248 954	901	249 30
263	247 931	486	248 457	700	248 981	907	247 825
269	247 951	493	248 113	705	248 973		







Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation



CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER SECOND SERIES



253 P.2d — 254 P.2d

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

Thus:
253 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.

1953

COPYRIGHT, 1953, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 253, Nos. 1-4;
Vol. 254, Nos. 1-3

COPYRIGHT, 1953, BY WEST PUBLISHING CO.

JUDGES AND OFFICERS

SUPREME COURT

CHIEF JUSTICE

PHIL S. GIBSON San Francisco

DEPARTMENT ONE

PRESIDING JUDGE

JOHN W. SHENK San Francisco

ASSOCIATE JUSTICES

JESSE W. CARTER San Francisco

B. REY SCHAUER San Francisco

DEPARTMENT TWO

PRESIDING JUSTICE

DOUGLAS L. EDMONDS San Francisco

ASSOCIATE JUSTICES

ROGER J. TRAYNOR San Francisco

HOMER R. SPENCE San Francisco

CLERKS

WILLIAM I. SULLIVAN Clerk San Francisco

HARRY M. GARDISER Chief Deputy Clerk San Francisco

A. ROBERT FAIRWELL Deputy Clerk San Francisco

WILLIAM J. SINKFORD Deputy Clerk San Francisco

RAYMOND J. BELL Deputy Clerk San Francisco

A. F. BRADOVICH Deputy Clerk Sacramento

HENRY P. CRABTREE Deputy Clerk Los Angeles

DAVID BLOMGREN Deputy Clerk Los Angeles

ATTORNEY GENERAL

EDMUND G. BROWN San Francisco

JUDGES AND OFFICERS

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

PRESIDING JUSTICE

RAYMOND E. PETERS San Francisco

ASSOCIATE JUSTICES

A. F. BRAY San Francisco

FRED B. WOOD San Francisco

Division 2

PRESIDING JUSTICE

JOHN T. NOURSE San Francisco

ASSOCIATE JUSTICES

C. J. GOODELL San Francisco

MAURICE T. DOOLING, Jr. San Francisco

CLERKS

WALTER S. CHISHOLM Clerk San Francisco

L. R. ELKINGTON Deputy Clerk San Francisco

PAUL DINOIA Deputy Clerk San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

PRESIDING JUSTICE

THOMAS P. WHITE Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN Los Angeles

LOUIS C. DRAPEAU Los Angeles

Division 2

PRESIDING JUSTICE

MINOR MOORE Los Angeles

ASSOCIATE JUSTICES

MARSHALL F. McCOMB Los Angeles

W. TURNEY FOX Los Angeles

JUDGES AND OFFICERS

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

PRESIDING JUSTICE

CLEMENT L. SHINN Los Angeles

ASSOCIATE JUSTICES

PARKER WOOD Los Angeles

PAUL VALLÉE Los Angeles

CLERKS

JAMES E. BROWN Clerk Los Angeles

WM. E. DORAN Deputy Clerk Los Angeles

EUGENE B. STANLEY Deputy Clerk Los Angeles

JOHN ALLEY Deputy Clerk Los Angeles

THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

B. F. VAN DYKE Sacramento

ASSOCIATE JUSTICES

PAUL PEEK Sacramento

ANDREW R. SCHOTTKY Sacramento

CLERKS

L. A. ENDRES Clerk Sacramento

THOMAS J. DILLON Deputy Clerk Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

PRESIDING JUSTICE

CHARLES R. BARNARD Fresno

ASSOCIATE JUSTICES

LLOYD E. GRIFFIN San Diego

STANLEY MUSSELL San Bernardino

CLERKS

EARL J. VERDECKBERG Clerk San Diego

LLOYD E. HIDDEN Deputy Clerk San Bernardino

ROY M. BOSTWICK Deputy Clerk Fresno

GEORGE J. KOBELIN Deputy Clerk San Diego

JUDGES AND OFFICERS

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

PRESIDING JUDGE

HARTLEY SHAW Los Angeles

JUDGES

EDWARD T. BISHOP Los Angeles

JESS E. STEPHENS Los Angeles

CLERK

J. J. MACGREGOR Los Angeles

SAN FRANCISCO COUNTY

PRESIDING JUDGE

HERBERT C. KAUFMAN San Francisco

JUDGES

PRESTON DEVINE San Francisco

EDWARD MOLKENBUHR San Francisco

CLERK

JOSEPH F. WHITMAN San Francisco

SAN DIEGO COUNTY

PRESIDING JUDGE

L. N. TURRENTINE San Diego

JUDGES

ROBERT B. BURCH San Diego

WILLIAM A. GLEN San Diego

SACRAMENTO COUNTY

PRESIDING JUDGE

GROVER W. BEDEAU Sacramento

JUDGES

MALCOLM C. GLENN Sacramento

JAY L. HENRY Sacramento

ALAMEDA COUNTY

PRESIDING JUDGE

S. VICTOR WAGLER Oakland

JUDGES

RALPH HOYT Oakland

THOMAS J. LEDWICH Oakland

APPELLATE DEPARTMENT, SUPERIOR COURT

—Continued

CONTRA COSTA COUNTY

PRESIDING JUDGE

HAROLD JACOBY ----- Martinez

JUDGES

HOMER W. PATTERSON ----- Martinez

HUGH H. DONOVAN ----- Martinez

FRESNO COUNTY

PRESIDING JUDGE

ARTHUR C. SHEPARD ----- Fresno

JUDGES

PHILIP CONLEY ----- Fresno

GEORGE M. DE WOLF ----- Fresno

KERN COUNTY

PRESIDING JUDGE

ROBERT B. LAMBERT ----- Bakersfield

JUDGES

W. L. BRADSHAW ----- Bakersfield

NORMAN F. MAIN ----- Bakersfield

RIVERSIDE COUNTY

PRESIDING JUDGE

OAKLEY K. MORTON ----- Riverside

JUDGES

RUSSELL S. WAITE ----- Riverside

JOHN G. GABBERT ----- Riverside

SAN BERNARDINO COUNTY

PRESIDING JUDGE

MARTIN J. COUGHLIN ----- San Bernardino

JUDGES

ARCHIE D. MITCHELL ----- San Bernardino

CARL B. HILLIARD ----- San Bernardino

SANTA CLARA COUNTY

PRESIDING JUDGE

WILLIAM F. JAMES ----- San Jose

JUDGES

JOHN FOLEY ----- San Jose

BYRL SALSMAN ----- San Jose

STANISLAUS COUNTY

PRESIDING JUDGE

B. C. HAWKINS ----- Modesto

JUDGES

H. L. CHAMBERLAIN ----- Modesto

SHERRILL HALBERT ----- Modesto

JUDGES AND OFFICERS

NEW APPELLATE DEPARTMENTS,
SUPERIOR COURTS

Effective January 5, 1953.

ORANGE COUNTY

PRESIDING JUDGE

FRANKLIN G. WEST Santa Ana

JUDGES

KENNETH E. MORRISON Santa Ana

ROBERT GARDNER Santa Ana

SAN JOAQUIN COUNTY

PRESIDING JUDGE

M. G. WOODWARD Stockton

JUDGES

R. M. DUNNE Stockton

GEORGE F. BUCK Stockton

SAN MATEO COUNTY

PRESIDING JUDGE

AYLETT R. COTTON Redwood City

JUDGES

EDMUND SCOTT Redwood City

MURRAY DRAPER Redwood City

CASES REPORTED

Vols. 253-254 P.2d

	P.2d	
	Vol.	Page
Acware Plastics; Davies v., App.	254	663
Adcock; Kirby v., App.	253	700
Agnew; John Paul Lumber Co. v., App.	254	131
Alhambra Gold Mine Corp.; Alhambra-Shumway Mines, Inc. v., App.	254	599
Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., App.	254	599
American Dist Tel. Co.; Better Food Markets v., Sup.	253	10
American Sportsmen Television Equity Soc.; Mike Hirsch Enterprises, Inc. v., Sup.	254	510
American Sportsmen Television Equity Soc.; Rubin v., Sup.	254	510
Appleton v. Beckhardt, App.	254	948
Asp v. Lowry, App.	254	967
Atkinson v. Pacific Fire Extinguisher Co., Sup.	253	18
Ayers v. Smock, App.	253	65
Ayers' Adoption, In re, App.	253	65
Bachenheimer v. Palm Springs Management Corp., App.	254	153
Baker; Spoerer v., App.	254	113
Bakery and Confectionery Workers Intern. Union of America, Local Union No. 37; Voeltz v., Sup.	254	553
Balboa Escrow Co.; Moore v., Super.	253	1043
Bank of America Nat. Trust & Sav. Ass'n; Cardozo v., App.	254	949
Bass v. Helseth, App.	253	525
Bauer v. Helene Curtis Industries, Inc., App.	254	931
Beal; People v., App.	254	100
Bechtel; People v., App.	254	618
Beckhardt; Appleton v., App.	254	948
Beery v. Los Angeles County, App.	253	1005
Berger v. McMahan, App.	253	543
Berger v. O'Hearn, App.	253	540
Best Service Cleaners v. State Bd. of Dry Cleaners, Sup.	254	42
Better Food Markets v. American Dist. Tel. Co., Sup.	253	10
Beverly Oil Co. v. City of Los Angeles, Sup.	254	865
Beyerbach v. Juno Oil Co., App.	254	632
Board of Directors of El Camino Irr. Dist.; May v., Sup.	253	6
Board of Directors of Turlock Irr. Dist. v. City of Ceres, App.	254	907
Boesel; Kentera v., App.	254	960
Bondy v. Phoenix Indem. Co., App.	254	148
Borwick; Le Fevre v., App.	254	626
Bowman v. Brazeal, App.	254	886
Bowman; People v., App.	254	134
Bowron; Parker v., Sup.	254	6
Boyden; People v., App.	253	773
Brady; Wells Fargo Bank & Union Trust Co. v., App.	254	71
Brazeal, Guardianship of, App.	254	886
Brazeal; Bowman v., App.	254	886
Brotherhood of Marine Engineers, AFL, v. National Marine Engineers Bene- ficial Ass'n, Sup.	254	578

CASES REPORTED

	P.2d	Page
	Vol.	
Brown v. Harper, App.	253	95
Brown; Sanford v., App.	253	1011
Brown; Sutter Basin Corp. v., Sup.	253	649
Bryant v. Los Angeles Transit Lines, App.	253	731
Buchholz v. Denison, App.	254	123
Building Maintenance Contractors Ass'n; People v., App.	253	983
Cal-Dak Co. v. Sav-On Drugs, Inc., Sup.	254	497
California Employment Stabilization Commission; Chrysler Corp. v., App.	253	68
California Toll Bridge Authority; California Water, Transit & Defense Project v., Sup.	253	670
California Toll Bridge Authority v. Durkee, Sup.	253	673
California Toll Bridge Authority; Faulkner v., Sup.	253	659
California Water, Transit & Defense Project v. California Toll Bridge Authority, Sup.	253	670
Cardozo v. Bank of America Nat. Trust & Sav. Ass'n, App.	254	949
Carrell; Scribner v., App.	254	622
Carter; Harless v., App.	254	168
Carter; Harless v., App.	254	172
Carter; People v., App.	253	1016
Carvel v. Ferguson, App.	254	44
Cella v. Cosgro, App.	253	57
Chamberlain v. Guglielmetti, App.	254	132
Chand; People v., App.	253	499
Charlton v. Pan Am. World Airways, App.	254	128
Chrysler Corp. v. California Employment Stabilization Commission, App.	253	68
City and County of San Francisco; Simmer v., App.	254	185
City of Berkeley; Terry v., App.	254	933
City of Ceres; Board of Directors of Turlock Irr. Dist. v., App.	254	907
City of Los Angeles; Beverly Oil Co. v., Sup.	254	865
City of Los Angeles; Erde v., App.	254	110
City of Los Angeles; Lorenson v., App.	254	54
City of Los Angeles; Morris v., App.	254	935
City of Los Angeles; Simpson v., Sup.	253	464
City of Los Angeles Dept. of Bldg. & Safety; Sullivan v., App.	254	590
City of National City v. Harless, App.	254	175
City of San Diego; Elbert, Limited v., App.	254	98
City of San Diego; Harless v., App.	254	168
City of San Diego; Sipe v., App.	254	168
Clare; Elbert, Limited v., Sup.	254	20
Clark; People v., App.	253	510
Clayton v. Clayton, App.	254	669
Cly; Kesson v., App.	253	486
Coastwise Lines; Fall v., App.	254	58
Cochran's Estate, In re, App.	253	41
Columbia-Geneva Steel Division, U. S. Steel Co., v. Industrial Acc. Com- mission, App.	253	45
Commercial Cas. Ins. Co. v. Industrial Acc. Commission, App.	254	954
Comunale v. Traders & General Ins. Co., App.	253	495
Conroy; Erwin v., App.	253	752
Coodley; Hirschy v., App.	253	93
Corbari; Manteca Veal Co. v., App.	254	884
Cornell; Jackson v., App.	254	871
Cosgro; Cella v., App.	253	57
Costa v. Regents of University of Cal., App.	254	85
Creely's Estate, In re, App.	253	997
Crowley v. Thomson, App.	254	607

CASES REPORTED

	P.2d	
	Vol.	Page
Cummins v. Levy, App.	253	975
Curran; Kuist v., App.	253	681
Dam; Vezina v., App.	254	103
D'Angelo; Ellis v., App.	253	675
Daremes; Elbert, Limited v., App.	254	49
Davies v. Acware Plastics, App.	254	663
Davis v. Davis, App.	253	506
Davis v. Silverwood, App.	253	83
Dealy; Moore v., App.	254	888
Denison; Buchholz v., App.	254	123
Dexter v. Dexter, App.	253	999
Dimon v. Dimon, Sup.	254	528
Doolan; Wolff v., App.	254	604
Dowling v. Fedele, App.	254	605
Drake v. Stein, App.	254	613
Durkee; California Toll Bridge Authority v., Sup.	253	673
Eagle Inv. Co.; Harless v., App.	254	168
Earll v. McCoy, App.	253	86
Ehni v. Wood, App.	254	940
Elbert, Limited v. City of San Diego, App.	254	98
Elbert, Limited v. Clare, Sup.	254	20
Elbert, Limited v. Daremes, App.	254	49
Elbert, Limited v. McKenna, App.	254	107
Elbert, Limited v. Semerad, App.	254	49
Electrical Products Corp. v. Tulare County, App.	253	111
Elliott, Ex parte, App.	254	135
Ellis v. D'Angelo, App.	253	675
Employers Mut. Liability Ins. Co. of Wis. v. Industrial Acc. Commis- sion, App.	253	737
Erde v. City of Los Angeles, App.	254	110
Ericson v. Petersen, App.	253	99
Erwin v. Conroy, App.	253	752
Estrella; People v., App.	254	182
Fall v. Coastwise Lines, App.	254	58
Farber v. Olkon, Sup.	254	520
Faulkner v. California Toll Bridge Authority, Sup.	253	659
Fedele; Dowling v., App.	254	605
Ferguson; Carver v., App.	254	44
Finerman & Sons; House Grain Co. v., App.	253	1034
Finn v. Washington, App.	253	60
Foster; People v., App.	253	50
Fox v. Fox, App.	253	1030
Frederick; Richmond v., App.	253	977
French v. Rishell, Sup.	254	26
French Art Cleaners v. State Bd. of Dry Cleaners, Sup.	254	42
Gavel v. Jamison, App.	254	47
Geller v. Geller, App.	253	52
Geophysical Service, Inc.; Menzies v., App.	254	51
Gill v. Hearst Pub. Co., Sup.	253	441
Goldman v. Goldman, App.	253	474
Goldman v. Goldman, App.	253	483
Gonzales; People v., App.	254	603
Goodman v. Harris, Sup.	253	447
Goodwill Industries of Southern Cal. v. Los Angeles County, App.	254	877
Gordon; Union Bank & Trust Co. v., App.	254	644
Green v. Key System Transit Lines, App.	253	780

CASES REPORTED

P.2d

	Vol.	Page
Greenberg; Levy v., App.	254	918
Greene; Harless v., App.	254	175
Gregory; Harless v., App.	254	172
Gregory Elec. Co.; Lipschultz v., Super.	253	537
Griffith v. State Bar of Cal., Sup.	254	22
Grocery Drivers Union Local 848; Seven Up Bottling Co. of Los Angeles v., Sup.	254	544
Gross v. Maytex Knitting Mills of Cal., App.	254	163
Guglielmetti; Chamberlain v., App.	254	132
Harless v. Carter, four cases, App.	254	168
Harless v. Carter, App.	254	172
Harless; City of National City v., App.	254	175
Harless v. City of San Diego, two cases, App.	254	168
Harless v. Eagle Inv. Co., three cases, App.	254	168
Harless v. Greene, App.	254	175
Harless v. Gregory, App.	254	172
Harless v. Johnson, App.	254	122
Harless v. Kipp, ten cases, App.	254	168
Harless v. Kipp, two cases, App.	254	172
Harless v. Michigan Mortg. Co., App.	254	163
Harless v. Mills, App.	254	168
Harless v. Purdy, two cases, App.	254	168
Harless v. Sedlack, App.	254	168
Harless v. Starke, App.	254	168
Harless v. Winter, App.	254	168
Harper; Brown v., App.	253	95
Harris; Goodman v., Sup.	253	447
Harris v. National Union of Marine Cooks & Stewards, App.	254	673
Hearst Pub. Co.; Gill v., Sup.	253	441
Helene Curtis Industries, Inc.; Bauer v., App.	254	931
Helseth; Bass v., App.	253	525
Henningsen v. Mayfair Packing Co., App.	253	35
Hirsch Enterprises, Inc. v. American Sportsmen Television Equity Soc., Sup.	254	510
Hirschy v. Coodley, App.	253	93
Holland v. Kerr, App.	253	88
Holloway v. Thiele, App.	253	131
Holy Family Adoption Service, Ex parte, App.	253	47
Hopkins v. Hopkins, App.	253	723
Hopson v. National Union of Marine Cooks and Stewards, App.	253	733
Horrell v. Sante Fe Tank & Tower Co., App.	254	893
House Grain Co. v. Finerman & Sons, App.	253	1034
Housing Authority of City of Los Angeles v. Record Searching Title Co., App.	254	628
Housing Authority of City of Los Angeles v. Shoecraft, App.	254	628
Howerton; People v., Sup.	253	8
Industrial Acc. Commission; Columbia-Geneva Steel Division, U. S. Steel Co. v., App.	253	45
Industrial Acc. Commission; Commercial Cas. Ins. Co. v., App.	254	954
Industrial Acc. Commission; Employers Mut. Liability Ins. Co. of Wis. v., App.	253	737
Industrial Management Corp.; Singer Metals, Inc. v., App.	253	515
Isthmian S. S. Co. v. National Marine Engineers Beneficial Ass'n, Sup.	254	578
Jackson v. Cornell, App.	254	871
Jackson v. Osborn, App.	254	871
Jamison; Gavel v., App.	254	47

CASES REPORTED

	P.2d	
	Vol.	Page
John Paul Lumber Co. v. Agnew, App.	254	131
Johnson; Harless v., App.	254	122
Johnson v. Warner, two cases, App.	254	124
Jones v. Jones, App.	254	67
Jorden; Mize v., App.	253	702
Juno Oil Co.; Beyerbach v., App.	254	632
Karrell v. Watson, App.	254	651
Kehlor v. Municipal Court, App.	254	897
Kelleher, Ex parte, Sup.	254	572
Kennedy; People v., App.	253	522
Kentera, Guardianship of, App.	254	960
Kentera v. Boesel, App.	254	960
Kerr; Holland v., App.	253	88
Kesson v. Cly, App.	253	486
Kettman v. Levine, App.	253	102
Key System Transit Lines; Green v., App.	253	780
Kipp; Harless v., App.	254	168
Kipp; Harless v., App.	254	172
Kipp v. Luberco, Limited, App.	254	150
Kirby v. Adcock, App.	253	700
Kitchens' Adoption, In re, App.	253	690
Kostick v. Swain, App.	253	531
Kuist v. Curran, App.	253	681
La Macchia; People v., App.	253	709
Langley v. Pacific Gas & Elec. Co., App.	254	915
Larson v. Thoresen, App.	254	656
Le Fevre v. Borwick, App.	254	626
Levine; Kettman v., App.	253	102
Levy v. Cummins, App.	253	975
Levy v. Greenberg, App.	254	918
Lipschultz v. Gregory Elec. Co., Super.	253	537
Lorenson v. City of Los Angeles, App.	254	54
Los Angeles County; Beery v., App.	253	1005
Los Angeles County; Goodwill Industries of Southern Cal. v., App.	254	877
Los Angeles Transit Lines; Bryant v., App.	253	731
Lowe v. State Bar, Sup.	254	506
Lowry; Asp v., App.	254	967
Luberco, Limited; Kipp v., App.	254	150
Luberco, Limited v. Mills, App.	254	172
McBride, Ex parte, App.	254	117
Mackay v. Whitaker, App.	253	1021
McCoy; Earll v., App.	253	86
McKenna; Elbert, Limited v., App.	254	107
McKenna v. Roche, App.	253	997
McMahan; Berger v., App.	253	543
McMahon; People v., App.	254	903
Macmillan Petroleum Corp. v. Griffin, 254 P.2d 132. Withdrawn by Order of Court.		
McNichols v. Nelson Val. Bldg. Co., App.	253	744
Magee; Perry v., App.	253	488
Malone v. Superior Court, In and For City and County of San Francisco, Sup.	254	517
Manteca Veal Co. v. Corbari, App.	254	884
Martin; Muller v., App.	253	686
Matthews v. Sears, Roebuck & Co., App.	253	43
May v. Board of Directors of El Camino Irr. Dist., Sup.	253	6

CASES REPORTED

P.2d

	Vol.	Page
Mayfair Packing Co.; Henningsen v., App.	253	35
Maytex Knitting Mills of Cal.; Gross v., App.	254	163
Means; People v., App.	254	585
Mehling v. Zigman, App.	254	141
Menzies v. Geophysical Service, Inc., App.	254	51
Metal Trades Council of Southern Cal.; Sommer v., Sup.	254	559
Michigan Mortg. Co.; Harless v., App.	254	168
Mike Hirsch Enterprises, Inc. v. American Sportsmen Television Equity Soc., Sup.	254	510
Mills; Harless v., App.	254	168
Mills; Luberc, Limited v., App.	254	172
Mize v. Jorden, App.	253	702
Moore v. Balboa Escrow Co., Super.	253	1043
Moore v. Dealy, App.	254	888
Morris v. City of Los Angeles, App.	254	935
Moss Const. Co. v. Wulffsohn, App.	253	483
Muller v. Martin, App.	253	686
Municipal Court; Kehlor v., App.	254	897
Murphy; Vierra v., App.	253	55
National City, City of, v. Harless, App.	254	175
National Marine Engineers Beneficial Ass'n; Brotherhood of Marine Engi- neers, AFL, v., Sup.	254	578
National Marine Engineers Beneficial Ass'n; Isthmian S. S. Co. v., Sup.	254	578
National Union of Marine Cooks & Stewards; Harris v., App.	254	673
National Union of Marine Cooks and Stewards; Hopson v., App.	253	733
Negley; People v., App.	254	146
Nelson v. Porterville Union High School Dist., App.	254	945
Nelson Val. Bldg. Co.; McNichols v., App.	253	744
Nemer v. Nemer, App.	254	661
Northern Counties Title Ins. Co.; Overholtzer v., App.	253	116
Oakdale Union Grammar School Dist., City of Oakdale, Stanislaus County; Pirkle v., Sup.	253	1
O'Hearn; Berger v., App.	253	540
Olkon; Farber v., Sup.	254	520
One 1950 Mercury Sedan, Engine No. 50LA40896M, 1950 License No. 29B9130; People v., App.	254	666
One 1950 Studebaker Commander Convertible Coupe; People v., App.	253	748
One 1951 Mercury 2-Door Sedan; People v., App.	254	140
Gsborn; Jackson v., App.	254	871
Overholtzer v. Northern Counties Title Ins. Co., App.	253	116
Pacific Fire Extinguisher Co.; Atkinson v., Sup.	253	18
Pacific Gas & Elec. Co.; Langley v., App.	254	915
Palm Springs Management Corp.; Bachenheimer v., App.	254	153
Pan Am. World Airways; Charlton v., App.	254	128
Parker v. Bowron, Sup.	254	6
Paulekas v. Paulekas, App.	254	941
Paul Lumber Co. v. Agnew, App.	254	131
Penney; Winston v., App.	253	492
People v. Beal, App.	254	100
People v. Bechtel, App.	254	618
People v. Bowman, App.	254	134
People v. Boyden, App.	253	773
People v. Building Maintenance Contractors Ass'n, App.	253	983
People v. Carter, App.	253	1016
People v. Chand, App.	253	499
People v. Clark, App.	253	510

	Vol.	Page
People v. Estrella, App.	254	182
People v. Foster, App.	253	50
People v. Gonzales, App.	254	603
People v. Howerton, Sup.	253	8
People v. Kennedy, App.	253	522
People v. La Macchia, App.	253	709
People v. McMahon, App.	254	903
People v. Means, App.	254	585
People v. Negley, App.	254	146
People v. One 1950 Mercury Sedan, Engine No. 50LA40896M, 1950 License No. 29B9130, App.	254	666
People v. One 1950 Studebaker Commander Convertible Coupe, App.	253	748
People v. One 1951 Mercury 2-Door Sedan, App.	254	140
People v. Pittullo, App.	253	705
People v. Reimringer, App.	253	756
People v. Roberts, Sup.	254	501
People v. Sica, App.	253	75
People v. Stuart, App.	254	583
People v. Sumner, App.	254	598
People v. Sweeden, App.	254	899
People v. Taylor, App.	254	179
People v. White, App.	253	108
People v. Zanes, App.	254	176
Perkins v. Sommers, App.	254	913
Perry v. Magee, App.	253	488
Petersen; Ericson v., App.	253	99
Petty v. Superior Court In and For Los Angeles County, App.	253	28
Phoenix Indem. Co.; Bondy v., App.	254	148
Pirkle v. Oakdale Union Grammar School Dist., City of Oakdale, Stanis- laus County, Sup.	253	1
Pittullo; People v., App.	253	705
Plumbe; Richards v., App.	253	126
Porterville Union High School Dist.; Nelson v., App.	254	945
Poteet; Upper v., App.	253	486
Purdy; Harless v., App.	254	168
Putman v. Putman, App.	254	589
Ralph M. Parsons Co.; Turner v., App.	254	970
Real Estate Com'r; Swital v., App.	254	587
Record Searching Title Co.; Housing Authority of City of Los Angeles v., App.	254	628
Regents of University of Cal.; Costa v., App.	254	85
Reimringer; People v., App.	253	756
Richards v. Plumbe, App.	253	126
Richmond v. Frederick, App.	253	977
Rishell; French v., Sup.	254	26
Roberts; People v., Sup.	254	501
Roche; McKenna v., App.	253	997
Rosenfeld v. Zimmer, App.	254	137
Roth v. State Bar, Sup.	253	969
Rubin v. American Sportsmen Television Equity Soc., Sup.	254	510
Ruiz; Whalen v., Sup.	253	457
Sanchez; Wilson v., App.	254	594
Sanford v. Brown, App.	253	1011
Santa Fe Tank & Tower Co.; Horrell v., App.	254	893
Sav-On Drugs, Inc.; Cal-Dak Co. v., Sup.	254	497
Schorr v. Southern Pac. Co., App.	254	579

CASES REPORTED

P.2d

	Vol.	Page
Scribner v. Carrell, App.	254	622
Sears, Roebuck & Co.; Matthews v., App.	253	43
Sedlack; Harless v., App.	254	168
Semerad; Elbert, Limited v., App.	254	49
Seven Up Bottling Co. of Los Angeles v. Grocery Drivers Union Local 848, Sup.	254	544
Shackelford, Ex parte, App.	254	610
Shepard v. Shepard, App.	254	120
Shields v. Shoaff, App.	253	1002
Shoaff; Shields v., App.	253	1002
Shoecraft; Housing Authority of City of Los Angeles v., App.	254	628
Sica; People v., App.	253	75
Silverwood; Davis v., App.	253	83
Simmer v. City and County of San Francisco, App.	254	185
Simpson v. City of Los Angeles, Sup.	253	464
Simpson; Stein v., App.	253	1026
Singer Metals, Inc. v. Industrial Management Corp., App.	253	515
Sipe v. City of San Diego, App.	254	168
Smith v. Smith, Sup.	254	1
Smock; Ayers v., App.	253	65
Sommer v. Metal Trades Council of Southern Cal., Sup.	254	559
Sommers; Perkins v., App.	254	913
Southern Pac. Co.; Schorr v., App.	254	579
Spoerer v. Baker, App.	254	113
Starke; Harless v., App.	254	168
State Bar; Lowe v., Sup.	254	506
State Bar; Roth v., Sup.	253	969
State Bar of Cal; Griffith v., Sup.	254	22
State Bd. of Dry Cleaners; Best Service Cleaners v., Sup.	254	42
State Bd. of Dry Cleaners; French Art Cleaners v., Sup.	254	42
State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Sup.	254	29
State Dept. of Social Welfare v. Thompson, App.	253	690
State Franchise Tax Board; Werfel v., App.	253	79
Stein v. Drake, App.	254	613
Stein v. Simpson, App.	253	1026
Stobie v. Stobie, App.	253	765
Stuart; People v., App.	254	583
Sullivan v. City of Los Angeles Dept. of Bldg. & Safety, App.	254	590
Sumner; People v., App.	254	598
Superior Court, In and For City and County of San Francisco; Malone v., Sup.	254	517
Superior Court In and For Los Angeles County; Petty v., App.	253	28
Superior Court In and For Los Angeles County; Velkov v., Sup.	253	25
Susman, Ex parte, App.	254	161
Sutter Basin Corp. v. Brown, Sup.	253	649
Swain; Kostick v., App.	253	531
Sweeden, Ex parte, App.	254	902
Sweeden; People v., App.	254	899
Swital v. Real Estate Com'r, App.	254	587
Taylor; People v., App.	254	179
Terry v. City of Berkeley, App.	254	933
Thiele; Holloway v., App.	253	131
Thompson; State Dept. of Social Welfare v., App.	253	690
Thomson; Crowley v., App.	254	607
Thoresen; Larson v., App.	254	656
Thrift-D-Lux Cleaners; State Bd. of Dry Cleaners v., Sup.	254	29

CASES REPORTED

P.2d

	Vol.	Page
Toomey; Truchon v., App.	254	638
Traders & General Ins. Co.; Comunale v., App.	253	495
Truchon v. Toomey, App.	254	638
Tulare County; Electrical Products Corp. v., App.	253	111
Turner v. Ralph M. Parsons Co., App.	254	970
Union Bank & Trust Co. v. Gordon, App.	254	644
Upper v. Poteet, App.	253	486
Vangel v. Vangel, App.	254	919
Velkov v. Superior Court In and For Los Angeles County, Sup.	253	25
Vezina v. Dam, App.	254	103
Vezina's Estate, In re, App.	254	103
Vierra v. Murphy, App.	253	55
Vierra's Guardianship, In re, App.	253	55
Voeltz v. Bakery and Confectionery Workers Intern. Union of America, Local Union No. 37, Sup.	254	553
Warner; Johnson v., App.	254	124
Washington; Finn v., App.	253	60
Washington's Estate, In re, App.	253	60
Watson; Karrell v., App.	254	651
Wells Fargo Bank & Union Trust Co. v. Brady, App.	254	71
Werfel v. State Franchise Tax Board, App.	253	79
Werfel's Estate, In re, App.	253	79
Whalen v. Ruiz, Sup.	253	457
Whitaker; Mackay v., App.	253	1021
White; People v., App.	253	108
Wilson v. Sanchez, App.	254	594
Wilson's Estate, In re, App.	253	1011
Winston v. Penney, App.	253	492
Winter; Harless v., App.	254	168
Wolff v. Doolan, App.	254	604
Wood; Ehni v., App.	254	940
Wood's Estate, In re, App.	254	940
Wulffsohn; Moss Const. Co. v., App.	253	483
Yost v. Yost, App.	253	696
Zanes; People v., App.	254	176
Zigman; Mehling v., App.	254	141
Zimmer; Rosenfeld v., App.	254	137

†



CALIFORNIA REPORTER

253 PACIFIC REPORTER

SECOND SERIES

40 Cal.2d 207

PIRKLE et al. v. OAKDALE UNION GRAMMAR SCHOOL DIST., CITY OF OAKDALE, COUNTY OF STANISLAUS et al.

Sac. 6268.

Supreme Court of California, in Bank.

Feb. 10, 1953.

Rehearing Denied March 9, 1953.

Action by a grammar school student against a school district, and others, for injuries sustained while playing a game of touch football. The Superior Court, Stanislaus County, H. L. Chamberlain, J., 238 P.2d 57, rendered a judgment adverse to defendants and defendants appealed. The Supreme Court, Edmonds, J., held that under evidence defendants were not liable on ground of negligence for injuries.

Reversed with direction.

Carter, J., dissented.

1. Schools and School Districts ⇨89

Standard of care required of an officer or employee of a public school is that which a person of ordinary prudence, charged with his duties, would exercise under same circumstances.

2. Schools and School Districts ⇨121, 147

In action against school district, its principal and instructor in physical education, for injuries sustained by a grammar school student during noon recess when boys of two grades were playing touch football, evidence did not justify predicated negligence upon failure of defendants to properly supervise players. Education Code, § 8252.

3. Schools and School Districts ⇨89.4

A recognized and desirable part of physical education programs in elementary public schools consists of free play games during recess, such as touch football. Education Code, § 8252.

253 P.2d—1

Cal.Rep. 253-254 P.2d—1

4. Schools and School Districts ⇨121, 147

In action against school district, its principal and instructor in physical education, for injuries sustained by a grammar school student during noon recess when boys of two grades were playing touch football, evidence that selection of grades for free play games according to grades was utilized throughout state was competent evidence of reasonableness of such method of selection of teams by defendants.

5. Schools and School Districts ⇨121, 147

In action against school district, its principal and instructor in physical education, for injuries sustained by a grammar school student during noon recess when boys of two grades were playing touch football, evidence established that selection of teams by matching seventh grade and eighth grade was a reasonable method.

6. Schools and School Districts ⇨89.4, 147

Where grammar school participants in touch football game conducted during recess were composed of students of seventh and eighth grades and were selected according to skill and were properly instructed, experienced, and proficient, and they participated in game only if they chose, school district, its principal and its instructor in physical education, were not liable on ground of negligence for injuries sustained by a student who participated in such a game and was struck in abdomen by knee of an opponent when blocking such opponent.

Vernon F. Gant, Frederick W. Reyland, Jr., County Counsel, and William R. Mitchell, Deputy County Counsel, Modesto, for appellants.

C. Ray Robinson, Margaret A. Flynn, James A. Cobey and William B. Boone, Merced, for respondents.

EDMONDS, Justice.

William H. Pirkle, an eighth grade student at the Oakdale Union Grammar School, sustained injuries while playing in a game of touch football. The chief ground relied upon by the school district, B. W. Gripenstraw, its principal, and Jules Perrin, the instructor in physical education, for a reversal of the judgment against them and orders denying certain motions is that there is no evidence upon which liability for damages legally may be based.

The jury, considering the evidence in the light most favorable to the plaintiffs, and giving them the benefit of all inferences reasonably to be drawn from it, might have found the following facts: During noon recess periods, the boys in the seventh and eighth grades were permitted to engage in "free play" activities. The games at such times included touch football, in which a "tackle" is accomplished by touching the ball carrier with both hands. Bodily contact is limited to a shoulder or body block, with both the blocker's feet on the ground. When properly regulated, the game is not rough.

Free play games were not a part of the required physical education program, and the boys participated in them only if they elected to do so. A team representing the seventh grade competed against another from the eighth grade. One boy from each grade was captain and chose the players for his team. As was customary in free play games, the participants were not selected according to age, size, or weight. As a consequence, the players ranged in weight from 85 to 190 pounds.

At the time of the accident, William was a member of the eighth grade team. He was 13 years, four months, of age, five feet, four inches tall, and weighed approximately 97 pounds. During the game he blocked Jack Perkins, a seventh grade student weighing 145 pounds, who was five feet, ten inches tall, and 14½ years old. William was struck in the abdomen by Jack's knee.

He remained in the game for the next two or three plays and then went to the sideline, where he lay down on a bench.

He was then sent to a first aid room where Gripenstraw had him lie down and covered him with a blanket. Near the close of the school day, Perrin came to see him. When William passed urine at Perrin's suggestion, it was observed that the urine contained blood. Perrin then took William home. This was about two hours after the accident. William's spleen and left kidney were removed about five hours later.

John Pirkle, the boy's father, sued for damages in the amount of his expenditures for William's medical care and, as guardian ad litem for William, for damages for the injuries the boy sustained. The theory of the complaint was that the defendants negligently failed properly to supervise the game, and that Gripenstraw and Perrin carelessly neglected to give William prompt medical attention. Named as defendants were Perrin, Gripenstraw, the school district, and the members of its board of trustees. The demurrer of the trustees was sustained and the action dismissed as to them.

During the trial, the motions of the defendants for a nonsuit and for a directed verdict were denied. The jury returned a verdict for William of \$7,500 and awarded the father \$800. Motions by the defendants for judgment notwithstanding the verdict and for a new trial were denied. The appeal is from the judgment entered upon the verdict and from an order denying the motions for judgment notwithstanding the verdict.

The principal ground relied upon in challenging the judgment is that the evidence is not sufficient to sustain the verdict. It is argued that there is no evidence justifying the jury's implied finding that the defendants were negligent in supervising the game, or that William sustained injury because of a negligent failure to provide prompt medical attention.

[1] The standard of care required of an officer or employee of a public school is that which a person of ordinary prudence, charged with his duties, would exercise un-

der the same circumstances. *Bellman v. San Francisco High School Dist.*, 11 Cal.2d 576, 582, 81 P.2d 894; *Hough v. Orleans Elementary School Dist.*, 62 Cal.App.2d 146, 155, 144 P.2d 383; *Buzzard v. East Lake School Dist.*, 34 Cal.App.2d 316, 321, 93 P.2d 233; *Ellis v. Burns Valley School Dist.*, 128 Cal.App. 550, 553, 18 P.2d 79. The plaintiffs take the position that the jury reasonably might have found that the defendants failed to maintain proper supervisory control of the manner in which the game was played.

[2] In their physical education classes, the boys received instruction in the rules of touch football, including demonstrations of the correct methods of blocking and tackling. They were skilled in the game, having played it many times previously. Immediately prior to the contest, they again were instructed that blocking was to be done with both feet on the ground, and were warned that rough play would not be tolerated. Perrin, the physical education instructor, acted as referee and Hass, his assistant, as head linesman. The injury occurred in the course of a play executed in accordance with the rules of the game; no charge is made that any of the players conducted himself improperly. In short, there is no evidence sufficient to predicate negligence upon a failure to supervise the playing of the game.

The Pirkles assert that the defendants were negligent in the manner in which the players were segregated. They contend that the jury reasonably might have found that the defendants should not have allowed boys of such different weights to play in the game in which William was injured. Specifically, they argue, the players should have been segregated according to an "exponent chart" which was used in connection with the required physical education programs and inter-school games.

[3] Physical education programs in the elementary schools are an accepted part of the curriculum. Education Code, § 8252; *Underhill v. Alameda Elementary School Dist.*, 133 Cal.App. 733, 735, 24 P.2d 849. A recognized and desirable part of such programs consists of organized free play

games of the type here concerned. *Kerby v. Elk Grove Union High School Dist.*, 1 Cal.App.2d 246, 248, 36 P.2d 431, 94 A.L.R. 1502. However, the difficulty in administering such activity is well illustrated by the evidence in the present case. To fill the teams, 22 boys must be selected from those desiring to play. Such selection must be made in a manner permitting the smaller boys to compete with safety and some degree of success, and yet without denying to the larger boys opportunity to participate. If the classification is made too narrow and rigid, particularly in the smaller schools, a sufficient number of players will not be available to make up the teams.

[4,5] The evidence shows that the selection of players for free play games according to grades is a convenient and practical method of segregation. That such method is utilized throughout the state is competent evidence of the reasonableness of its use by the defendants in the present case. *Perumean v. Wills*, 8 Cal.2d 578, 583, 67 P.2d 96. All the evidence is to the effect that touch football is not a dangerous or rough game. Several witnesses testified that, although the practice of matching the seventh against the eighth grade had been followed extensively throughout the county, they knew of no serious injury prior to the one to Pirkle. From this evidence, it must be concluded that the method of segregation employed by the defendants was a reasonable one.

This determination is not affected by the fact that so-called "exponent charts" were used in connection with interscholastic contests and in the required physical education periods. Such charts classify the pupils according to certain combinations of age, height, and weight. According to the evidence, apart from the fact that they are useful only where there is a large group of boys to draw from, the charts are designed primarily to present equal opportunities of competition, and, if at all, only partially for the safety of the participants. However, the uncontradicted testimony of school officials using the chart is to the effect that the classifications are broad enough to permit a variation in weights at least as great as that involved in the present case. In addi-

tion, players in the lower classifications are permitted to compete in the higher classifications if they possess sufficient skill. In short, the evidence fails to establish such charts as a standard of care, the failure to observe which may be deemed negligence.

This conclusion is not inconsistent with the holding in *Bellman v. San Francisco High School Dist.*, 11 Cal.2d 576, 81 P.2d 894. In the *Bellman* case, a high school girl was injured during a required physical education period while attempting to perform a tumbling exercise. There was evidence from which the jury reasonably might have found that the exercise was inherently dangerous and that its performance required, in addition to physical strength and agility, a proper mental attitude. At the time she attempted the exercise, the girl was suffering from a knee injury, and she was taking part in the class against her wishes. The record also showed that the physical instructor in charge knew that she had failed in prior attempts to perform the trick. It was held that liability might be imposed only where the evidence showed a failure on the part of the school officials to use ordinary care. "What is ordinary care depends upon the circumstances of each particular case and is to be determined as a fact with reference to the situation and knowledge of the parties." 11 Cal. 2d at page 582, 81 P.2d at page 897. A majority of the court joined in the conclusion that those facts justified the submission of the issue of negligence to the jury. Three justices dissented upon the ground that, even under the unusual circumstances presented in that case, the evidence would not reasonably support a finding of negligence.

[6] The facts of the present case, however, are readily distinguishable. The activity here involved was not an inherently dangerous one. The boys were selected according to their skill and by a reasonable means of classification. They were properly instructed, experienced, and proficient, and they participated in the game only if they chose to do so. Under such circumstances, there is no legal basis for a finding of negligence.

Nor is there merit in the contention that liability may be predicated upon a failure to

provide prompt medical attention. Plaintiffs' medical expert, the sole witness to testify on this point, stated that a layman could not reasonably have been expected to discover the nature of the injury sooner and, in any event, no injury resulted to the boy from the delay.

The evidence being insufficient to sustain the verdict and judgment, the defendants' motions for judgment notwithstanding the verdict should have been granted. Under such circumstances, this court may order judgment to be so entered. Code Civ.Proc. § 629; *Jordan v. Guerra*, 23 Cal.2d 469, 472, 144 P.2d 349; *Johnson v. Sacramento Northern Ry.*, 54 Cal.App.2d 528, 543, 128 P.2d 503.

The judgment and the order denying the motions for judgment notwithstanding the verdict are reversed and the trial court is directed to enter its order granting said motions.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority of this court has again invaded the realm of fact finding, and in violation of the settled rule that facts must be determined in the trial court, has found and determined the issues of fact contrary to the trier of fact—the jury in this case—and the trial judge who denied motions for a nonsuit, directed verdict, judgment notwithstanding the verdict and a new trial. In so holding, this court again denies litigants the right to a jury trial on issues of fact in a case where a trial by jury is admittedly a matter of right under the Constitution and laws of this state.

What was the ultimate issue of fact to be determined in this case? It was whether or not the conduct of the individual defendants was that of a reasonably prudent person under like circumstances. If the conduct was not such, he was negligent, and if such negligent conduct was a proximate cause of the injuries suffered by plaintiff, liability was established.

It must be remembered that a jury and trial judge heard the evidence in this case and concluded that the conduct of either Gripenstraw or Perrin or both of them was not that of a reasonably prudent person and that either or both of them was or were negligent. It cannot be denied that this ultimate fact was so determined.

The members of the jury and trial judge are presumed to have "reasonable minds." They saw the participants and saw and heard the witnesses and must have concluded that a reasonably prudent person would not have permitted boys ranging in weight from 85 to 190 pounds to engage in a game of touch football under the circumstances there depicted. These fact finders, with "reasonable minds," may have felt that a reasonably prudent person in charge of the playground would have applied the "exponent chart" which was admitted to be *"partially for the safety of the participants"* in such a game. These fact finders, with "reasonable minds," may have disbelieved the witnesses who testified that touch football, when played as described by them, would not endanger the life or limb of the participants. In short, these fact finders with "reasonable minds," on whom the Constitution and law of this state places the responsibility of determining issues of fact, concluded from the evidence that a reasonably prudent person would not have permitted little Willie Pirkle, 13 years, 4 months of age, 5 feet, 4 inches tall and weighing 97 pounds to play in a game of touch football with big-overgrown Jackie Perkins, 14 years, 6 months of age, 5 feet, 10 inches tall and weighing 145 pounds, and that in so doing Mr. Gripenstraw or Mr. Perrin or both were guilty of negligence.

Now, a majority of this court says that this jury and this trial judge did not possess "reasonable minds"; that they are not entitled to the benefit of the presumption which the law has bestowed upon them—that they possess "reasonable minds"; and that the constitutional mandate and statutory provisions relating to the function of a jury and a trial judge are of no force or effect whatsoever as this court arrogates to itself both the fact finding and law making powers.

No evidence of negligence, the majority says. But what is the test for determining when negligence is a question of fact or a question of law? The only test mentioned in the law books is the so-called "reasonable minds" test. That is, where the evidence is such that "reasonable minds" cannot differ as to the conclusion to be reached, it is a question of law. The majority does not mention this test or any other test. It simply declares arbitrarily, contrary to the conclusion reached by the jury and trial judge, that there was "no negligence." But suppose little Willie Pirkle was only 8 years of age, 4 feet tall and weighed only 60 pounds and big-overgrown Jackie Perkins was 16 years of age, 6 feet tall and weighed 200 pounds, and the record was the same in other respects, what would the majority say? If it would find there was negligence in such a case, where should the line be drawn? It seems only reasonable to me that if this court intends to overthrow the "reasonable minds" test as it has done in this case, it should lay down some other test or standard for determining when the issue of negligence is one of fact or law. The present decision places the determination of this issue within the arbitrary power of four members of this court without regard to any test, standard or rule to guide either this court or any lower court in future cases. Thus, the reason of the law is superseded by the arbitrary rule of four men. Obviously this rule will change from time to time as the philosophy of the majority changes.

The decision which the majority of this court has rendered in this case resolving an issue of fact contrary to the conclusion reached by the jury and the trial judge is more far-reaching than its effect upon the law applicable to this particular case. In effect, it is an attack upon the jury system. By this decision the majority of this court says to the people of California, You can write into your Constitution and statutes that litigants in cases of this character are entitled to a trial by jury, but regardless of the determination by the jury of the factual issues, a majority of this court will have the last say as to the determination of the factual issues. This means that

when a majority of this court desires to overthrow the factual determination by a jury it may do so regardless of the nature and character of the evidence supporting such determination.

The volumes of the reported decisions of this court contain the record of the Justices of this court who have expressed their views on the effect of factual determinations by juries and it may be gleaned therefrom that some of those Justices have not been in accord with the constitutional and statutory provisions which make the jury system a part of our system of jurisprudence. While the validity of these provisions has been settled beyond the realm of successful attack, the operation of the system is greatly restricted and rendered ineffective by decisions such as this, which are becoming more numerous as the decisions of the present court are rendered. By such decisions a bare majority of this court may snatch from a litigant his property and rights gained through the lawful process of a jury trial, thereby depriving such litigant of one of his most valuable, fundamental, constitutional rights, guaranteed by both the Constitution of the United States and the Constitution of California. Such is the situation in the case at bar. As one who believes in preserving the American way of life and upholding and supporting the Constitutions which guarantee the continuance of that way of life, I cannot refrain from expressing my unqualified disapproval of this decision and those of similar import which is now the trend of decision by the majority of this court.

Because I believe in upholding the constitutional guarantee of the right of trial by jury and the statutory law of this state which confers upon a jury and trial judge the exclusive power of determining the facts in a case such as this, and because it appears beyond question that an honest evaluation of the record in this case must necessarily resolve the issue of negligence here to be one of fact which must be determined by the jury and trial judge in accordance with the process of law as defined in our Constitution and statutes, I would affirm the judgment in this case.

Rehearing denied; CARTER, J., dissenting.

MAY v. BOARD OF DIRECTORS OF EL CAMINO IRR. DIST.

Sac. 6030.

Supreme Court of California, in Bank.

Feb. 16, 1953.

Rehearing Denied March 16, 1953.

Holder of bonds issued by Irrigation District filed a petition against Board of Directors of Irrigation District for relief in aid of writ of mandamus ordering board to levy an assessment on lands in district to pay bonds and interest. The Supreme Court, Carter, J., held that in view of fact that District Attorney had instituted mandamus proceedings to compel County Board of Supervisors to make levy, and board had expressed willingness to comply with writ of mandamus, petition should not be granted.

Petition denied.

Mandamus **185**

Where District Attorney of county, in which irrigation district was located, had commenced proceeding in Superior Court of that county for writ of mandamus to compel County Board of Supervisors to make levy of assessments on lands in irrigation district so that district's bonds could be paid, and board expressed a willingness to comply with writ of mandate ordering levy of assessments, Supreme Court would deny petition of holder of district's bonds for relief in aid of writ of mandate of Supreme Court ordering assessment. Water Code, § 20500 et seq., 26550-26553.



W. Coburn Cook, Turlock, for petitioner.

Bruce A. Werlhof, Red Bluff, for respondent.

CARTER, Justice.

In a mandamus proceeding instituted in this court by Mary Ruth May, the owner of \$5,000 of the \$423,000 of bonds issued by the El Camino Irrigation District together with interest coupons, she obtained a writ of mandate ordering the board of directors of the district to levy an assessment on lands in the district to pay her bonds and interest. May v. Board of Directors, 34 Cal.2d 125, 208 P.2d 661.

Since the issuance of said writ, May has filed a petition in this court in that proceeding, designated a petition for relief in aid of writ of mandamus, charging in chief that although the board of directors of the district has levied two assessments, one for a million dollars and the other for something over \$100,000, (the amounts being apparently considered by the board as an amount sufficient to pay all of the bonds and interest thereon, the last of which, according to the board, matures in 1954), various steps required by the irrigation district law, Water Code, § 20500 et seq. were not followed, including the failure to equalize the assessments or give notice thereof, complete the computations for the amount of the assessments on each parcel of land or give proper notice of the assessments to the assessee, and defects in the resolution levying the assessment and in other respects. The board asserts that it levied the assessments, and in due course, after the period of redemption has expired, deeds will be issued conveying delinquent lands to the district; that there are either no defects in the proceedings or they will or have been cured by provisions of the irrigation law; that it has done its best to comply with the writ of mandate heretofore issued by this Court and that if the assessments heretofore levied are irregular it is desirous of complying with the law and the writ.

Without deciding the validity of the assessments levied or the effect of curative provisions, it is quite apparent that there is very serious doubt of their validity and hence they are subject to attack even though it may be unsuccessful. Some indication

of this situation is that the District Attorney of Tehama County, in which the district is located, has commenced a proceeding in the Superior Court of that county for a writ of mandamus to compel the county board of supervisors to make the levy,¹ alleging that the duties with reference to levying assessments had not been properly performed in various respects by the board of directors of the district.

Apparently the board of directors of the district has not had proper legal advice on the proceedings to be taken by them and has relied on copies of old proceedings. The members of the board assert that they have not intentionally refused to obey the writ issued by this court and are willing to obey it.

Taking into consideration the interest taken in the matter by the District Attorney of Tehama County, and what has already transpired, together with the expressed willingness of the board to comply with the writ, we do not believe petitioner's petition should be granted. Indeed her counsel stated at oral argument that it was not the purpose of petitioner to have the district board cited for contempt but rather to have it state what it has done or intends to do in compliance with the writ. It has done that. If more is required the board shall have one year from and after the date hereof to comply with the writ in the manner required by the irrigation district law.

In all other respects the petition is denied, and the order to show cause is discharged.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

1. Under the irrigation district law if assessments are not properly levied as required by the board of directors of the district, the county board of supervisors must do it, Water Code, § 26500, and the district attorney shall each year ascertain whether the district board has performed its duties, and if he finds it has not done so, he shall advise the board

of supervisors, and if the latter does not then perform those duties, the district attorney shall take action to compel their performance by the board of supervisors. And finally, if the district attorney does not take such action the Attorney General shall do so. Water Code, §§ 26550-26553.

40 Cal.2d 217

PEOPLE v. HOWERTON.

Cr. 5399.

Supreme Court of California, in Bank.

Feb. 10, 1953.

Prosecution for the commission of a lewd and lascivious act upon a child under the age of fourteen. The Superior Court, Los Angeles County, Clement D. Nye, J., rendered judgment of conviction. In the same proceeding, the court found defendant to be a sexual psychopath and suspended execution of sentence pending outcome of sexual psychopath proceedings. The defendant was committed to the State Hospital for observation. He did not appeal from the judgment of conviction. After the State Hospital Superintendent reported that defendant was a sexual psychopath and a menace to the health and safety of others and would not benefit from treatment, the Superior Court, Los Angeles County, Clement D. Nye, J., ordered that sentence be placed in full force and effect, and defendant appealed. The Supreme Court, Traynor, J., held that the order placing sentence in effect was not an appealable order.

Appeal dismissed.

Prior opinion, 248 P.2d 98; rehearing denied 249 P.2d 35.

1. Criminal Law ⚡1069(1)

In criminal cases, an appeal must be taken within ten days of the rendition of judgment or order appealed from. Rules on Appeal, rule 31.

2. Criminal Law ⚡1023(11)

A judgment of conviction is appealable although execution thereof is suspended after judgment is pronounced. Pen.Code, § 1237.

3. Criminal Law ⚡625

Proceedings under statute pertaining to the commitment of sexual psychopaths are of a civil nature. Welfare and Institutions Code, §§ 5501, 5512.

4. Criminal Law ⚡625

Proceedings under statute pertaining to the commitment of sexual psychopaths need not be heard before the same judge that heard the criminal charge involving sexual deviation. Welfare and Institutions Code, §§ 5501, 5512.

5. Criminal Law ⚡625

Under statute pertaining to the commitment of sexual psychopaths, the guilt of the alleged psychopath is determined when the judgment of conviction is pronounced in the criminal proceeding involving sexual deviation, and nothing that may be done in the sexual psychopath proceeding can modify or nullify that determination. Welfare and Institutions Code, §§ 5501, 5512.

6. Criminal Law ⚡625

In prosecution for the commission of a lewd and lascivious act on a child under the age of fourteen, commencement of sexual psychopath proceedings under statute pertaining to the commitment of sexual psychopaths held execution of judgment of conviction in abeyance during period that defendant was under observation at state hospital, but validity of the judgment remained unaffected. Welfare and Institutions Code, §§ 5501, 5512; Pen.Code, § 288.

7. Criminal Law ⚡1083

The pendency of an appeal from a judgment of conviction for a crime involving sexual deviation will not divest court of jurisdiction of sexual psychopath proceedings. Welfare and Institutions Code, §§ 5501, 5512.

8. Criminal Law ⚡1023(12)

"Substantial rights" under statute permitting appeal from any order after judgment affecting the substantial rights of a party does not include such rights that could have been reviewed on a timely appeal from the judgment. Pen.Code, § 1237, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Substantial Rights".

9. Criminal Law ⚡1023(12)

In prosecution for the commission of a lewd and lascivious act on a child under the age of fourteen in which Superior Court rendered judgment of conviction and found defendant to be a sexual psychopath and suspended execution of sentence pending outcome of sexual psychopath proceedings, and committed defendant to state hospital for observation, and defendant had not appealed from judgment of conviction, order placing sentence in full force and effect

after report by state hospital superintendent that defendant was a sexual psychopath and would not benefit from treatment was not an appealable order. Welfare and Institutions Code, §§ 5501, 5512; Pen.Code, §§ 288, 1237.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Elizabeth Miller, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant Azel Howerton was charged by information with the commission of a lewd and lascivious act on a child under the age of fourteen. Penal Code, § 288. He pleaded not guilty and waived trial by jury. By stipulation, the People submitted its case on the transcript of testimony taken at the preliminary examination. Defendant testified in his own behalf. On January 10, 1952, the court adjudged defendant guilty of the crime charged in the information. On February 6, 1952, with defendant and his attorney present, the court denied defendant's application for probation and pronounced judgment and sentenced him to prison for the term prescribed by law.¹ In the same proceeding, the court found defendant to be a sexual psychopath, and suspended execution of sentence pending outcome of sexual psychopath proceedings. Defendant was committed to Norwalk State Hospital for observation. Defendant did not appeal from the judgment of February 6th.

On April 9, 1952, defendant was returned to the superior court for further proceedings. The hospital superintendent reported that in his opinion defendant was a sexual psychopath and a menace to the health and safety of others, and would not

benefit from treatment. The court ordered that the sentence imposed on February 6th be placed in effect and that defendant be delivered into the custody of the Director of Corrections. Defendant appeals from the "judgment" of April 9th, contending that the evidence adduced at the trial was insufficient to sustain his conviction. The People have filed a motion to dismiss the appeal, on the ground that the order of April 9th is a nonappealable order. We have concluded that this contention must be sustained and that the appeal must be dismissed.

[1] In criminal cases an appeal must be taken within ten days of rendition of the judgment or order appealed from. Rules on Appeal, rule 31. A timely appeal was not taken from the judgment of February 6th. The present appeal may be maintained only if the order of April 9th is an appealable order. Section 1237 of the Penal Code provides:

"An appeal may be taken by the defendant:

"1. From a final judgment of conviction; * * *

"2. From an order denying a motion for a new trial;

"3. From any order made after judgment, affecting the substantial rights of the party."

Subsection 2 is inapplicable in this case since defendant did not make a motion for a new trial.

[2-7] Defendant first contends that his appeal may be maintained under subsection 1, on the ground that a final disposition of the case was not made until the trial court committed him to prison. It is settled that a judgment is appealable although execution thereof is suspended after judgment is pronounced. *People v. Neal*, 108 Cal.App.2d 491, 493, 239 P.2d 38;

on for the term prescribed by law.

"It is also ordered that execution of sentence be suspended.

"It is further ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles.

"Done in open Court this 6th day of February, 1952."

"Whereas the said defendant having been duly found guilty in this Court of the crime of violation of Section 288, Penal Code of California, a felony, as charged in Count 2 of the Information,

"It is therefore ordered, adjudged and decreed that the said defendant be punished by imprisonment in the State Pris-

People v. Casillas, 60 Cal.App.2d 785, 787, 141 P.2d 768; People v. Dawes, 37 Cal. App.2d 44, 46, 98 P.2d 787; see, also, In re Davis, 37 Cal.2d 872, 875, 236 P.2d 579. Defendant contends, however, that an appeal could not have been taken from the judgment of February 6th, on the ground that allowance of an appeal would have deprived the superior court of jurisdiction over the sexual psychopath proceedings pending action by the appellate court. The proceedings under section 5512 of the Welfare and Institutions Code are of a civil nature. People v. McCracken, 39 Cal.2d 336, 345, 346, 246 P.2d 913; In re Keddy, 105 Cal.App.2d 215, 217, 233 P.2d 159; see, Sane Laws for Sexual Psychopaths, 1 Stanf.L.Rev. 486, 492. Sexual psychopath proceedings need not be heard before the same judge that heard the criminal charge. Welf. & Inst. Code § 5501. The guilt of defendant is finally determined when the judgment of conviction is pronounced in the criminal proceeding, and nothing done in the sexual psychopath proceeding could modify or nullify that determination. Thus, in the present case the sexual psychopath proceedings under section 5512 necessarily held in abeyance execution of the judgment during the period that defendant was under observation at the state hospital, but the validity of the judgment remained unaffected. People v. Hector, 104 Cal.App.2d 392, 394-395, 231 P.2d 916; cf. People v. Mason, 109 Cal. App.2d 87, 90, 240 P.2d 64. Pendency of an appeal from the judgment would not have divested the superior court of jurisdiction over the sexual psychopath proceedings. In re Keddy, supra; In re Morehead, 107 Cal.App.2d 346, 350, 237 P.2d 335. The order of commitment on April 9th had on more legal effect than would an order of commitment in an ordinary case where judgment had been pronounced and execution of sentence suspended. Cf. In re Ralph, 27 Cal.2d 866, 869, 168 P.2d 1.

[8,9] Defendant contends finally that the order of April 9th was appealable under subsection 3 of section 1237. Defendant does not contend, however, that there was any error in the proceedings under

section 5512 that led to the commitment order. Cf. People v. Neal, supra, 108 Cal. App.2d 491, 495, 239 P.2d 38; People v. Thompson, 102 Cal.App.2d 183, 188, 227 P.2d 272. He contends only that the evidence was insufficient to sustain his conviction of violation of section 288 of the Penal Code. "Substantial rights" under subsection 3 of section 1237 are not affected when defendant's objections concern matters that could have been reviewed on timely appeal from the judgment. People v. Smith, 218 Cal. 484, 487, 24 P.2d 166; see, also, People v. Stein, 31 Cal.2d 630, 632, 191 P.2d 409.

The appeal is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



40 Cal.2d 179

BETTER FOOD MARKETS, Inc. v. AMERICAN DIST. TEL. CO. et al.

L. A. 22373.

Supreme Court of California, in Bank.

Feb. 6, 1953.

As Corrected March 5, 1953.

Action for damages to plaintiff as result of failure of defendants to properly transmit burglar alarm signals in accordance with terms of contract. The Superior Court, Los Angeles County, Arthur Crum, J., directed verdict for defendant, and plaintiff appealed. The Supreme Court, Shenk, J., held that evidence made question for jury on whether the plaintiff's loss from burglary was the proximate result of defendant's breach of contract, but that provision for liquidated damages was valid and limited any recovery to amount provided for thereby.

Judgment modified and affirmed.

Carter, J., dissented.

Prior opinion 242 P.2d 351.

I. Appeal and Error Ⓒ927(7)

On appeal from a judgment on a directed verdict for the defendant, the evi-

dence will be viewed in light most favorable to the plaintiff.

2. Telegraphs, Telephones and Radio ⇨73(3)

In action against defendant whose burglar alarm system had been installed in plaintiff's food market for loss to plaintiff from robbery as result of failure of defendant to properly transmit burglar alarms signals as they had by written contract agreed to do, wherein it appeared that approximately nine minutes had elapsed from time signal of opening of safe was received until police were informed, and that police had arrived within 1 minute thereafter, evidence made question for jury on issue whether plaintiff's loss was the proximate result of defendant's breach of its contract.

3. Damages ⇨76

A valid agreement may be made for the payment of liquidated damages, but an agreement for the payment of a penalty is invalid. Civ.Code §§ 1670, 1671.

4. Damages ⇨79(1)

Parties to a contract may provide for liquidated damages when necessary to do so in order that they know with reasonable certainty the extent of liability for a breach of the agreement, but provision of parties, in exercise of their business judgment, that it is impracticable and extremely difficult to fix damages which may result from breach of agreement, is not controlling as to actual difficulty in fixing damages, but may be entitled to some weight. Civ.Code, §§ 1670, 1671.

5. Damages ⇨83

Unless a clause in a contract providing for liquidated damages falls within statutory provision permitting parties to fix liquidated damages when, from the nature of case, it would be impracticable or extremely difficult to fix the actual damage, the clause is invalid, and question of invalidity is, except on admitted facts, a question to be resolved by the trier of fact. Civ. Code, §§ 1670, 1671.

6. Damages ⇨150, 163(3)

The burden is on the party who seeks to rely upon a liquidated damage provision in a contract to plead and prove facts showing impracticability of fixing actual dam-

ages, and consequently, the validity of provision for liquidated damages. Civ.Code, §§ 1670, 1671.

7. Damages ⇨79(1)

In determining the impracticability and difficulty of fixing actual damages for breach of contract, and consequently the validity of provision for liquidated damages, court should place itself in position of parties at time contract was made and should consider the nature of the breaches that might occur and any consequences that were reasonably foreseeable. Civ.Code §§ 1670, 1671.

8. Appeal and Error ⇨1169(7)

Where a trial court, when passing upon validity of provision in contract for liquidated damages, finds that it was impracticable or extremely difficult for contracting parties to fix actual damages, but it appears to reviewing court that from the nature of the possible detriment, the damages could have been fixed without difficulty, judgment based on that finding should be reversed. Civ.Code, §§ 1670, 1671.

9. Damages ⇨79(1)

Where defendant contracted to install burglar alarm system in plaintiff's food market, the possible losses which might result from failure of defendant to properly receive signals and perform its duties in connection therewith were, in view of varying circumstances which might develop, such that it would have been impracticable or extremely difficult to fix actual damage for breach of contract, and provision for liquidated damages could validly be made. Civ.Code, §§ 1670, 1671.

10. Damages ⇨80(1)

The amount of a liquidated damages provision in a contract must represent result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that might be sustained. Civ. Code, §§ 1670, 1671.

11. Damages ⇨80(1)

Where it had been determined that it was impracticable or extremely difficult for parties to a contract by which defendant was to install and maintain burglar system

in plaintiff's food market, to fix the actual damages for breach agreement of parties that in all cases of breach by defendant the damages would be fixed at \$50 whether in fact the loss was greater than that amount, was not unreasonable, but bore a sufficient relation to the possible and variable losses which might be sustained as result of breach. Civ.Code, § 1671.

12. Negligence ⚡

Although an action in tort may sometimes be brought for the negligent breach of a contractual duty, the nature of the duty owed and the consequences of its breach must be determined by reference to the contract.

13. Damages ⚡

Mere fact that defendant's breach of contract by which it installed and maintained burglar alarm system in plaintiff's food market had been a negligent one did not entitle plaintiff to avoid the effect of a valid provision for liquidated damages by bringing his action in tort.

14. Damages ⚡

The validity of a clause in a contract providing for liquidated damages must be determined in accordance with the facts and circumstances of each particular case.

Eugene S. Ives and John Goddard, Los Angeles, for appellant.

Lawler, Felix & Hall, Reed A. Stout, Los Angeles and John M. Hall, Redondo Beach, for respondent.

SHENK, Justice.

This is an action brought on counts alleged in tort and in contract wherein the plaintiff seeks to recover damages resulting from the alleged failure of the defendants to properly transmit burglar alarm signals to their own guards and to the headquarters of the municipal police department. Such failure is alleged to have permitted a burglar to escape with the sum of \$35,930 taken from the plaintiff's food market.

On the first trial the court granted a motion for nonsuit in behalf of all the defendants except the American District

Telegraph Company, and ordered judgment for those defendants. As against the defendant American District Telegraph Company the jury on the first trial found for the plaintiff, but a new trial was granted on the ground of insufficiency of the evidence. On the second trial the jury was unable to agree and was dismissed. Thereafter the defendant successfully moved for a directed verdict pursuant to section 630 of the Code of Civil Procedure (ordering judgment where motion for directed verdict should have been, but was not granted), and the court ordered judgment for the defendant. On this appeal taken from that judgment the plaintiff contends that there is sufficient evidence of the defendant's negligence and breach of contract to sustain a verdict for the plaintiff, and that it was error to grant the motion for a directed verdict.

In June of 1947 the parties entered into a written agreement whereby the defendant was to install and maintain its standard "Central Station Burglar Alarm and Hold-up System" in the plaintiff's food market. The contract provided that the defendant "on receipt of a burglar alarm signal from the Subscriber's [plaintiff's] premises, agrees to send to said premises, its representatives to act as agent of and in the interest of the Subscriber * * *. The Subscriber hereby authorizes and directs the Contractor [defendant] to cause the arrest of any person or persons unauthorized to enter his premises and to hold him or them until released by the Subscriber * * *. The Contractor, on receipt of a holdup alarm signal from the Subscriber's premises, agrees to transmit the alarm promptly to headquarters of the public police department."

[1,2] Viewing the evidence in the light most favorable to the plaintiff on this appeal from a judgment on a directed verdict for the defendant, *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826, the following facts were established: On November 16, 1947, at approximately 7:30 p. m. the assistant manager of the plaintiff's market set the burglar alarm system and locked the building. As he entered his car in the parking lot he was accosted by an armed robber

and at gun point forced to return and open the store, the inner office and the safe. The robber took the contents of the safe, taped the assistant manager, and left. Approximately 14 minutes elapsed between the time when the store was reopened and when the robber left the store with the loot. During this period signals were being received at the defendant's central station indicating the sequence of the opening and closing of the doors. The defendant's operators at the central station did not call a guard or inform the police until 7:51, 9 minutes after the signal indicating that the safe had been opened, was received. The assistant manager had succeeded in knocking a telephone off the hook and calling for help at approximately 7:50. The police arrived at the market at 7:52, within one minute after receiving a call. The defendant's guards arrived shortly thereafter. The assistant manager's watch was broken at the time he was taped and the hands had stopped at 7:50.

Under the circumstances of this case it would have been reasonable to conclude that the defendant had a duty to call the police as well as its own guards to the plaintiff's premises. Promptness being the essence of the defendant's obligation, its delay in acting could reasonably be found to be an omission to render the agreed service and a failure of performance of the contract.

There is evidence upon which it could have been found that the loss was the proximate result of the defendant's delay in responding to the alarms. There was but one individual committing the burglary. He acted deliberately and there is reason to believe that the agreement between the parties was entered into with the intention of providing for the apprehension of such a person before he left the premises. The time and distance factors indicate that this particular burglar may have been caught had the police and guards been called to the premises a few minutes earlier, and that the delay of nine minutes after the safe had been opened permitted the escape. Such probabilities are to be weighed in the light of common experience in such matters and

present a triable issue of fact. There was substantial evidence from which a jury could have found that the plaintiff's loss was the proximate result of the defendant's breach of its contract. Therefore it was error for the trial court to order judgment for the defendant on its motion for a directed verdict.

There remains the question of the validity of the following provisions of the contract for liquidated damages: "It is agreed by and between the parties that the Contractor is not an insurer, that the payments hereinbefore named are based solely on the value of the service in the maintenance of the system described, that it is impracticable and extremely difficult to fix the actual damages, if any, which may proximately result from a failure to perform such services and in case of failure to perform such services and a resulting loss its liability hereunder shall be limited to and fixed at the sum of fifty dollars as liquidated damages, and not as a penalty, and this liability shall be exclusive."

[3, 4] It is generally recognized that a valid agreement may be made for the payment of liquidated damages, whereas an agreement for the payment of a penalty is invalid. Under the law generally the parties are allowed to contract for liquidated damages if it is necessary to do so in order that they may know with reasonable certainty the extent of liability for a breach of the agreement. Where the parties exercise their business judgment in providing that it is impracticable and extremely difficult to fix the damages which may result from the defendant's failure to render its service such a provision is not controlling as to the actual difficulty in fixing damages, although it is entitled to some weight. See *Stark v. Shemada*, 187 Cal. 785, 788, 204 P. 214; *Dyer Bros. Golden West Iron Wks. v. Central Iron Wks.*, 182 Cal. 588, 592, 189 P. 445; see also *Restatement of Contracts*, § 339(f), p. 544.

[5, 6] The statutory law and its interpretation in this state are in accord with the general law. Civil Code section 1670 states that a provision in a contract which provides for the amount of damages to be paid

in the event of a breach of the contract is void, except as expressly provided in section 1671 as follows: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Unless a clause providing for liquidated damages falls within the provisions of section 1671 it is invalid, *Dyer Bros. Golden West Iron Wks. v. Central Iron Wks.*, supra, 182 Cal. 588, 593, 189 P. 445; *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 405, 67 P. 499; and except on admitted facts this is generally a question to be resolved by the trier of fact, *Rice v. Schmid*, 18 Cal.2d 382, 385, 115 P.2d 498, 138 A.L.R. 589; *Petrovich v. City of Arcadia*, 36 Cal.2d 78, 86, 222 P.2d 231; *Dyer Bros. Golden West Iron Wks. v. Central Iron Wks.*, supra, 182 Cal. 588, 593, 189 P. 445. It is settled law that the burden is on the party seeking to rely upon a liquidated damage provision in a contract to plead and prove facts showing impracticability. *Rice v. Schmid*, supra, 18 Cal.2d 382, 385, 115 P.2d 498; *Dyer Bros. Golden West Iron Wks. v. Central Iron Wks.*, supra, 182 Cal. 588, 593, 189 P. 445.

[7] The plaintiff argues that there is no difficulty in the present case in fixing the actual damage and that the amount of money stolen should be the actual damage. Its contention is that the time for the determination of the question of the impracticability and difficulty in fixing the damages is after the loss has occurred. This is not the rule. In determining this question the court should place itself in the position of the parties at the time the contract was made and should consider the nature of the breaches that might occur and any consequences that were reasonably foreseeable. In *Hanlon Drydock etc. Co. v. McNear, Inc.*, 70 Cal.App. 204, 232 P. 1002 (relying on *Pacific Factor Co. v. Adler*, 90 Cal. 110, 120, 27 P. 36, the court, in dealing with the question presented by the plaintiff's contention, stated, 70 Cal.App. at page 211, 232 P. at page 1005, "If adopted it would practically destroy the power given contracting parties under section 1671 of the Civil Code

in any case to make a binding agreement as to stipulated damages * * *. Appellant's theory is manifestly contrary to authorities of other jurisdictions, notably the federal jurisdiction; it finds no support in the text-books so far as our attention has been called, and if inference may be indulged in, we think the cases of the local jurisdiction clearly indicate that there is no intention to depart from the universal rule established elsewhere." The court cited numerous authorities supporting the general proposition quoted from *New Britain v. New Britain Telephone Co.*, 74 Conn. 326, 50 A. 881, 884: "It is the look forward, and not backward, that we are called upon to take". This rule is too well settled to admit of further discussion.

[8] In the present case there was no finding with respect to the impracticability or extreme difficulty in fixing damages. Where a trial court does find that such a situation did exist but it appears to a reviewing court that from the nature of the possible detriment the damages could have been fixed without difficulty, a judgment based on the finding will be reversed, *Stark v. Shemada*, supra, 187 Cal. 785, 204 P. 214. The question becomes one of law where the facts are not in dispute and admit of but a single conclusion. Such is the present case. When the uncertainties as to what might have happened if the plaintiff's store were entered is viewed from the position of the contracting parties, it satisfactorily appears that there is no basis whatever for a conclusion that it would have been practicable or reasonably possible for the parties to fix the probable damage. The question, upon the admitted facts, is clearly one of law.

[9] The possibilities of the consequences of a failure of the defendant to perform its obligation under the contract are innumerable. A failure to receive the signals, or to respond to them, or to report them to the plaintiff would be a violation of the agreement. Entrances to the building after working hours might be made by persons having authority as well as by burglars or by persons bent upon mischief. They might or might not cause damage. There might be the theft of a ham, or of a truckload of

goods, or the contents of a safe. There might be a breaking in for the purpose of theft and no theft. If money was taken it might be a few dollars or many thousands. Books might be tampered with, or papers abstracted. Damage might be caused in many ways that were not foreseeable. In short, it was extremely difficult to predict the nature and extent of the loss. Furthermore, there was no way of ascertaining what portion of any loss sustained could be attributed to the defendant's failure to perform. The contract specifically provided that the defendant was not an insurer. Therefore, if it should have fully performed on the contract and a loss resulted nevertheless it could in no way be liable. The parties recognized, then, that losses might have resulted which were not causally connected with the defendant's failure of performance. Where there had been a failure of performance and a loss, what part of that loss could be attributed to the failure of performance; or how much of that loss would have resulted had there not been a failure of performance? Under the complexity of the circumstances in this case the parties could not answer this question. There being no reasonable basis upon which to predict the nature and extent of any loss, or how much of that loss the defendant's failure of performance might account for, it is certain that it would have been "impracticable or extremely difficult to fix the actual damage" § 1671, Civ.Code.

[10] The validity of a clause for liquidated damages requires that the parties to the contract "agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof * * *." Civ.Code § 1671. This amount must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained. *Dyer Bros. Golden West Iron Wks. v. Central Iron Wks.*, supra, 182 Cal. 588, 189 P. 445; *Rice v. Schmid*, supra, 18 Cal.2d 382, 386, 115 P.2d 498; *Restatement, Contracts*, § 339, p. 554. It had been suggested that the greater the difficulty encountered by the parties in estimating the damages which might arise from a breach, the greater should be the range of

estimates which the courts should uphold as reasonable. (5 *Corbin on Contracts*, § 1059, p. 291.) The plaintiff's contention that the agreed amount did not represent an endeavor by the parties to estimate the probable damage is based on evidence that the liquidation clause was part of the printed material in a form contract generally used by the defendant in dealing with subscribers such as the plaintiff, and that the defendant did not investigate the plaintiff's manner of conducting its business or the character and value of its stock. Nevertheless the parties agreed to the liquidation provisions, and there is no evidence that they were not fully aware of circumstances making it desirable that liquidated damages be provided for.

[11] In the present case the impracticability or extreme difficulty in fixing actual damages appeared as a matter of law. In the exercise of their business judgment the parties reasonably agreed that in all cases of breach by the defendant the damages would be fixed at \$50 whether in fact the defendant's loss for a given breach was greater or less than that amount. As previously stated the stipulation that the amount was to be paid "as liquidated damages and not as a penalty" while entitled to some weight is not conclusive. Nevertheless, it is clear that the actual loss resulting from a breach could in many cases be less than the amount provided for. It is equally clear that in many other cases the actual loss would exceed that amount. To construe this as a penalty it would have to be said that the amount provided to be paid bore no reasonable relation to the losses the parties thought might be sustained. This may not rightly be stated.

[12, 13] The plaintiff seeks to avoid the effect of the liquidation clause on the ground that it has no application to a tort action. However, the plaintiff makes no claim that a duty was owed to it outside of that created by the contract, and no breach of duty was alleged other than a failure to render the contracted for service. Although an action in tort may sometimes be brought for the negligent breach of a contractual duty, *Jones v. Kelly*, 208 Cal. 251, 280 P. 942, still the nature of the duty owed

and the consequences of its breach must be determined by reference to the contract which created that duty. In the present case the duty created by the contract was one for which liability for a breach thereunder was fixed, and whether the action is brought in tort or in contract the nature of the duty remains the same. The plaintiff cites no authority and none has been discovered to the effect that where the breach of a duty created only by contract is a negligent one the application of a valid clause for liquidated damages may be avoided by bringing an action in tort.

[14] The plaintiff relies upon a number of cases holding that agreements purporting to be for liquidated damages were in fact agreements for penalties. *Pacific Factor Co. v. Adler*, supra, 90 Cal. 110, 27 P. 36; *Stark v. Shemada*, supra, 187 Cal. 785, 204 P. 214; *Rice v. Schmid*, supra, 18 Cal.2d 382, 115 P.2d 498; *Marsh & Co. Inc., v. Tremper*, 210 Cal. 572, 292 P. 950; *Eva v. McMahon*, 77 Cal. 467, 19 P. 872; *Sherman v. Gray*, 11 Cal.App. 348, 104 P. 1004. The validity of a liquidation clause in a contract must be determined in accordance with the facts and circumstances of each particular case. The factual situations in the cases relied upon make them inapplicable to the present case. As a group they are distinguishable upon the ground that in each there were factors which would permit the parties to fairly estimate actual damages in the event of a breach—as a predetermined amount for every item of merchandise an obligor failed to deliver. There was no inherent uncertainty as to the amount of loss that could be sustained, as in the present case. The function of the agreed sum in each of those cases was to insure performance by the obligor and was properly held to be a penalty.

The order directing a verdict for the defendants involved questions of fact which could have been found in the plaintiff's favor. However, the error warrants only a qualified reversal of the judgment, as the plaintiff's recovery is limited to \$50 if he should prevail on a retrial.

The judgment of the trial court is modified to provide as follows: "It is ordered, adjudged and decreed that plaintiff recov-

er from the defendant, American District Telegraph Company, the sum of \$50.00 without costs." As so modified the judgment is affirmed. Each party shall bear its own costs on appeal.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

This court holds the following provision a valid contract for liquidated damages: "It is agreed by and between the parties that the Contractor [defendant] is not an insurer, that the payments hereinbefore named are based solely on the value of the service in maintenance of the system described, that it is impracticable and extremely difficult to fix the actual damages, if any, which may proximately result from a failure to perform such services and in case of failure to perform such services and a resulting loss its liability hereunder shall be limited to and fixed at the sum of fifty dollars as liquidated damages, and not as a penalty, and this liability shall be exclusive." (Emphasis added.)

It is conceded that defendant failed to perform its duty; that plaintiff's loss resulted therefrom; that plaintiff's loss was the sum of \$35,930 which was taken, by a burglar, from plaintiff's food market.

In order to uphold the so-called \$50 liquidated damage provision, it was necessary for the majority to find that damages were "impracticable and extremely difficult" to fix at the time the contract was entered into, and further that the \$50 provision bore a reasonable relation to any loss which the parties contemplated might be sustained as a result of a breach of the contract.

It is said in the majority opinion that "In determining this question [the losses which might be expected to occur] the court should place itself in the position of the parties at the time the contract was made and should consider the nature of the breaches that might occur and any consequences that were reasonably foreseeable."

Placing myself in the position of the parties at the time the contract was entered into, I would say that one way of ascertaining the loss which might occur, was to take an average of the amount of cash left in the safe in the store overnight; an inventory of the average merchandise kept in the store. If the losses sustained did not approximate the damages provided for by the parties, the rule set forth in *Kothe v. R. C. Taylor Trust*, 280 U.S. 224, 50 S.Ct. 142, 74 L.Ed. 382, would be applicable. There the parties provided for excessive liquidated damages, and the Supreme Court held that the damages provided for in the contract bore no reasonable relation to the probable loss to be sustained and held the provision a penalty and therefore unenforceable. It is the rule that the validity of the provision must be proved by the one seeking to enforce it. And as is said in the majority opinion "Where a trial court does find that such a situation did exist [impracticability or extreme difficulty in fixing damages] but it appears to a reviewing court that from the nature of the possible detriment the damages could have been fixed without difficulty, a judgment based on the finding will be reversed, *Stark v. Shemada*, supra, 187 Cal. 785, 204 P. 214."

It is also said in the majority opinion that "The question becomes one of law where the facts are not in dispute and admit of but a single conclusion." Even if the facts are not in dispute, they seldom admit of but one conclusion. In this case, one jury found for plaintiff and the second jury disagreed. Does this not prove that these facts admit of more than one conclusion? I think it does. It is also said here that whether damages are impracticable, or extremely difficult, to fix is "except on admitted facts * * * generally a question to be resolved by the trier of fact * * *." In *Rice v. Schmid*, 18 Cal.2d 382, 115 P.2d 498 (the latest pronouncement of this court on this subject), it was held that in "each instance" it was a question of fact. Further, even on admitted facts, more than one inference can be, and is often, drawn. See *Black v. Black*, 91 Cal. App.2d 328, 204 P.2d 950 (stipulated facts; different inferences possible); *Crisman v.*

Lanterman, 149 Cal. 647, 87 P. 89 (agreed statement of facts; different inferences possible); *Anderson v. Thacher*, 76 Cal. App.2d 50, 172 P.2d 533 (evidence not conflicting; conflicting inferences therefrom possible); *Rench v. McMullen*, 82 Cal.App. 2d 872, 187 P.2d 111 (only documentary evidence offered was subject to conflicting inferences). Again, this court goes to great lengths to uphold the validity of a provision such as this. Note the "possibilities" which it considers might have happened from a failure of the burglar detection system. It is said that "Entrances to the building after working hours might be made by persons having authority as well as by burglars or by persons bent on mischief. They might or might not cause damage. There might be the theft of a ham, or of a truckload of goods, or the contents of a safe. There might be a breaking in for the purpose of theft and no theft. If money was taken it might be a few dollars or many thousands. Books might be tampered with, or papers abstracted. Damage might be caused in many ways that were not foreseeable." If persons having authority to enter did so, plaintiff would, in all probability, not have sued the defendant, or, if it had done so, that would have been a matter of defense at the trial. If a ham had been stolen, the provision for \$50 in all probability, would have been held a penalty as disproportionate to the loss involved. These same arguments apply to the balance of the "reasoning" of the majority.

It is also necessary that the amount agreed upon by the parties "represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained. *Dyer Bros. Golden West Iron Wks. v. Central Iron Wks.*, supra, 182 Cal. 588, 189 P. 445; *Rice v. Schmid*, supra, 18 Cal.2d 382, 386, 115 P.2d 498; *Restatement, Contracts*, § 339, p. 554." In other words, the amount agreed upon must bear some reasonable relation to the losses which might occur as a result of a breach. In my opinion, the \$50 provision bears no reasonable relation to any amount which might have been lost by a failure of the system to operate.

The characteristic feature of a penalty is that it bears no relation to the actual damage which may be caused by a breach, but is arbitrarily fixed without any attempt to estimate the amount of injury. (8 Cal. Jur. 847.) The majority admits that the validity of a liquidation clause in a contract must be determined in accordance with the facts and circumstances of each particular case, but distinguishes the following cases: *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 P. 36; *Stark v. Shemada*, 187 Cal. 785, 204 P. 214; *Rice v. Schmid*, 18 Cal.2d 382, 115 P.2d 498; *Marsh & Co. Inc., v. Tremper*, 210 Cal. 572, 292 P. 950; *Eva v. McMahon*, 77 Cal. 467, 19 P. 872; *Sherman v. Gray*, 11 Cal.App. 348, 104 P. 1004, on the ground that "in each there were factors which would permit the parties to fairly estimate actual damages in the event of a breach—as a predetermined amount for every item of merchandise an obligor failed to deliver", and that "The function of the agreed sum in each of those cases was to insure performance by the obligor and was properly held to be a penalty." I find no distinguishing features. It appears to me that the \$50 provision here might just as well be held to be a penalty in the event of non-performance by the defendant, and that it certainly bears no reasonable relation to the losses which the parties had in contemplation.

I would reverse the judgment with directions to the trial court to retry the case and submit the issue of damages to the jury.



40 Cal.2d 192

ATKINSON et al. v. PACIFIC FIRE EXTINGUISHER CO.

S. F. 18603.

Supreme Court of California, in Bank.
Feb. 6, 1953.

As Modified on Denial of Rehearing
March 5, 1953.

Action for damages to plaintiffs' planing mill when fire detection system installed by defendant failed to operate. The Superior

Court, County of Alameda, S. Victor Wagler, J., entered judgment on verdict for plaintiffs, and defendant appealed. The Supreme Court, Shenk, J., held that in view of variable losses which might occur from fires, insurance rates, or costs of maintenance to plaintiff from breach of contract by defendant, provision for liquidated damages in amount of \$25.00 was valid.

Judgment modified and affirmed.

Carter J., dissented.

Prior opinion 240 P.2d 651.

1. Contracts ⇨305(3)

Where contract by which defendant had installed automatic fire detection system in plaintiff's planing mill called for annual rental payable in monthly installments, acceptance by defendant of habitually overdue rental payments from plaintiffs was a waiver of strict compliance thereafter, and default of plaintiffs could not be relied upon as defense to action for loss from fire when detection system failed to operate.

2. Contracts ⇨305(1)

Where an obligee condones delay in periodic performance strict compliance thereafter is waived.

3. Contracts ⇨322(3)

In action against defendant which had installed automatic fire detection system in plaintiffs' planing mill, for loss from fire when detection system failed to operate, wherein it appeared that contract called for payment of annual rent in monthly installment, and that plaintiffs were in default at time of fire, evidence sustained implied finding that defendant's habitual acceptance of overdue payment constituted a waiver of strict performance on part of plaintiffs.

4. Damages ⇨83

Under statute authorizing contractual liquidated damages provisions when, from the nature of the case, it would be impracticable or extremely difficult for the parties to fix the actual damage, the question of impracticability and difficulty is generally one of fact, to be determined by viewing the circumstances as of the time of making the contract, and question becomes one of law when the facts are not

in dispute and admit of but one conclusion. Civ.Code, §§ 1670, 1671.

5. Damages ⇨79(1)

In view of fact that various types of fires might occur in planing mill, and extent of damage could be variable, and changed insurance rates might result from failure to maintain fire detection system, contract by which defendant was to install automatic fire detection system in plaintiff's planing mill could properly contain provision for liquidated damages in event of failure of system, it being, as a matter of law, impracticable or extremely difficult for the contracting parties to fix actual damages. Civ.Code, §§ 1670, 1671.

6. Damages ⇨163(3)

One who relies upon a provision in contract for liquidated damages must show that the parties to the contract had agreed upon an amount, as result of a reasonable endeavor by the parties to estimate a fair compensation for loss by reason of breach of contract which should be presumed to be amount of damages sustained by breach thereof. Civ.Code, § 1671.

7. Damages ⇨79(1)

Where the difficulty encountered by contracting parties in estimating damages from breach thereof is great, a greater range of estimates will be upheld in liquidated damages provision. Civ.Code, §§ 1670, 1671.

8. Damages ⇨78(2)

A stipulation by contracting parties that they agreed upon an amount as liquidated damages, and not as a penalty, while not conclusive, is entitled to some weight. Civ. Code, §§ 1670, 1671.

9. Damages ⇨79(1)

Provision in contract by which defendant had installed automatic fire detection system in plaintiff's planing mill, that in event of failure of device to perform detection service and a resulting loss, defendant's liability would be limited to sum of \$25 as liquidated damages, and not as a penalty, was, in view of uncertainty and contingencies with regard to which contract was made, a valid provision for liquidated damages. Civ.Code, §§ 1670, 1671.

Fitzgerald, Abbott & Beardsley and Charles A. Beardsley, Oakland, for appellant.

Clark & Heafey, Oakland, Thornton & Taylor, San Francisco and Augustin Donovan, Oakland, for respondents.

SHENK, Justice.

This is an appeal from a judgment on a verdict for \$97,437 in favor of the plaintiffs in an action for breach of contract. The questions presented are the effect of a prior default by the plaintiffs and the validity of a clause in a written contract fixing liquidated damages for breach of the contract.

On June 5, 1939, plaintiffs entered into a written "lease" agreement with the defendant company whereby the defendant agreed to install, maintain and operate a fire detection system in the plaintiffs' planing mill located in Oakland. The system was designed to detect fires originating on the plaintiffs' premises and to automatically transmit signals to the Municipal Fire Alarm System of the City of Oakland. The term of the lease was ten years, at an annual rental of \$180 payable in monthly installments of \$15 each. Paragraph 6 provides that in the event of default in payments, the defendant had the right to enter and remove the detection system. Paragraph 11 provides, "It is agreed by and between the parties hereto that the Lessor is not an insurer, and that the payments hereinbefore named are based solely on the value of the services in the operation of the system described, and in case of failure to perform such service and a resulting loss its liability hereunder shall be limited to and fixed at the sum of Twenty-five dollars as liquidated damages, and not as a penalty, and this liability shall be exclusive."

On July 8, 1948, while the system supposedly remained in operation, a fire was discovered in the plaintiffs' mill. The defendant does not contest the implied finding of the jury that the detection system failed to operate. The first alarm to the fire department was manually transmitted by one of the plaintiffs' employees, and there is evidence that fire fighting equipment ar-

rived on the scene within two minutes after the alarm. Nevertheless the fire was then out of control and the planing mill was destroyed.

[1,2] At the time of the fire the plaintiffs were in default in the payment of the monthly rental installments for June and July of 1948. During the trial the plaintiffs tendered and the defendant accepted these payments. There was evidence received without objection that throughout the period of the lease the plaintiffs' payments were occasionally in arrears. During most of 1946 payments were made a month or more after becoming due. On these occasions the defendant did not remove the detection system or discontinue the service nor was there any demand for strict compliance. Time had not been made of the essence of the contract. It was customary for the plaintiffs to pay the rental charges upon receipt of an invoice each month, and although controverted there was evidence that invoices were not received for June and July. The record furnishes substantial grounds for the application of the principle that where an obligee condones delay in periodic performance strict compliance thereafter is waived. *Boone v. Templeman*, 1910, 158 Cal. 290, 110 P. 947; *Kern Sun-set Oil Co. v. Good Roads Oil Co.*, 1931, 214 Cal. 435, 6 P.2d 71, 80 A.L.R. 453.

[3] In view of the conclusion on the second phase of the case concerning liquidated damages it is unnecessary to discuss other points made by the defendant as to the form of the pleadings and the evidence with reference to the question of waiver. It is enough to say that the implied findings of the jury to the effect that the defendant's acceptance of overdue payments constituted a waiver of strict performance is supported by substantial evidence.

[4] The principal contention of the defendant is that paragraph 11 of the contract is a valid provision for liquidated damages. This is the second phase of the case and the facts with reference thereto are undisputed. Civil Code § 1670 states that a provision in a contract which provides for the amount of damages to be paid in the event of a subsequent breach

of the contract is void, except as expressly provided in Section 1671 as follows: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." In the case of *Better Food Markets, Inc. v. American District Telegraph Company*, Cal.Sup., 253 P.2d 10, it was held that the question whether it would be impracticable or extremely difficult to fix liquidated damages is generally a question of fact and that the time for the determination of the question is the time of making the contract. It was also held in that case that the question becomes one of law where the facts are not in dispute and admit of but one conclusion.

[5] In the present case the defendant claims that as a matter of law the jury could not properly have found that it was not impracticable or extremely difficult to fix actual damages when viewed from the position of the contracting parties under all the circumstances of the case existing at the time the contract was executed. The defendant points out that the detection system was intended to provide protection in case of a wide variety of fires. Some of them would be slow burning, as in a bed of sawdust, where a loss resulting from the failure of the detection system might be negligible. Other fires might result only in a pitted floor. Still others would immediately envelop the buildings in flames and result in a very substantial loss. Looking ahead the parties had no way of knowing what type of fire might occur after a particular failure of the detection system. The merit in the defendant's contention lies in the argument that in no event could the parties have predicted what portion of the loss in any particular fire would be the proximate result of the failure of the detection system. It is true that in the event the detection system was functioning properly, there would probably be some damage by fire prior to the alarm; that further damage would have occurred before the fire fighting equipment could have been put into operation; and that the fire may

have been of such a nature that the planing mill would have been consumed. The uncertain extent to which losses might occur viewed from the time of entering into the contract would make the task of fixing damages an extremely difficult if not an impossible one. There were additional factors to be considered, such as the weather conditions at the time of the fire, the season of the year, the success of the municipal fire fighting department in moving through traffic to the scene of the fire, and the presence of a full crew of employees or of only a night watchman on the premises. The factors involved were too many and too variable to permit of any certainty in predicting the extent of the losses directly attributable to the failure of the detection system with reference to a particular fire.

The liquidation clause here in question is in effect the same as that appearing in the contract considered in the companion case of *Better Foods Markets, Inc. v. American District Telegraph Company* above referred to. There the parties contracted for the installation and operation of a burglar alarm system which failed to operate. A substantial loss occurred. It was held, as here, that under the undisputed facts it was competent for the parties, at the time the contract was executed, to agree that it was impracticable or extremely difficult to fix in advance the actual damages that might result from a breach of the contract.

[6, 7] It is true that the validity of a clause for liquidated damages may be questioned on other grounds. One who relies upon a liquidation clause must show that the parties to the contract "agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof * * *." Civ.Code § 1671. As held in the *Better Foods Market, Inc.* case the amount agreed upon must result from a reasonable endeavor by the parties to estimate a fair compensation for any loss that may be sustained because of a breach. In the present case the defendant, for a compensation of \$15 a month agreed to sound an early warning in case of fire; also to inspect and test the detection system,

and to maintain the equipment which was a part thereof. It was agreed that the payments were based "solely on the value of the services in the operation of the system" and that in the event of a failure of the defendant "to perform such services and a resulting loss", its liability was to be fixed at \$25 as liquidated damages. It is to be noted that the contract does not limit the defendant's liability to losses resulting from fire, but rather to losses resulting from the defendant's failure to perform the contracted-for services, which services included inspecting, testing and maintaining the equipment as well as early warning in the event of a fire. These supplementary services were recognized in the contract to have value in themselves. They also included advantageous fire insurance rates where a detection system was kept in operation. A breach of contract by the defendant, then, might result in losses to the plaintiff other than fire losses, such as the cost to the plaintiff of maintaining the system where the defendant had failed to do so. From the standpoint of the defendant it was important that it should know the extent of its liability. For the small compensation received obviously it could not afford to assume responsibilities such as are assumed in the case of fire insurance coverage. On the other hand, while the plaintiffs could not and did not expect the defendant to furnish the security which fire insurance would afford, they were entitled to some compensation for the defendant's breach of contract although they had no way of knowing either the nature or the extent of a loss which might result after the defendant's breach. In view of the fact that neither party could foresee what the consequences of a breach would be, it was entirely reasonable for them to agree upon the stated amount which by the statute is then presumed to be the damages sustained because of a breach. These damages, as stated, might be greater or less than the amount agreed upon. The greater the difficulty encountered by the parties in estimating the damages, the greater should be the range of estimates which the courts should uphold as reasonable. (5 *Corbin on Contracts*, § 1059, p. 291.)

[8] To hold that the parties have not entered into a valid contract for liquidated damages, it would be necessary to construe the agreement as one for a penalty wherein the amount agreed upon bore no reasonable relation to the losses the parties considered might be sustained. This cannot be said to be true in this case. The parties did stipulate that they agreed upon an amount "as liquidated damages, and not as a penalty". While not conclusive, such a stipulation is entitled to some weight. *Stark v. Shemada*, 187 Cal. 785, 788, 204 P. 214; *Restatement of Contracts*, § 339(f), p. 544.

[9] The view here taken of the effect of paragraph 11 of the contract makes it unnecessary to consider arguments by the defendant wherein it attempts to uphold the validity of paragraph 11 as a provision for limited liability. The language employed is clear and unambiguous and does not attempt to limit damages but rather to provide a fixed amount in the event of a breach, whether the actual damages should be greater or less than that amount. Under all of the facts and circumstances of the case the provision is a valid clause for liquidated damages as authorized by statute.

The judgment of the trial court is modified by reducing the same to the sum of \$25.00 without costs. As so modified the judgment is affirmed. Each party shall bear its own costs on appeal.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Paragraph 11 of the agreement between plaintiffs and defendant company provided that "It is agreed by and between the parties hereto that the Lessor is not an insurer, and that the payments hereinbefore named are based *solely on the value of the services in the operation of the system described, and in case of failure to perform such service and a resulting loss its liability hereunder shall be limited to and*

fixed at the sum of Twenty-five dollars as liquidated damages, and not as a penalty, and this liability shall be exclusive." (Emphasis added.) This provision is held by the majority of this court to constitute a valid and enforceable provision for liquidated damages.

Section 1670 of the Civil Code provides that a provision in a contract which provides for the amount of damages to be paid in the event of a subsequent breach of the contract is void, except as expressly provided in section 1671. Section 1671 provides that "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be *impracticable or extremely difficult to fix the actual damage.*" (Emphasis added.)

It is conceded in *Better Food Markets, Inc. v. American District Telegraph Company*, Cal.Sup., 253 P.2d 10, that the question as to whether it would be impracticable or extremely difficult to fix liquidated damages is *generally* (see my dissent in that case) a question of fact. The jury here made that determination adversely to defendants, but this court has reversed that determination and decided, for itself, the question of fact and, in so doing, has once again usurped the function of the jury. This is another of the growing list of cases where a fact question has been decided by the trial court on demurrer, by a jury, again by the trial court on a motion for a new trial, and by the District Court of Appeal which affirmed the judgment, Cal. App., 240 P.2d 651, and this court reverses. This practice—that of reversing findings of fact, and implied findings, made on conflicting evidence by the trial court and the jury—may very well at some later date be held to violate the constitutional provision, Cal.Const. art. I, § 7, which guarantees that "The right of trial by jury shall be secured to all, and remain inviolate; * * *." (See, also, 23 So.Cal.L. Rev., pp. 334-343.)

The person seeking enforcement of a liquidated damage clause has the burden of

establishing that at the time the contract was entered into the nature of the agreement was such that it would be extremely impracticable or difficult for a court (or jury) to fix the actual damage in the event of a breach, *Rice v. Schmid*, 18 Cal. 2d 382, 115 P.2d 498, 138 A.L.R. 589. It is said that "It is a question of fact in each instance whether the nature of the case is such that it would be impracticable or extremely difficult to fix the actual damage." *Rice v. Schmid*, supra, 18 Cal.2d 382, 385, 115 P.2d 498, 499. (Emphasis added.)

It cannot be said with a clear conscience that in the event of damage by fire, it would be impracticable or extremely difficult to fix the amount of damages which might be suffered. It happens every day. Appraisers estimate the amount of damage which could be done by fire, or theft, to whatever type of business or residence is involved. Hence, it could easily have been ascertained how damages were to be computed in the event a fire occurred. It could have been computed what the damages would be in the event the fire occurred in the planing mill, in the stacks of lumber, in the office, the sawdust piles, or any other part of plaintiffs' property. There is a going price for lumber, repairs, etc. at any time of the year. In the *Schmid* case, supra, the price of flour was involved. This court held that a provision for liquidated damages could not be upheld because actual damages involved could have been estimated in accordance with established principles. We said there that "In states like California, * * * which have code sections governing the matter of liquidated damages, the courts can not disregard the plain provisions of the statute."

It is said in the majority opinion that "It is to be noted that the contract does not limit the defendant's liability to losses resulting from fire, but rather to losses resulting from the defendant's failure to perform the contracted-for services, which services included inspecting, testing and maintaining the equipment as well as early warning in the event of a fire." It is not essential that any such thing be noted. It can as easily be inferred from the lan-

guage used that the plaintiffs' purpose in installing the system was *only* the early detection of fire so that losses might be minimized. The agreement provides that the payments (rental) are based "*Solely on the value of the services in the operation of the system described*" and that "*in case of failure to perform such service and a resulting loss*," the defendant's liability should be limited to \$25. (Emphasis added.) It surely is reasonable to infer from the language used that the only value of the system was the early detection of a fire; that "resulting loss" meant a loss from fire. But the majority concludes that a breach of this contract might result in a loss, other than from fire, "such as the cost to the plaintiff of maintaining the system where the defendant had failed to do so." This statement appears to me to be the height of absurdity. The maintenance of a fire detection system is a matter for experts; plaintiffs would have no way of knowing whether or not defendant had maintained it in proper working order until a test, such as a fire, occurred and until precisely the same results as here occurred.

The so-called liquidated damage provision here was for \$25. This Court in the *Schmid* case said that "A valid liquidated damage clause *must, of course, represent a reasonable endeavor by the parties to estimate fair compensation for the loss sustained*." *Dyer Bros. G[olden] W[est] Iron Works v. Central Iron Works*, 182 Cal. 588, 593, 189 P. 445; 3 Williston, *Contracts* (1936), p. 2192, sec. 779; *Restatement of Contracts*, sec. 339; 10 Cal.L.Rev. 8, 14." (Emphasis added.) It is said in the majority opinion that "To hold that the parties have not entered into a valid contract for liquidated damages, it would be necessary to construe the agreement as one for a penalty wherein the amount agreed upon bore no reasonable relation to the losses the parties considered might be sustained. This cannot be said to be true in this case." Upon what possible, rational basis can it be said that the sum of \$25 bears *any* reasonable relation to *any* loss which the parties considered might be sustained? Considering the price of lumber in 1949 (the

time the contract was entered into), it might almost be said as a matter of judicial notice that \$25 would not be reasonable compensation for a bale of shingles! But the majority, to sustain its unsound position, must strain at gnats to find a reason why the sum of \$25 might bear some relation to any possible loss! Note: "The defendant points out that the detection system was intended to provide protection in case of a wide variety of fires. Some of them would be slow burning, as in a bed of sawdust, where a loss resulting from the failure of the detection system might be negligible. Other fires might result only in a pitted floor. Still others would immediately envelop the buildings in flames and result in a very substantial loss. Looking ahead the parties had no way of knowing what type of fire might occur after a particular failure of the detection system." It is then said that weather conditions, the particular season of the year, and the traffic, and the number of plaintiffs' employees present would all have a bearing on the loss sustained. The evidence showed that the fire fighting equipment arrived at the premises within two minutes after the alarm had been given manually. Surely it would not have been difficult to determine in advance, from other fires in the vicinity, the type of service to be expected from the fire department, and as I have heretofore pointed out, the damage which might be expected from a fire in a particular part of plaintiffs' business.

The characteristic feature of a penalty is that it bears no relation to the actual damage which may be caused by a breach, but is arbitrarily fixed without any attempt to estimate the amount of injury (8 Cal.Jur. 847). "The tendency and preference of the law is to regard a stated sum as a penalty, except where the actual damages cannot be ascertained by any standard." *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 36, 18 P. 90, 94. (Emphasis added.) Any provision by which money or property is to be forfeited without regard to actual damage suffered, calls for a penalty and is therefore void, *Fox Chicago R. Corp. v. Zukor's*, 50 Cal.App.2d 129, 122 P.2d 705; *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 2 P.2d 776; *Mente & Co. v. Fresno Com-*

press & Warehouse Co., 113 Cal.App. 325, 298 P. 126; *White v. City of San Diego*, 126 Cal.App. 501, 14 P.2d 1062. A provision for liquidated damages in a contract for the purchase of stock was held to be void since it was neither impracticable nor extremely difficult to fix the seller's actual damage for the purchaser's breach, *Porter v. Gibson*, 25 Cal.2d 506, 154 P.2d 703.

In *McCormick on Damages*, p. 606, et seq., it is said that courts are tending to adopt as the sole test whether the amount named was reasonably proportionate to the probable loss. It is said that "the law's sole purpose in departing from its usual rule of enforcing agreements, when it declines to enforce agreements for penalties, is to avoid the extortion and injustice which a free power to stipulate damages would invite, the proper test of whether a particular stipulation is a penalty (that is, is unenforceable) is whether, viewed as of the time of its making, it is reasonably proportioned to the probable loss which will ensue from a breach." (Emphasis added.) In *Kothe v. R. C. Taylor Trust*, 280 U.S. 224, 226, 50 S.Ct. 142, 143, 74 L.Ed. 382, a tenant had stipulated that, in the event of his bankruptcy, the lessor should be entitled to damages equal to the rent for the balance of the term. The term was two years and the rent was \$4,000 a year. The tenant became bankrupt fifteen months before the lease expired, the lessor demanded damages of \$5,000 under the agreement. The Supreme Court said: "The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty." (Emphasis added.)

It is my opinion that the majority opinion is wrong for two reasons: The damages to be expected could have been ascertained at the time of entering into the contract and cannot be said, as a matter of law, to be "impracticable or extremely difficult" to fix; and that it cannot be said that the sum of \$25 bears any reasonable proportion to the loss which might be expected from the failure of the fire detection system to operate.

I would affirm the judgment.

Rehearing denied; CARTER, J., dissenting.

40 Cal.2d 289

VELKOV v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.**L. A. 22582.**

Supreme Court of California, in Bank.

Feb. 20, 1953.

Petition for writ of prohibition to restrain the Superior Court from proceeding in a certain civil action upon the ground that the court has no jurisdiction. The Supreme Court, Edmonds, J., held that where witness was in state for purpose of testifying in disciplinary proceeding before The State Bar and such witness was the moving party in such proceeding claiming alleged irregularities growing out of the assignment of oil royalties, witness was not immune from service of summons in action for declaratory relief arising out of the same assignment of royalties.

Writ denied.

Prior opinion, 247 P.2d 723.

1. Process ⇨120

General rule that during period reasonably necessary to giving of testimony in judicial proceeding, nonresident witness who enters state primarily for that purpose is immune from service of summons is based upon public policy, and even though in derogation of the rights of the individual litigant, is justified by the public interest served by the granting of immunity.

2. Attorney and Client ⇨54

Disciplinary proceedings are a function of the Supreme Court and, although the Board of Governors of the State Bar and its local committees technically are not judicial tribunals, their findings are considered to be those of an intermediate agency.

3. Process ⇨120

A nonresident witness appearing to testify before State Bar in disciplinary proceedings is immune from service of process during period reasonably necessary to giving of such testimony.

4. Process ⇨120

General rule that during period reasonably necessary to giving of testimony in judicial proceeding, nonresident witness who enters the state primarily for that pur-

pose is immune from service of summons does not apply if judicial proceeding in regard to which immunity from service is claimed, arises out of or involves same subject matter as one in which nonresident has made voluntary appearance.

5. Process ⇨120

Where witness was in state for purpose of testifying in disciplinary proceeding before the State Bar and such witness was the moving party in such proceeding claiming alleged irregularities growing out of the assignment of oil royalties, witness was not immune from service of summons in action for declaratory relief arising out of the same assignment of royalties. Gen. Laws, Act 3814.

C. E. Spencer, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Leonard Horwin and Harry M. Fain, Beverly Hills, for real parties in interest.

EDMONDS, Justice.

Virginia Velkov seeks a writ of prohibition to restrain the superior court from proceeding with a certain civil action in which she is named as a defendant. She bases her claim for such relief upon the ground that the court in which that action is pending has no jurisdiction of her person.

By her petition, Mrs. Velkov states that she is a resident of the State of New York. Gold and Needleman, the real parties in interest, have brought an action for declaratory relief against her and her former husband. This action is now pending in the Superior Court of Los Angeles County. When she came to California, at the request of The State Bar, to testify in a disciplinary proceeding before that body, she was served with summons.

Mrs. Velkov appeared specially and moved to quash the summons, but, after a hearing, her motion was denied. At a subsequent hearing for the purpose of tak-

ing her deposition she again objected to the jurisdiction of the court and refused to answer the questions propounded to her, for which refusal she is now threatened with punishment for contempt.

Her challenge to the jurisdiction of the court is based upon the contention that, as a nonresident appearing in this state solely for the purpose of testifying in a proceeding before The State Bar, she was immune from service of civil process. Unless prohibited from doing so, she asserts, the court will proceed with the action, and she is without a speedy and adequate remedy in the ordinary course of the law.

By answer, Gold and Needleman deny the alleged lack of jurisdiction. They contend that the local administrative committee of The State Bar, before which the disciplinary proceeding was conducted, is not a judicial tribunal. For that reason, they say, a nonresident witness before it may not claim immunity from service of process in another action or proceeding. Furthermore, they argue, the subject matters of The State Bar proceeding and the declaratory relief action are the same and, under such circumstances, the rule of immunity does not apply.

Another contention is that Mrs. Velkov has failed to meet the burden of showing that she is a resident of another state. Finally, they assert that by making certain objections to questions presented in the hearing of the motion to quash the summons and in the deposition proceeding, the petitioner made a general appearance and thus waived jurisdictional defects.

[1] It is a rule of general application that, during a period reasonably necessary to the giving of testimony in a judicial proceeding, a nonresident witness who enters a state primarily for that purpose is immune from service of summons. *Murrey v. Murrey*, 216 Cal. 707, 710, 16 P.2d 741, 85 A.L.R. 1335; *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 369, 424, 41 P. 308; *Franklin v. Superior Court*, 98 Cal.App.2d 292, 294, 220 P.2d 8; *Gerard v. Superior Court*, 91 Cal.App.2d 549, 552, 205 P.2d 109; *Lamb v. Schmitt*, 285 U.S. 222, 225, 52 S.

Ct. 317, 76 L.Ed. 720; *Stewart v. Ramsay*, 242 U.S. 128, 129, 37 S.Ct. 44, 61 L.Ed. 192. The rule is based upon public policy and, even though in derogation of the rights of the individual litigant, is justified by the public interest served by the granting of immunity.

In its common-law inception, the privilege was that of the court and was formulated to prevent interruptions and delays in judicial proceedings occasioned by necessary participants being required to defend against other actions. *Lamb v. Schmitt*, supra. The courts increasingly have emphasized the interest advanced by the voluntary appearance of a nonresident who could not otherwise be made to appear. In such cases, immunity is an inducement to the witness to appear and is said to be his substantive right. See *Murrey v. Murrey*, supra, 216 Cal. at page 710, 16 P.2d 741; note 5 Calif.L.Rev. 347. Under this reasoning, the privilege has been extended to situations other than those involving strictly judicial proceedings. *Thorp v. Adams*, 58 Hun 603, 11 N.Y.S. 479 (appearance before legislative commission); *Matthews v. Tufts*, 87 N.Y. 568 (hearing before referee in bankruptcy); *Burroughs v. Cocke & Willis*, 56 Okl. 627, 156 P. 196, L.R.A.1916 E, 1170 (taking of deposition); *Filer v. McCormick*, D.C., 260 F. 309 (bank president attending meeting necessary to the war effort in time of emergency).

[2,3] Disciplinary proceedings are a function of the supreme court and, although the board of governors of The State Bar and its local committees technically are not judicial tribunals, their findings are considered to be those of an intermediate agency. *Gray v. State Bar*, 7 Cal.2d 177, 180, 59 P.2d 1033; *In re Petersen*, 208 Cal. 42, 45, 280 P. 124. Immunity from service of process upon a nonresident witness appearing before such a body serves the same public interest as giving immunity to one who testifies in a judicial proceeding.

[4] A recognized exception to the rule of immunity is that it does not apply if the later action, in regard to which immunity from service is claimed, arises out

of or involves the same subject matter as the one in which the nonresident has made a voluntary appearance. *Slosberg v. Municipal Court*, 101 Cal.App.2d 238, 240, 225 P.2d 312; *Von Kesler v. Superior Court*, 109 Cal.App. 89, 91, 292 P. 544; annotation 19 A.L.R. 328. The reason for this limitation is that to permit a resident of a foreign state, by means of an immunity from service of process, to pick and choose among portions of the subject matter of litigation may result in a hardship to the opposing party. *Livengood v. Ball*, 63 Okl. 93, 94, 162 P. 768, 770, L.R.A.1917C, 905.

The respondents claim under the exception. They contend that Mrs. Velkov is the moving party in the disciplinary proceeding before The State Bar and that the subject matter of that proceeding is the same as that of the action for declaratory relief.

According to the evidence presented at the hearing on the motion to quash the summons, Gold and Needleman, as attorneys, represented Mrs. Velkov in an action for separate maintenance. As a fee for their legal services they were given a 25 per cent overriding interest in certain oil properties. Subsequently, on the grounds that the assignment of royalties violated provisions of the Corporate Securities Act, Gen.Laws, Act 3814, Mrs. Velkov sought to invalidate the transfer. Thereafter, as complaining witness, she instigated the disciplinary proceedings before The State Bar, apparently because of the allegedly illegal transfer. The purpose of the action of Gold and Needleman is to obtain a declaration of the rights of the parties under the assignment.

The petitioner asserts that the disciplinary proceeding does not concern the rights of the parties to the property but relates only to the discipline of an attorney. Furthermore, she contends, the parties in the two proceedings are not the same.

[5] A comparable situation was presented in *Slosberg v. Municipal Court*, supra. Mrs. Slosberg, a nonresident, caused to be served upon the administrator of an estate an order to show cause why he should not be required to include in his inventory certain personal property. Thereafter, the administrator filed a separate action in which he charged Mrs. Slosberg with converting other property of the estate. She sought a writ of prohibition to prevent a trial of the conversion action, alleging that she was not a plaintiff in the former proceeding, and as a nonresident witness she was immune from the service of process.

This reasoning was rejected. Declining to rest its decision upon the technical ground that, under Probate Code section 1230, she would be deemed a "plaintiff", the court denied the writ on a ground of public policy. "She was the moving party in the probate proceeding, the one who set in motion the particular proceeding involved. The rule before us is not established by statute, thus requiring construction of specific words, but by the courts themselves as a matter of public policy. Applying the reasons for such policy to the case before us, it seems clear that petitioner * * * was not immune from service of summons." 101 Cal.App.2d at page 241, 225 P.2d at page 314.

These policy considerations are controlling in the present case. Mrs. Velkov was the moving party in the disciplinary proceeding, which concerns the same transaction which is the basis of the action for declaratory relief. Under such circumstances, no public interest would be served by granting the claimed immunity.

The writ of prohibition is denied, and the alternative writ is discharged.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

116 Cal.App.2d 20

**PETTY v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY et al.**

Civ. 19366.

District Court of Appeal, Second District,
Division 3, California.

Feb. 10, 1953.

Proceeding for a writ to review an order of Superior Court in and for County of Los Angeles restraining petitioner from representing plaintiff in a certain action as his attorney. The District Court of Appeal, Parker Wood, J., held that affidavits on which an order, obtained by defendant, to show cause why petitioner should not be restrained from representing plaintiff, was heard, showed the existence of a relationship of attorney and client between petitioner and defendant in the preparation of oil well drilling agreements under which plaintiff sought an accounting, but that such agreements and conversations respecting employment and instruction of petitioner did not indicate any confidential communication between him and either party to the action.

Order annulled.

1. Attorney and Client ☞72

In proceeding to review order restraining petitioner from representing plaintiff in action for accounting under oil well drilling agreements as attorney, affidavits showed relationship of attorney and client between petitioner and defendant in preparing agreements.

2. Attorney and Client ☞20

Provisions of written oil well drilling agreements and conversations respecting employment and instruction of attorney preparing agreements showed no confidential communication between such attorney and either party to agreements, and therefore, attorney was not disqualified to be attorney for one party in his action against other party, who asserted such disqualification, for accounting under agreements.

3. Witnesses ☞206

Where two persons mutually employ same attorney to represent them as their common agent and attorney in particular transaction, communications made by either of them in other's presence to attorney

are privileged as to strangers to transaction, but not as between either of such persons and attorney.

Joseph Doyle and L. Dean Petty, Beverly Hills; for petitioner.

Harold W. Kennedy, County Counsel and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Dolley, Knight, Woods, & Hightower, Los Angeles, for real parties in interest.

PARKER WOOD, Justice.

Petition for writ of review. Petitioner, an attorney at law, seeks an annulment of an order of the superior court restraining him from representing the plaintiff and cross-defendant in a certain action.

On March 21, 1952, the petitioner, as the attorney for the plaintiff hereinafter mentioned, commenced an action in the superior court of Los Angeles County, entitled Joseph R. Neaves, Jr., v. C. J. Gibson, et al., wherein the plaintiff sought an accounting by defendants under the terms of certain agreements between plaintiff and defendants covering the drilling for oil on property known as the "Hawn Deal", and an accounting for expenses in connection with said drilling operations.

On April 6, 1952, defendants answered the amended complaint in said action and filed a cross-complaint. The demurrer of plaintiff and cross-defendant to the amended cross-complaint was set to be heard on October 15, 1952.

On September 12, 1952, the attorneys for said defendants obtained an order to show cause why petitioner herein should not be restrained from representing, as an attorney at law, the plaintiff and cross-defendant. The order was made upon the basis that it would be improper for Mr. Petty to represent Mr. Neaves, because Mr. Petty had been attorney for him and Mr. Gibson in the preparation of the agreements referred to in said action.

On October 1, 1952, the order to show cause was heard upon affidavits as follows: an affidavit of Mr. Knight (one of the attorneys for defendants) which affidavit was

the basis for issuing the order to show cause; affidavits of the petitioner herein (Mr. Petty), the plaintiff Neaves, and Mr. Doyle, one of the attorneys for plaintiff; and counter-affidavits of Mr. Knight and defendant C. J. Gibson. On said October 1st, the court ordered that L. Dean Petty (petitioner) be and is restrained from taking any part in the maintenance or trial of the action as attorney of record for plaintiff and cross-defendant, or as attorney assisting any attorney of record for said party, or at all. It was stipulated that the superior court file might be considered by this court.

Petitioner contends that the court acted without and in excess of its jurisdiction; and that the order is wholly without support in the evidence. He argues to the effect that in view of the fact that he represented both Mr. Neaves and Mr. Gibson in the preparation of said agreements, and in view of the nature of such representation and agreements, there was no privileged communication as between him and Mr. Gibson; and that it was not improper for him to represent Mr. Neaves in said action.

The affidavit of Mr. Knight stated that: he is one of the attorneys for defendants in said action; he is also one of the attorneys for said defendants in an action pending in a municipal court, in which an assignee of Mr. Petty sued them for attorney's fees for legal services allegedly rendered for defendants, including the preparation of the

certain contracts involved in the present superior court case of Neaves v. Gibson; that Mr. Petty testified, in his deposition in the municipal court case, as follows: that he was employed by Mr. Gibson and Mr. Neaves to prepare all the said contracts; Mr. Gibson directed him many times as to what to do, talked over his problems, and Mr. Petty researched the lease and advised him on it; he first rendered legal services to Mr. Gibson on December 28, 1950, when Mr. Gibson came to his office and outlined the proposed agreement with Mr. Neaves as to the acquisition of the Hawn oil lease, and as to the drilling operations; thereafter and before the next office conference, he had two or more telephone conversations with Mr. Gibson; the next office conference was between January 5th and 10th, when Mr. Gibson and Mr. Neaves were present and the entire deal was discussed at length; after Mr. Petty had outlined the agreements of the parties as he understood them, he told Mr. Gibson that there was quite a bit of work to be done, and he asked Mr. Gibson who was going to be his attorney in the matter; and that Mr. Gibson replied: "Why don't you draw all the agreements for both of us?" Mr. Petty replied that he would be glad to do the best he could to record the agreements in accordance with their mutual understanding; he was instructed by both of them to draw the agreements; Mr. Petty drew the agreement dated January 11, 1951,¹ and also the drilling

1. It may be stated generally that the agreement of January 11, 1951, provided that the Coast Exploration Company, Lee Gibson (brother of C. J. Gibson), and Neaves each owned, as tenants in common, an undivided $\frac{1}{3}$ interest in an oil lease which had been made by George H. Hawn, as lessor, and Coast Exploration Company and Lee Gibson, as lessees, which said interests were subject to $\frac{1}{8}$ land owner's royalty, and subject to an overriding royalty of $7\frac{1}{2}$ per cent retained by Des Moines Oil Company, assignor of the lease; that C. J. Gibson and Coast Exploration Company are engaged in the business of drilling oil wells under the name of Gibson Drilling Company, and have entered into a drilling contract for re-drilling a well on the Hawn lease to a depth of 6,940 feet; that Neaves shall incur no obliga-

tion in the drilling of the well except as provided in the drilling contract, which provides for the payment by Neaves of \$20,000; that Neaves agrees to lend, concurrently with the making of said agreement, \$10,000 to Gibson and Coast Exploration Company to be used exclusively by them in drilling the well, and said loan to be evidenced by a promissory note; that if the well is a commercial well, the parties shall enter into an operating agreement which shall provide that the Gibsons and Coast shall be the operators, that all expense of operating the well shall be borne $\frac{1}{3}$ by Lee Gibson, $\frac{1}{3}$ by C. J. Gibson and Coast, and $\frac{1}{3}$ by Neaves; that a certain part of the casing in the well will be exchanged for more suitable casing, and that the additional expense of such exchange will be paid from the oil production; that the

agreement bearing the same date.² The affidavit of Mr. Knight stated further that Mr. Gibson held several conferences with Mr. Petty, in connection with the preparation of the contracts, at which Mr. Neaves was not present; Mr. Gibson also conversed by telephone with Mr. Petty about certain matters when Mr. Neaves was not present.

Des Moines Oil Company, assignor of the lease,* shall receive, in addition to its overriding $7\frac{1}{2}$ per cent royalty, $\frac{1}{4}$ of the production after paying the land owner and the overriding royalty, until the amount due to the Des Moines Oil Company for casing has been paid; that from the remaining production, after paying operating expense, Lee Gibson shall receive 5 per cent, C. J. Gibson and Coast shall receive 5 per cent, and Neaves shall receive 5 per cent; the balance of the production is to be paid to Neaves until he has received \$30,000, — \$10,000 in repayment of said amount advanced by Neaves, and \$20,000 in repayment of amount paid by Neaves for drilling the well.

2. It may be stated generally that the drilling contract between C. J. Gibson and Coast Exploration Company, doing business as Gibson Drilling Company (referred to as Coast), as parties of the first part, and Neaves, as party of the second part, provided that it is the desire of Coast and Neaves that for consideration of \$20,000 to be paid by Neaves to Coast, Coast will re-drill a well on the Hawn lease to a depth of 6910 feet in a manner particularly set forth in the agreement; that Coast shall pay all bills for labor, taxes and insurance, and shall, upon demand of Neaves, exhibit all payrolls and bills; that Coast may charge not more than \$2,000 for depreciation of its drilling equipment; that Neaves shall pay Coast \$10,000 upon the execution of the agreement, and \$10,000 when the well is on commercial production, or when drilled to a depth of 6940 feet; that Coast shall furnish all drilling equipment necessary to complete the well; that Coast will render to Neaves, not less than 20 days after completion of the well, a complete accounting of expenses; that Coast is operating solely as an individual contractor, and Neaves has no obligation in connection with the drilling, except for the payment of said \$20,000.
3. By that supplemental agreement, Neaves agreed to pay \$19,720.51 to the Des Moines Oil Company for casing, and it

On February 12, 1951, Mr. Petty prepared a supplemental agreement³ for said persons. On March 21, 1951, he prepared another supplemental agreement⁴ for them. On March 22, 1951, he prepared another supplemental agreement⁵ for them.

The affidavit of Mr. Petty stated that: he is the assignor of plaintiff in said

was agreed that the $7\frac{1}{2}$ per cent overriding royalty of the Des Moines Oil Company would be assigned to, or held for the order of, Neaves in consideration of said payment, and that the agreement of January 11, 1951, would be modified to provide that the balance of oil production, after paying said royalties of $\frac{1}{8}$ and $7\frac{1}{2}$ per cent and 5 per cent to each of the parties, should be paid to Neaves until he had been paid said \$30,000 and \$19,720.51, or \$49,720.51; then after such repayment, Neaves would assign $\frac{1}{2}$ of the $7\frac{1}{2}$ per cent royalty to C. J. Gibson; and thereafter, after deducting operating expenses, the oil production should be divided equally among Coast, Lee Gibson and Neaves, — $\frac{1}{3}$ each; that the \$19,720.51 was advanced by Neaves upon C. J. Gibson's guarantee that the well would be a producing well; that if the well was not a producing one, C. J. Gibson agreed to reimburse Neaves for $\frac{1}{2}$ of the loss occasioned by failure to recover the casing from the well.

4. By that supplemental agreement, Neaves agreed to advance \$12,000 additional to pay unpaid bills for expenses in connection with the well; and it may be stated generally that the agreement of January 11th was modified to provide that the balance of oil production, after paying said royalties and 5 per cent to each of said parties, should be paid to Neaves until he had been paid said \$49,720.51 and \$12,000, or \$61,720.51.
5. By that supplemental agreement, it was agreed that Des Moines Oil Company was holding for the account of Neaves and C. J. Gibson the overriding royalty of $7\frac{1}{2}$ per cent, and it may be stated generally that the agreement of January 11th was modified to provide that Coast and Gibson agreed to obtain from Des Moines Oil Company an assignment of said $7\frac{1}{2}$ per cent royalty to C. J. Gibson and to obtain a permit from the corporation commissioner authorizing such assignment; that after Neaves has been paid \$61,720.51, he will assign to Coast or C. J. Gibson, as directed by them, $\frac{1}{2}$ of said $7\frac{1}{2}$ per cent royalty.

municipal court case against C. J. Gibson for attorney's fees; Mr. Gibson, in his answer in that case, denied that legal services were performed for him by petitioner herein; Mr. Gibson, in his deposition in that case, testified that he did not employ petitioner as his attorney or agree to pay him for legal services in preparing said agreements; petitioner has been attorney for Mr. Neaves for some years prior to filing the complaint herein, and in 1950 petitioner represented him in two oil well ventures similar to the one in the present case, wherein Mr. Neaves and Mr. C. J. Gibson were parties; in said other ventures Mr. Gibson was represented by other attorneys; about January 5, 1951, Mr. Gibson and Mr. Neaves came to his office and jointly engaged petitioner and instructed him, in the presence of each other, to draw all necessary agreements concerning the oil well venture known as the "Hawn Lease"; his services in the preparation of the agreements continued from approximately January 5th to March 31, 1951; he billed Mr. Neaves and Mr. Gibson each for 1/2 the legal services; thereupon Mr. Gibson denied that he had employed petitioner and he refused to pay for any part of said services; all communications made to petitioner in connection with the subject matter of the present action and the preparation of said agreements were commonly known by Mr. Neaves and C. J. Gibson; at no time during said negotiations or any conference did Mr. Gibson or Mr. Neaves communicate to petitioner any communications which were confidential in nature in that they were not fully disclosed and understood by all parties to the agreements and incorporated in the agreements; no controversy, to petitioner's knowledge, arose in connection with the agreements until approximately October, 1951, when questions regarding proper accounting of the agreements were raised, ultimately resulting in the filing of the present action on March 21, 1952.

The affidavit of Joseph Doyle, attorney at law, stated that: on April 1, 1952, he became associated with Mr. Petty in the representation of plaintiff Neaves in the present action; in the complaint in the municipi-

pal court case, it was alleged that C. J. Gibson became indebted to Mr. Petty for \$775.85, that \$124.70 of said amount had been paid leaving an unpaid balance of \$651.15, and that the indebtedness was incurred on an open book account for services rendered by Mr. Petty at Mr. Gibson's request; in the verified answer of C. J. Gibson in said case he denied said allegations of the complaint; that as between the averments in said answer and the averments in the affidavit of Mr. Knight there is contrast and conflict—the answer "contending" there was no relation of attorney and client, and the affidavit "contending" there was such a relation; the said agreements in the present case are the type of agreement normally found in a joint oil well venture and are not the type of agreement in which there would be any confidential communications; Mr. Gibson, in his deposition, denied that he engaged Mr. Petty as attorney to represent him in the preparation of any of said agreements or in any matter in connection with the present case.

The affidavit of Mr. Neaves, plaintiff herein, states that: Mr. Petty has been his attorney for some years prior to the filing of this action; about January 3, 1951, Mr. Gibson approached plaintiff for the purpose of entering into a joint oil well venture known as the "Hawn Lease"; in the initial conferences regarding the venture, they jointly consulted Mr. Petty regarding the preparation of the necessary agreements; they jointly employed and instructed Mr. Petty to prepare all necessary agreements in connection with said venture; many conferences were had in Mr. Petty's office at which both plaintiff and Mr. Gibson were present; other conferences were had between plaintiff and Mr. Gibson not in the presence of Mr. Petty; certain conferences were had by plaintiff and Mr. Gibson with Mr. Petty individually; all said conferences pertained exclusively to the Hawn oil well venture; all communications made to Mr. Petty by plaintiff and Mr. Gibson were commonly known to both plaintiff and Mr. Gibson; at no time, to plaintiff's knowledge and belief, were any communications made

by Mr. Gibson to Mr. Petty regarding any matter other than the preparation of the said agreements; Mr. Gibson failed to give a proper accounting and failed to comply with the agreement, and an actual controversy with Mr. Gibson did not fully develop until October, 1951; no controversy arose between plaintiff and Mr. Gibson during the period that services were rendered by Mr. Petty; that to plaintiff's best knowledge and belief no confidences were made by plaintiff or Mr. Gibson to Mr. Petty in connection with said agreements which were not fully known to plaintiff and Mr. Gibson.

The affidavit of C. J. Gibson states that: during 1950 Mr. Petty represented Mr. Neaves in connection with several contracts affiant had entered into with Mr. Neaves; in the early part of January, 1951, affiant and Mr. Neaves entered into an oral agreement with respect to the Hawn Lease; affiant began drilling under the lease about January 8th and wanted to get the oral agreement reduced to writing quickly; in order to save time as well as attorney's fees, affiant decided not to submit the contracts that were to be drawn to other counsel; neither Mr. Petty nor Mr. Neaves stated that he would be expected to pay a part of the attorney's fees, except as to the application to be made to the corporation commissioner for a permit to transfer an overriding royalty; the charge made by Mr. Petty for preparing such application was \$124.70, which sum affiant paid promptly; it was affiant's understanding that he was not to pay any part of the attorney's fees except as to said application; about April 20, 1951, he received a letter from Mr. Petty which stated in part that Mr. Petty had assumed that he was being employed by all the parties to handle the legal matters in connection with the well and that his fees would be paid by all of them; affiant had several private conferences with Mr. Petty regarding the agreements when Mr. Neaves was not present; it is not true that no controversy arose until October, 1951; during August, 1951, he received seven letters from Mr. Neaves regarding various matters that were in dispute—one of the

matters was whether an income tax return should be filed on a joint venture basis; in August, he received a letter from Mr. Neaves which stated that the agreements did not constitute a joint venture; also in August he received a letter from Mr. Neaves which referred to controversies then existing as to whether checks drawn on the California Bank should be signed by the parties, and as to interpretation of the agreements; affiant did not refuse or fail to give a proper accounting, or fail to comply with said agreements.

As above stated, this is an action for an accounting. In the amended complaint, it was alleged, among other things, that defendants (referring to C. J. Gibson, individually, and doing business as Gibson Drilling Company, Coast Exploration Company, a corporation, and Lee Gibson) have failed to pay the 7½ per cent royalty as prescribed under said agreements, and have withheld from plaintiff proceeds of sale of oil and gas from said well in excess of \$25,000; defendants have refused to render a true accounting; they have charged against production expense costs not applicable thereto; they have taken pipe and casing for their own use and have refused to account therefor; and they have refused to deposit the proceeds of sale of oil and gas in the operating bank account.

In the answer to the amended complaint, the defendants alleged that about January 15, 1952, the defendant Coast Exploration Company transferred all its assets to C. J. Gibson; defendants carried on the drilling operations, and about February 14, 1951, they brought in a producing well and it has remained on commercial production; they have sold and continued to sell oil and gas produced from the well and they have continued to make proper deposits of said proceeds; the proceeds at all times through December, 1951, were deposited in the California Bank in Beverly Hills; during March, 1952, plaintiff discontinued using the account in the California Bank as an operating account, and after plaintiff refused to sign a check in payment of land owner's royalty then due, defendants opened an account at the

Bank of America as the operating account for the well, and they have deposited therein all funds derived from the sale of oil from said well, and the expenses of operating the well are paid by checks drawn upon said account. As an affirmative defense, defendants made allegations to the effect that in consideration for the loan of \$10,000 and as a bonus therefor, defendants transferred a $\frac{1}{3}$ interest in said lease to plaintiff Neaves; that said $\frac{1}{3}$ interest was of a greater value than the sum allowed by law as compensation for making the loan; that the plaintiff in making the advance of \$19,720.51 for the benefit of defendants exacted as a bonus an overriding royalty of $7\frac{1}{2}$ per cent; that said bonus was of greater value than the sum allowed by law as compensation for making said advance; that prior to April 30, 1952, defendants had paid to plaintiff \$35,787.67, and on said date they paid to plaintiff \$25,932.84, which constituted payment of said sum of \$61,720.51 and that plaintiff has been paid in full. They asked for judgment declaring plaintiff's interest in the lease ended.

In an amended cross-complaint, defendants alleged, as a first cause of action, to the effect that in paying plaintiff his share of the oil proceeds they had paid, according to certain computations (therein stated), \$3,000 on account of a bonus exacted by him, and that plaintiff is indebted to defendants in treble that amount, or \$9,000. As a second cause of action therein, they alleged to the effect that in paying plaintiff a part of the overriding royalty they had paid, according to certain computations (therein stated), \$175.49 on account of a bonus exacted by him, and that plaintiff is indebted to defendants in treble that amount, or \$526.47. They asked for judgment declaring plaintiff's interest in the lease ended.

[1] A question here is whether the relationship of attorney and client existed between Mr. Petty and Mr. Gibson. Although the testimony of Mr. Gibson in his deposition in the municipal court case, regarding attorney's fees, is to the effect that he did not employ Mr. Petty as his at-

torney, it must be concluded, from other averments in the affidavits in the present proceeding, that the relationship of attorney and client existed between them.

[2,3] The other question herein is whether the attorney was disqualified to represent plaintiff Neaves against defendant C. J. Gibson. The determination of that question depends upon whether or not, in the matter of preparing the oil well agreements for his said clients, there was any communication to the attorney by his client Mr. Gibson which was confidential as against his other client Mr. Neaves.

Mr. Neaves and Mr. Gibson mutually employed Mr. Petty to represent them jointly in the matter of reducing to writing their agreements regarding the oil well lease. In order to indicate the nature of the legal services rendered, and to indicate the existence or nonexistence of confidential communications during such relationship, it has been necessary to set forth in some detail the provisions of said written agreements and the conversations had with respect to employing and instructing the attorney. There is nothing in the agreements or conversations, or in the nature of the transactions referred to therein, that indicates there was any confidential communication between the attorney and either Mr. Gibson or Mr. Neaves. Where two persons mutually employ the same attorney to represent them as their common agent and attorney in a particular transaction, the communications made by either of them in the presence of the other to the attorney are privileged as to strangers to the transaction, but are not privileged as between either of them and the attorney. See *Clyne v. Brock*, 82 Cal.App. 2d 958, 965, 188 P.2d 263; *Croce v. Superior Court*, 21 Cal.App.2d 18, 20, 68 P.2d 369; *De Olazabal v. Mix*, 24 Cal. App.2d 258, 262, 74 P.2d 787. "The reason assigned for the rule is that, as between the clients, communications made for the mutual benefit of all lack the element of confidentiality which is the basis of privileged communications." 58 Am.Jur., pp. 277-278, § 496. In *Murphy v. Water-*

house, 113 Cal. 467, 45 P. 866, it was held that an attorney, who was attorney for both the maker and payee of a promissory note and who was present with them when the note was executed, was not disqualified as a witness in litigation between the parties based on the note. The court said, 113 Cal. at page 470, 45 P. 866, that the communications between the parties and the attorney were not privileged. It was also said therein, 113 Cal. at pages 470 and 471, 45 P. at page 866: "The rule, however, is the same where the witness is attorney for only one of the contracting parties. Where two persons are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction, and the circumstances surrounding it, are inconsistent with the notion of a confidential communication between one of the parties and his attorney, who happens to be present." In *Croce v. Superior Court*, supra, 21 Cal.App.2d 18, 68 P.2d 369, it was held that a former attorney for several persons was not disqualified from representing one of them as plaintiff in subsequent litigation against the others. It was said therein, 21 Cal.App.2d at page 20, 68 P.2d at page 370: "* * * if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, it cannot be held that under the same circumstances he is disqualified from serving as an adverse attorney." In the present case, the conversations of both parties with the attorney as to his employment, his instructions to reduce their oral agreements to writing, and the terms of their oral agreements, were in the presence of both parties and the attorney. At times, however, there were conversations between the attorney and one of the parties out of the presence of the other party. As above indicated, the agreements and the nature of the transaction

are not such as to indicate there would be privileged communications as between either client and the attorney. The pleadings do not indicate an issue involving alleged confidential communications. The complaint in the action is for an accounting under the provisions of the agreements. The answer alleges a proper accounting, and the cross-complaint is based upon a theory of alleged usury. Mr. Gibson does not assert that any conversation which he had with the attorney out of the presence of Mr. Neaves was confidential. It is to be noted that Mr. Gibson testified in the municipal court case to the effect that Mr. Petty was not his attorney. Also, in the present proceeding he stated in effect that he did not understand that he was expected to pay any part of the attorney's fees. In view of those statements by Mr. Gibson, it is understandable that he does not assert that his conversation with the attorney out of the presence of Mr. Neaves was confidential. It is to be assumed, under the circumstances herein, that such conversation was not confidential. "Ordinarily, the attorney for both parties is not the depository of confidential communications from either party which ought to be withheld from the other." 58 Am.Jur., p. 278, § 496. It is not to be assumed that Mr. Gibson, out of the presence of Mr. Neaves, gave to their attorney material information which the attorney ought to withhold, as confidential information, from Mr. Neaves. The communications between Mr. Gibson and Mr. Petty were not privileged communications. Mr. Petty was not disqualified to be attorney for Mr. Neaves in said action of *Neaves v. Gibson*.

The order restraining petitioner from representing plaintiff and cross-defendant Neaves is annulled.

SHINN, P. J., and VALLÉE, J., concur.

**HENNINGSSEN v. MAYFAIR PACK-
ING CO. et al.***

Civ. 15132.

District Court of Appeal, First District,
Division 2, California.

Feb. 10, 1953.

Rehearing Denied March 12, 1953.

Hearing Granted April 8, 1953.

Action by buyer of carloads of dried fruit against seller who gave guaranty against decline in invoice prices, and others, for the amount of such decline. The Superior Court, County of Santa Clara, Byrl R. Salsman, J., entered judgment for plaintiff, and the seller appealed. The District Court of Appeal, Goodell, J., Acting P. J., held, inter alia, that plaintiff, to whom the claim had been assigned and who was secretary to the lawyer who had been retained to litigate the claim, was not suing as a collection agency without a license as such and, therefore, plaintiff could maintain the action.

Affirmed.

1. Sales ⇨441(1)

In action by buyer of several carloads of dried fruit against seller, who gave guaranty against decline in invoice prices, for amount of decline, evidence supported determination that the guaranty had not been obtained by misrepresentation.

2. Licenses ⇨39.39

The burden of proving that person to whom claim had been assigned could not maintain action on such claim because such person was suing as a collection agency but not licensed as such was upon the defense. Business and Professions Code, §§ 6852, 6854, 6870; Code Civ.Proc. § 1869; Civ. Code, §§ 953, 954.

3. Licenses ⇨39.39

In action by person to whom claim had been assigned and who was secretary to attorney who had been retained by non-resident assignor to litigate the claim, evidence was insufficient to show that the plaintiff was suing as a collection agency but not licensed as such. Business and Professions Code, §§ 6852, 6854, 6870; Code Civ.Proc. § 1869; Civ.Code, §§ 953, 954.

4. Licenses ⇨19(3)

The exemption of attorneys at law from the statutory definition of collection

agency carries with it the exemption of all persons who assist the attorney in doing his professional work. Business and Professions Code, §§ 6852, 6854, 6870; Code Civ. Proc. § 1869; Civ.Code, §§ 953, 954.

5. Appeal and Error ⇨1071(6)

An appellant cannot complain of the absence of a finding which necessarily must have been adverse.

6. Licenses ⇨11(1)

The statutory definition of collection agency as any person engaged in collecting claims for another where employment is for one or more persons did not apply to the case of a secretary to a lawyer who had been retained to litigate a claim which was later assigned to the secretary. Business and Professions Code, § 6852.

7. Appeal and Error ⇨1071(6)

Where trial court concluded that plaintiff was entitled to maintain action on claim and to recover judgment, defendant could not complain of absence of finding on issue whether plaintiff was acting as a collection agency though not licensed as such. Business and Professions Code, § 6852.

8. Sales ⇨441(1)

In action by buyer of carloads of dried fruit against seller under guaranty against decline in invoice prices for amount of such decline, evidence supported determination that such prices had declined a total of \$7,593.11.

James F. Boccardo and Jean M. Blum, San Jose (Edward J. Niland, Santa Clara, of counsel), for appellant.

O. Vincent Bruno and Frank S. Barrett, San Jose, for respondent.

GOODELL, Acting Presiding Justice.

This appeal was taken from a judgment entered on findings for \$7,593.11 in an action on a guaranty.

The action was brought by the assignee of J. B. Griffin, who is in the brokerage business in Norfolk, Virginia under the name J. B. Griffin Company, handling dried and canned fruits and other foodstuffs.

* Subsequent opinion 261 P.2d 521.

In September, 1946 Griffin, who had been a broker in Norfolk for about 30 years, visited San Jose with a view to making a business connection with defendant Mayfair. Defendant Battaglia represented Mayfair in the negotiations, which resulted in Griffin ordering 5 carloads of dried fruit, mostly prunes, from the 1946 crop and processed and packed by Mayfair. At first they discussed handling the sales on a consignment basis whereby Griffin would be paid a brokerage when the goods were disposed of, but Mayfair would not accede, and it was ultimately agreed that the sales would be made outright to Griffin, to which he consented provided Mayfair agreed to give him a guaranty against a decline in the invoice prices. The 5 carloads were shipped to Norfolk; the first two were promptly sold by Griffin and are not involved herein. The last three, after being warehoused by Griffin in Norfolk, were slow in moving and by that time the market seems to have become inactive elsewhere including the Santa Clara Valley. The 3 carloads had been shipped from San Jose on November 8 and December 13 and 20, 1946, and the invoices, aggregating \$36,677.29, were promptly paid by Griffin.

The promised guaranty was not forthcoming. In January, 1947 a Canner's Convention was held in Atlantic City, and Griffin, anticipating Battaglia's attendance, prepared and Battaglia there signed, the contract in suit which reads in part as follows:

"J. B. Griffin Co.
Brokers and Distributing Agents
225 West Main Street
Norfolk 10, Va.

January 15th, 1947,

"J. B. Griffin Co.
225 W. Main St.
Norfolk, Va.

"Gentlemen:

"In accordance with our conversation when you visited our office in San Jose, we guarantee your floor stocks of Mayfair Dried Fruits against decline in our prices. This agreement covers the following three cars shipped you as follows: * * *." It then described the 3 carloads of dried fruit

then in Griffin's floor stock. It was signed by Battaglia for Mayfair.

On December 29, 1947 Griffin sent Mayfair an invoice showing the items making up the total decline in prices, aggregating \$7,593.11. Mayfair temporized and Griffin pressed in vain for settlement. At another Convention Griffin saw Battaglia who then promised to "take it up when he got back home" but nothing was done, and a year later at still another Convention Battaglia told Griffin that he would see that it was paid provided the claim was taken out of the lawyers' hands. That was not done, and this action was eventually filed.

The complaint is in 3 counts, the first based on the contract of guaranty, the second on an account stated, and the third on a claim for brokerage. At the end of the 3-day trial Battaglia's motion for nonsuit was granted on the ground that no personal liability on his part had been proved. Mayfair's motion for a new trial was denied.

[1] In addition to denials and certain admissions, presently noted, the answer pleaded that the guaranty had been obtained by misrepresentation in that Griffin had led Battaglia to believe that his purpose in getting it was merely to make a showing to his banker that would satisfy him; that Griffin was financially embarrassed and that no claim would ever be made on the guaranty. At the trial Battaglia testified that such had been the case, but the court found against that position and there is substantial evidence to support the finding. See *Boies v. Wylie*, 113 Cal.App.2d 243, 248 P.2d 76.

It will be noted that the writing is silent with respect to the duration of the guaranty, and one of the questions at the trial was as to the period which the guaranty was supposed to cover. Griffin contended that it should continue as long as any of the fruit bought from Mayfair remained unsold on his floor. Battaglia and another defense witness testified that by custom such guaranty period never ran beyond 90 days. The court adopted this view when the findings were made, fixing the terminal date at April 14, 1947. Griffin contended that his total losses were as high as \$17,000.

(based on a longer guaranty period) but the court's adoption of the 90-day period settled that matter. The court found against plaintiff on the second count based on an account stated, and on the third count for brokerage.

Appellant's first contention is that plaintiff cannot maintain this action because she is not a licensed collection agency.

The action was commenced on February 7, 1950 and the answer was filed promptly. The trial opened on March 6, 1951, and at the end thereof, almost a year after issue was joined, permission to amend the answer was granted. The amendment pleaded that plaintiff "is not entitled to maintain this action on the ground that she is not a licensed collection agency as defined by chapter 8 of the Business and Professions Code * * *."

The court found that "on December 23, 1949, J. B. Griffin, for a valuable consideration duly assigned his claim to the plaintiff" and that "the plaintiff was not engaged directly or indirectly as a primary or secondary object, business or pursuit in soliciting claims for collection or in the collection of claims owed or due or asserted to be owed or due another." This language

follows that of § 6852 of the Business and Professions Code quoted in the footnote.*

[2] The burden of proving that plaintiff could not maintain the action because she was suing as a collection agency but not licensed as such, was of course upon the defense. Code Civ.Proc. § 1869; 10 Cal. Jur. pp. 786-7. It was not incumbent on plaintiff to prove negatively that she *was not* a collection agency since *prima facie* she had a right to sue on an assigned chose in action. Civil Code, §§ 953, 954.

[3] The only showing appellant attempted to make on this phase of the case was by way of a stipulation that plaintiff was the secretary of Attorney Bruno, "employed to do the secretarial stenographic work" in his office, also that she was not an attorney at law or within any of the classes exempted by § 6854. There was no attempt by the defense to prove affirmatively that she was a person "engaging, directly or indirectly and as a primary or secondary object, business or pursuit, in soliciting claims for collection or in the collection of claims owed or due * * * to another." The claim was not solicited by her; it was in the hands of her employer who had been retained as an attorney by Griffin to liti-

* Sec. 6852 provides: " 'Collection agency' means and includes all persons engaging, directly or indirectly and as a primary or secondary object, business or pursuit, in soliciting claims for collection or in the collection of claims owed or due or asserted to be owed or due to another, and includes the repossession-collection business as that business is defined in this article. Any person, when engaged in collecting claims for another, where the employment is for one or more persons, is engaged as a collection agency."

Section 6854 provides: " 'Collection agency' does not include any of the following unless they are conducting collection agencies:

"(a) Attorneys at law.

"(b) Persons regularly employed on a regular wage or salary, in the capacity of credit men or in similar capacity, except as an independent contractor; provided, however, no such person is excluded from 'collection agency' if he shall file or maintain suits as assignee to collect claims assigned to him without being represented in each such suit by a duly

authorized and licensed attorney at law.

"(c) Banks.

"(d) Common carriers.

"(e) Title insurers and abstract companies, while doing an escrow business.

"(f) Duly licensed real estate brokers or agents doing a real estate business.

"(g) Merchant-owned nonprofit credit associations.

"(h) Duly licensed personal property brokers while making collections for another person of common ownership or affiliated through corporate control."

Section 6870 provides: "No person shall conduct within this State a collection agency or engage within the State in the business of collecting claims for others, or of soliciting the right to collect or receive payment for another of any claim, or advertise, or solicit, either in print, by letter, in person or otherwise, the right to collect or receive payment for another of any claim, or seek to make collection or obtain payment of any claim on behalf of another without having first applied for and obtained a license."

gate it through to judgment. There was nothing about it which even squinted at a collection agency transaction. See discussion of collection agencies in *Koepple v. Morrison*, 84 Cal.App. 137, 257 P. 590, and in *McCarthy v. Hughes*, 1913, 36 R.I. 66, 88 A. 984, 985, Ann.Cas.1915D, 26, quoting 6 Am. & Eng. Ency. of Law, 209. See, also, 14 C.J.S. p. 1324.

Plaintiff did not select her employer, Bruno, as her attorney. He was already the attorney of the equitable owner of the chose in action and he, Bruno, selected plaintiff to act as the assignee of his client. In so acting she did not step out of her role as legal secretary; both positions were perfectly consistent.

[4] We are satisfied that the exemption of "Attorneys at law" carries with it the exemption of all persons who assist the attorney in doing his professional work. Qui facit per alium facit per se. Whatever the plaintiff did in connection with this litigation, whether as assignee suing on behalf of her employer's client, or in connection with the preparation of the pleadings, the preparation of the case for trial, or otherwise, she did as a part of the attorney's organization. If he was not a collection agency it is difficult to see how she could be one, in such circumstances. The argument that the legislature in drafting § 6854 could have expressly added the exemption of attorneys' secretaries and other employees, but did not do so (*Inclusio unius est exclusio alterius*) is in our opinion wholly without merit.

At 23 Cal.Jur. pp. 766 et seq., § 140, "Absurdity"; § 141, "Hardship or Injustice"; § 142, "Inconvenience," there are set forth certain familiar rules of statutory construction which, without stopping to quote them, cover this case.

The construction for which appellant contends would produce startling, not to say absurd, results. It would mean that where a person, in or out of the state, assigned a cause of action for suit, his assignee—even though his own brother or other highly trusted person—would have to obtain a collection agency license before maintaining his action. Such an unworkable and

unreasonable burden would greatly impair the right of assignment, Civil Code, § 954, *supra*, which has existed in California for many years. It is inconceivable that the legislature in adopting these sections intended to impose any such burden, or to cut down any such well-settled right, in the absence of language clearly indicating such intent.

[5-7] As already appears, the court found that "the plaintiff was not engaged directly or indirectly" etc. in certain activities described in § 6852 defining "Collection agency". The last sentence of that section reads: "Any person, when engaged in collecting claims for another, where the employment is for one or more persons, is engaged as a collection agency." Appellant points to this language and says that this plaintiff comes squarely within it, and that the court failed to find thereon, citing *Fairchild v. Raines*, 24 Cal.2d 818, 830, 151 P.2d 260 and *Andrews v. Cunningham*, 105 Cal.App.2d 525, 233 P.2d 563, decided by this court. We are satisfied that the last sentence of § 6852 was not intended by the legislature for a case such as this. At 23 Cal.Jur. p. 767 it is said: "General terms will be so limited in their application as not to lead to absurd consequences." The findings which were made show clearly that the court was convinced that plaintiff was not a collection agency or acting as such in this *one* instance. The conclusion of law that plaintiff "is legally entitled to maintain this action and recover judgment" also so indicates. Had the court found on the language of the last sentence of § 6852 it must have inevitably found in substance that although, literally, the plaintiff was engaged in collecting this one claim for another ("for *one* or more persons") she was not acting as a collection agency. No citation is necessary in support of the proposition that an appellant cannot complain of the absence of a finding which necessarily must have been adverse.

In granting leave to file this eleventh-hour, collection agency amendment the court said: "the Court has no idea what the Business and Professions code provides for on this subject. I haven't read that section, but the Court can see that the de-

fense proposed to be added to the answer would be highly technical and if sustained and if valid would have the effect of defeating the cause of action without meeting the cause of action on its merits. Ordinarily the Court would be not too inclined to entertain at this stage of the proceedings an amendment of that nature * * *."

We quote that statement because we thoroughly agree with it. It is obvious that the judge granted permission to amend at that late date only to make sure that both sides would have every opportunity to present everything they had, regardless of its merits when viewed after a complete judicial hearing.

We find no merit whatever in appellant's first contention.

[8] Appellant's second contention is that the finding that the prices of Griffin's floor stocks (based on the decline of Mayfair's prices) declined to and including April 14, 1947 a total of \$7,593.11, is not supported by any substantial evidence.

Throughout both its briefs appellant points to the language of the writing which guaranteed against a "decline in our prices." Appellant says: "It therefore follows that evidence as to the *market price generally, prices of other packers* and the prices at which Griffin sold the merchandise *are entirely immaterial* in determining this issue. Attention must be directed *solely* to the *prices of Mayfair Packing Company* for the products herein involved up to and including April 14, 1947." (Emphasis added). This, the main theme of appellant's briefs, has been repeatedly stressed.

The evidence itself, however, does not support this argument for it shows that the prices of other packers, despite Mayfair's price lists, might have had such a controlling influence on Mayfair's prices as to make them decline to the prevailing level.

In the first place, the complaint alleged that from January 1, 1947 to and including November 11, 1948, Mayfair's prices did decline. Paragraph V of the answer reads: "Answering paragraph IX * * * defendants deny each and every, all and singular, the allegations therein contained, ex-

cept that *defendants admit that during the period of the 1st day of January, 1947, and the 11th day of November, 1948, the prices of said defendant Mayfair Packing Company's dried and processed fruit did decline.*" (Emphasis added.)

That admission left no issue in the case as to whether Mayfair's prices declined between January 1, 1947 and April 14, 1947; the only remaining issue was the extent or amount of the total decline. The court found "That during said period of on or about September 1, 1946 to and including April 14, 1947, the prices of Mayfair Packing Company on said merchandise did decline. That the prices of floor stocks of J. B. Griffin Company, based on the decline of Mayfair Packing Company prices, declined, by reason thereof, a total of * * * \$7,593.11."

There is ample evidence from which the court could have found that the prices of other packers automatically influenced and changed Mayfair's own prices despite its price lists.

Defendants' witness Abinante testified on direct examination:

"Q. Mr. Abinante, where a packer in the dried fruit trade would issue a guarantee against decline in that packer's prices, according to the general and accepted usage and custom in the trade, would there be any decline in that packer's prices if, for the duration of that guarantee, that packer sold no products below the price at which the guarantee was given? A. No. * * *

"Q. Mr. Abinante, according to the general and accepted usage and custom in the trade, under the circumstances of the last question I just gave you, would there be any decline in the prices of the packers giving the guarantee if some other packer happened to sell similar merchandise at a lower price? A. No."

On cross-examination he testified:

"Q. How do you know that the answer to that question is 'No', Mr. Abinante? A. Because under the contract, why, if you guarantee against other packers' decline, why, then you have to meet it; but if you don't guarantee against other packers' de-

cline you do not have to meet that decline, so long as you don't sell any merchandise below that price * * *.

"Q. Assume Mayfair's prices decline, do you know as a matter of fact, of your own knowledge, that Rosenberg's prices thereafter will not decline? * * *

"The Court: It's fair cross examination, counsel; *that is the crux of the whole case.* (Emphasis added) * * * A. sometimes it happens that they do not decline.

"Q. *And sometimes it happens that they do?* A. *That is right.* [Emphasis added]

"Q. There is no definite rule about that subject, is there? A. Well, it depends on the packer."

The Court's remark that this was the crux of the whole case is significant. There is enough in this one piece of testimony to support a finding that just as a decline in Mayfair's prices would influence Rosenberg's, so also a reduction of Rosenberg's prices would automatically force a reduction in Mayfair's.

With respect to the inviolability of price lists defendant Battaglia was examined by plaintiff under § 2055, Code Civ.Proc.:

"Q. Well * * * will you state to your own knowledge that your products are all sold at the list quoted on your price list? A. No, I will not.

"Q. As a matter of fact, they're all sold for less than that price list, aren't they? A. Generally, yes. But conditions such as we had from '43 on to including '46, it was list.

"Q. And beginning in '47 it was below list all the time, wasn't it? A. Whatever—well, whatever you could make a sale for, I imagine."

This testimony certainly did not indicate that a price list was sacrosanct. On the contrary, either taken alone or in combination with Abinante's testimony, it furnishes ample basis for concluding that if the prices of Rosenberg or Sunsweet or Del Monte (all of whom have branches and carry stocks in Norfolk) declined, Mayfair's

prices would follow suit, which corroborates Griffin's testimony that "we have to follow our competitors". Battaglia was himself a defendant and he signed the guaranty on behalf of Mayfair, and it was he who admitted that their products generally were "sold for less than that price list" (except list prices held up in such conditions as prevailed from '43 to '46).

The person who verified the answer expressly admitting that Mayfair's prices "did decline" knew, of course, what their price lists showed, and at the same time knew the prices which they were *actually getting*. The admission was made without qualification, and in the face of its bald statement that their prices did decline appellant's repeated arguments respecting *Mayfair's own prices* lose all their force.

Once that admission was made, there was no issue whether or not Mayfair's prices declined and the only remaining question was, How much did they decline?

The plaintiff introduced 21 exhibits, the defendants 5. The record contains price lists, invoices, correspondence, and other documentary evidence. It was the task of the trial judge to determine from the testimony and from this mass of evidence whether Griffin's claim of \$7,593.11 was proved. This was purely a question of fact on which the Court found in plaintiff's favor. Appellant has not convinced us that there is any lack of substantial evidence to sustain it.

Most of the testimony was given by Griffin. He testified respecting market conditions and prices. It was the function of the trial judge to weigh his testimony against that of the defense witnesses. The findings show that the court was satisfied with Griffin's testimony and with the fairness and accuracy of his computation of the price decline, since the judgment, to a cent, is for the amount of his claim.

The judgment is affirmed.

DOOLING, J., and JONES, J. pro tem., concur.

116 Cal.App.2d 98

In re COCHRAN'S ESTATE.**Civ. 19268.**

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1953.

Hearing Denied April 15, 1953.

Proceedings on petition to determine heirship. The Superior Court of Los Angeles County, Victor R. Hansen, J., entered a decree determining heirship and persons who were bequeathed testator's entire estate and who were strangers in blood to testator appealed. The District Court of Appeal, Patrosso, J. pro tem., held that whether failure of testator to provide in will for his children was intentional was determinable from will alone and that will did not manifest intention of excluding testator's children from substantial portion of testator's estate so as to preclude pretermitted children of testator under statute from same share of testator's estate to which they would have been entitled if testator had died intestate.

Affirmed.

1. Descent and Distribution ⇨47(2)

Under statute entitling pretermitted issue of testator to same share of testator's estate as such issue would have been entitled to if testator had died intestate unless it appears from will that omission was intentional, whether failure of testator to provide in will for his children was intentional was determinable from will alone, and letters written by a child of testator relating to expectation of testator's children of disinheritance were not admissible in evidence. Probate Code, § 90.

2. Descent and Distribution ⇨47(2)

Will which bequeathed testator's entire estate to persons who were strangers in blood to testator, and which made no specific mention of testator's children, and which provided that any one who contested will was bequeathed \$1, did not manifest intention of excluding testator's children from substantial portion of testator's estate so as to preclude pretermitted children of testator under statute from same share of testator's estate to which such children would have been entitled if testator had died intestate. Probate Code, § 90.

Borah & Borah, A. Noah Borah, Los Angeles, for appellant.

Title & Tannenbaum, Julius M. Title, Los Angeles, for respondents, Leota A. Larson, Edith Kirkland and Gladys Watts.

Birger Tinglof, Los Angeles, for respondent, Irla McKinney.

PATROSSO, Justice pro tem.

Appeal from a decree determining heirship whereby it was adjudged that respondents were pretermitted heirs and entitled to succeed to the entire estate.

The testator died June 17, 1951, leaving surviving as his sole heirs at law four daughters, who are the respondents here. By his will dated April 20, 1951, he bequeathed his entire estate to the appellants who are strangers in blood to him. The will, which made no specific mention of his children, among other things provides: "To anyone who may contest this will I give the sum of \$1.00." Respondents filed a petition to determine heirship pursuant to Probate Code section 1080, upon the hearing of which the order appealed from and previously mentioned was made.

Upon the hearing, appellants offered in evidence two letters, both written after the death of the testator, from the respondent Leota A. Larson to the appellant Leuschner in which it was stated that the children and their father were not on good terms and had not been for a number of years; that they (the children) expected to be disinherited and that the only daughter to whom he might leave anything was the respondent Irla McKinney. Respondents objected to the receipt in evidence of these letters but the same were admitted subject to a motion to strike. At the close of the hearing, respondents made such a motion and it was granted by the court.

As ground for reversal appellants advance two contentions: (1) that the court erred in striking the letters above mentioned, and (2) that the provision of the will bequeathing \$1 to anyone contesting the same constitutes a sufficient indication of an intention on the part of the testator

to exclude his children from participation in his estate within the mention of Probate Code section 90. We shall consider these in the order of their statement.

Counsel for appellants frankly concede that the trial court's action in excluding the Larson letters was proper in the light of the many decisions of the Supreme and appellate courts of this state which unite in holding that, under section 90 of the Probate Code, whether the failure of a testator to provide in his will for any of his children was intentional is to be determined solely from the will itself. In *re Garraud's Estate*, 35 Cal. 336; In *re Stevens' Estate*, 83 Cal. 322, 23 P. 379; In *re Salmon's Estate*, 107 Cal. 614, 40 P. 1030; In *re Trickett's Estate*, 197 Cal. 20, 22, 239 P. 406; In *re Estate of Allmaras*, 24 Cal.App.2d 457, 75 P.2d 557; In *re Estate of Price*, 56 Cal.App.2d 335, 337, 132 P.2d 485.

[1] We are urged to overrule these cases because it is said that they were erroneously decided. We need not however consider the argument urged in support of this contention, for regardless of whether the earlier cases were rightly or wrongly decided, the matter was put beyond doubt by the 1931 amendment by which the words "from the will" were added to Probate Code section 90. In *re Estate of Price*, supra, 56 Cal.App.2d 335, 337, 132 P.2d 485, 486. The trial court therefore did not err in the ruling complained of.

[2] Appellants' second contention is that by the provision of the will bequeathing "to anyone who may contest this will" the sum of \$1 the testator manifested his intention of excluding his children from any substantial portion of his estate. In support of this, the following cases are cited: In *re Estate of Allmaras*, 24 Cal. App.2d 457, 75 P.2d 557; In *re Estate of Minear*, 180 Cal. 239, 180 P. 535; In *re Estate of Lindsay*, 176 Cal. 238, 168 P. 113; In *re Estate of Kurtz*, 190 Cal. 146, 210 P. 959; In *re Estate of Dixon*, 28 Cal.App.2d 598, 83 P.2d 98; In *re Estate of Frincha-boy*, 108 Cal.App.2d 235, 238 P.2d 592, and In *re Estate of Talmadge*, 114 Cal.App.2d 18, 249 P.2d 345. In all of these cases,

however, as pointed out by respondents, the no-contest or disinheritance clause contained a reference to "heirs" or to "persons claiming to be heirs" or "any person who if I died intestate would be entitled to any part of my estate" whereas the clause here makes no mention of heirs but refers only "to anyone who may contest this will."

In the *Estate of Price*, supra, 56 Cal. App.2d 335, 132 P.2d 485, 486, the court had occasion to consider a clause reading as follows: "I purposely refrain from leaving anything * * * to any other person or persons, and in the event that any other person or persons shall either directly or indirectly contest this my last will and testament I give to any such person or persons contesting said will the sum of \$1 and no more, hereby declaring that I have only at this date two surviving children, to wit: my said two sons above named." There the testatrix left surviving her not only the two sons mentioned in her will but two grandchildren, children of a previously deceased son of the testatrix. Upon the hearing of a petition filed on behalf of the grandchildren, the trial court held that they were pretermitted heirs of the deceased and entitled to their proportionate share of the estate. The District Court of Appeal, in affirming the decree, considered all of the authorities cited above and held them inapplicable by reason of the fact that the language of the will made mention only of "persons" contesting the will and not to heirs. The court, after referring to the *Estate of Lindsay*, 176 Cal. 238, 168 P. 113, and observing that our Supreme Court therein "discussed and distinguished" the case of *Hargadine v. Pulte*, 27 Mo. 423, proceeds as follows, 56 Cal. App.2d at page 338, 132 P.2d at page 487:

"In that case (*Hargadine v. Pulte*) the excluding clause covered 'all and every person or persons.' Our Supreme Court said that from these words it was not apparent 'upon the face of the will' that the testator intended to distinguish between his living children and his grandchildren.

"Turning to the will of Mrs. Price we find nothing which brings it within this rule. The grandchildren are

not mentioned and nothing is contained therein which would indicate that the testatrix had them in mind when the will was executed. The language excluding 'any other person or persons' is the same as that found in the Hargadine case which we have just referred to. The clause as a whole is the ordinary 'no contest' clause which is designed to prevent a contest of a will which frequently brings to life the private life and conduct of the decedent. That this is what the testatrix had in mind when she referred to 'any other person or persons' is made clear by the language following where she gave to 'such person or persons *contesting said will*' the sum of one dollar. Now it is settled law that a pretermitted heir seeking his interest under this section of the code is not a contestant and does not contest the will. His rights vest absolutely upon the death of the testator and, so far as his particular interest is concerned, there is no will. [In re] Estate of Sankey, 199 Cal. 391, 405, 249 P. 517."

And at page 339 of 56 Cal.App.2d, at page 487 of 132 P.2d the court continues as follows:

"The plain terms of the code section calling for a showing upon the face of the will that 'such omission was intentional' preclude a holding that a general exclusion of all persons not mentioned is sufficient. If such a general exclusion clause were sufficient the next step would be one declaring 'my wife my sole heir' which was held insufficient in *Bradley v. Bradley*, 24 Mo. 311 [at] page 320, and in which the Missouri court said: 'And in reading the testator's will in this case, it is not in the power of the court, from the will alone, to say whether the testator had a child living or not, or whether he ever had one. As to the children of the testator the will is a mere blank.' We could say the same here, and if we were to reverse the case, it would be necessary to indulge in judicial legislation, and to declare

that the section of the code did not require the 'intentional' omission of an heir to appear upon the face of the will."

Counsel for respondents argue with some force that the conclusion reached in the *Re Estate of Price* is erroneous. However, a petition for hearing by the Supreme Court was there denied, and having received the approval of the Supreme Court, we feel that if a different rule is now to be announced it should be by a decision of the highest court of State.

The order appealed from is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 96

MATTHEWS et al. v. SEARS,
ROEBUCK & CO.

Civ. 19227.

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1953.

Rehearing Denied March 12, 1953.

Action by 69 year old pedestrian who had cataracts on her eyes, against corporate defendant and individual defendants, the latter of whom were using sidewalk as workshop to cut and measure carpet, for injuries allegedly sustained when pedestrian fell over carpet lying across sidewalk. The Superior Court of Los Angeles County, Fred Miller, J., rendered judgment of nonsuit in favor of the defendants, and the plaintiffs appealed. The District Court of Appeal, Doran, J., held that, there being no evidence tending to show that employer-employee relationship existed between corporate defendant and individual defendants, nonsuit was properly granted as to corporate defendants, but that, as respects liability of individual defendants as independent contractors, a question for jury was presented as to whether pedestrian was contributorily negligent.

Affirmed as to corporate defendant and reversed as to individual defendants.

1. Master and Servant ⇨332(1)

In action for injuries sustained when pedestrian allegedly fell over roll of carpet which was allegedly lying across sidewalk, evidence was insufficient to present a question for jury as to whether employer-employee relationship existed between corporate defendants and individual defendants the latter of whom were using sidewalk for workshop to cut and measure the carpet. *

2. Master and Servant ⇨316(1)

Where relationship of independent contractor rather than employer-employee existed between corporate defendant and individual defendants, the latter of whom were using sidewalk for workshop to cut and measure carpet, the corporate defendant was not liable for injuries sustained by pedestrian allegedly falling over the carpet.

3. Municipal Corporations ⇨821(21)

In action against defendants using sidewalk for workshop to measure and cut carpet, for injuries allegedly sustained when 69 year old pedestrian having cataracts on her eyes allegedly fell over carpet lying across sidewalk, whether pedestrian was contributorily negligent in respect to care exercised by her was for jury.

4. Municipal Corporations ⇨821(20)

Using a public sidewalk for a workshop does not as a matter of law affect the degree of care required by pedestrians.

James C. Webb, Long Beach, for appellants.

Ball, Hunt & Hart, Long Beach, John L. Wheeler, Los Angeles, for respondents.

DORAN, Justice.

As recited in respondents' brief, "This is an appeal from a judgment of nonsuit granted in favor of Sears and Flack and Rook.

[1, 2] "Plaintiffs' complaint was for damages for personal injuries received when she allegedly fell over a roll of carpet which was allegedly lying across the sidewalk where she was walking. In said complaint it is further alleged

that defendants Flack and Rook were the agents, servants and employees of defendant, Sears, and were acting in the scope of their employment as such.

"The trial court ruled there was no evidence tending to show that the relationship between Sears, Roebuck & Co., and Flack and Rook was that of an employer and employee. To the contrary, all evidence pointed toward the relationship of independent contractor. As to the defendants Flack and Rook, the trial court granted a nonsuit on the ground that plaintiff, Matthews, was negligent as a matter of law, and that she never looked at the sidewalk and never attempted to and while walking westward on East Third Street, was interested in getting the attention of another person some distance away."

The trial was before a jury. When the plaintiff rested the motion for a nonsuit followed and was granted.

The contention of Sears, Roebuck & Co. that defendants Flack and Rook were independent contractors is supported by the record.

[3, 4] On the other hand, the court's action in granting the motion on the grounds that plaintiff was guilty of contributory negligence was error. That there was substantial evidence to the contrary there can be no question, hence, the issue of fact in such a circumstance is for the jury. Defendants Flack and Rook were laying the carpet and were using the sidewalk for a workshop to measure and cut the carpet. Respondents' argument that, "From the testimony of the plaintiff, Mrs. Matthews, we have the undisputed story that she was a woman sixty-nine years of age, who had great difficulty in seeing because of cataracts on both eyes, walking westward on East Third Street, crossing an alley and onto the sidewalk, without at any time paying attention to the sidewalk in front of her, and the dangers consistent with everyday life which might be lurking there.", does not effect the issue of contributory negligence and the law applicable thereto. Even if plaintiff had been totally blind and walking with a cane a prima facie case would

have been established. Using a public sidewalk for a workshop does not as a matter of law affect the degree of care required by pedestrians.

The judgment is affirmed as to respondent Sears, Roebuck & Co. It is reversed as to respondents Flack and Rook.

WHITE, P. J., and DRAPEAU, J., concur.



115 Cal.App.2d 862

**COLUMBIA-GENEVA STEEL DIVISION,
UNITED STATES STEEL CO., v. INDUSTRIAL
ACCIDENT COMMISSION et al.**
Civ. 15499.

District Court of Appeal, First District,
Division 2, California.
Feb. 10, 1953.

Proceeding before the Industrial Accident Commission. A referee who heard the application and made findings denied employee an award. Panel One of the Industrial Accident Commission thereafter granted a petition for reconsideration and without further hearing made an award of compensation to the employee, and the employer petitioned for writ of review. The District Court of Appeal, Dooling, J., held that award to employee for medical and hospital treatment incurred as a result of an industrial injury was improper, in absence of a finding of the notice of the injury to the employer, and Commission's reception of certain medical report of employee's doctor as evidence without a hearing was a denial of employer's right of constitutional due process.

Award annulled with directions.

1. Workmen's Compensation ⇨1539

Statute limiting right of court to review order, decision or award of the Industrial Accident Commission to certain specific grounds, including ground that such order, decision, or award is not supported by substantial evidence, does not give the court power to substitute its judgment for

that of the Commission. St.1951, p. 1769, § 9; Labor Code, § 5952(d).

2. Workmen's Compensation ⇨1532

Evidence sustained finding of Panel of Industrial Accident Commission that employee who was suffering from a ruptured intervertebral disc sustained injury arising out of and in the course of his employment. Labor Code, § 5952(d).

3. Workmen's Compensation ⇨1820

The Industrial Accident Commission may make a factual determination contrary to that made by referee, notwithstanding that the testimony is conflicting and that the Commission did not hear the testimony or observe the witnesses but did examine the evidence. Labor Code, §§ 5906, 5907.

4. Workmen's Compensation ⇨975

Before notice of an industrial accident, employer is under no duty to furnish medical and hospital care. Labor Code, § 4600.

5. Workmen's Compensation ⇨999

Award by Panel of Industrial Accident Commission for medical and hospital treatment incurred as result of an industrial injury to employee was improper, in absence of a finding of the date of the notice of injury to the employer. Labor Code, § 4600.

6. Constitutional Law ⇨301

It is a deprivation of constitutional due process to receive evidence in a workmen's compensation proceeding without the opportunity to rebut and cross-examine.

7. Constitutional Law ⇨301

Reception of medical report of employee's doctor as evidence by Panel of Industrial Accident Commission in reconsidering referee's denial of compensation to employee, which report was attached to employee's application for compensation, constituted a denial of employer's right of constitutional due process by depriving employer of opportunity to rebut and cross-examine.

Thomas Ashby, D. J. McDaniel, K. C. McGuiness, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, for Industrial Accident Commission.

DOOLING, Justice.

In this proceeding before the Industrial Accident Commission the referee who originally heard the application made findings against the applicant and an award was made accordingly denying him any relief. Panel One of the Commission thereafter granted the applicant's petition for reconsideration and without further hearing made an award of compensation to the applicant. The evidence was in sharp conflict as to whether applicant was suffering from an injury arising out of his employment. The applicant testified that on March 24, 1951 while he was shoving a ten-ton "back-up roll" suspended on a crane he felt a sharp pain in his heel. He is suffering from a ruptured intervertebral disc which, according to his medical reports, probably resulted from the strain at the time that he felt the pain in his heel. The employer produced reports showing that applicant was not working on March 24 and that on that date no "back-up rolls" were being handled in the shop where applicant worked. These records showed that applicant did work on March 23 and that "back-up rolls" were handled in the shop on that date. There was also testimony that applicant originally claimed that his injury occurred on March 21 and it is undisputed that there was a delay in his notifying his employer that he claimed to be suffering from an industrial injury. Relying on the amendment to section 5952, Labor Code adding to the grounds of review that "(d) The order, decision, or award was not supported by substantial evidence," Stats.1951, ch. 606, petitioner argues that there is no substantial evidence to support the finding of the Panel that applicant sustained injury arising out of and in the course of his employment.

[1,2] This amendment was not intended to give the courts the power to substitute their judgment for that of the Commission as to the effect or weight of the evidence.

Section 9 of the statute embodying this amendment specifically provides that it does not "permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." Stats.1951, p. 1769. Since we cannot exercise our independent judgment on the evidence our inquiry ends when we find substantial evidence to support the Panel's finding. The evidence of the applicant above outlined meets this test and the effect of the contradictory evidence and matters tending to discredit applicant's testimony were for the Panel to weigh and determine.

[3] Petitioner argues that "if * * * the Commission (is) permitted to substitute its opinion as to the credibility of witnesses for that of the hearing referee, there would seem to be no reason for oral hearings other than to perpetuate testimony." The legislature has given just this power to the Commission, Labor Code, secs. 5906, 5907, and it is settled that "the commission may make a factual determination contrary to that of a referee although the testimony is conflicting and it did not itself hear the testimony or observe the witnesses, but did examine the evidence and record." *National Automobile & Casualty Co. v. Industrial Acc. Com.*, 34 Cal.2d 20, 28, 206 P.2d 841, 845.

[4,5] The applicant without notifying his employer of his claim of industrial injury employed physicians of his own choosing to treat him. The evidence is in dispute as to the date on which the employer was given such notice. Without finding the date of notice to the employer the Panel ordered the employer to pay all medical and hospital expense theretofore procured. The liability for such costs is imposed on the employer "(i)n the case of his neglect or refusal seasonably" to furnish such treatment. Sec. 4600, Labor Code. Before notice of the industrial injury the employer is under no duty to furnish such care. 27 Cal.Jur., *Workmen's Compensation*, sec. 183, p. 528; *Leadbetter v. Industrial Acc. Com.*, 179 Cal. 468, 177 P. 449. The Commission should have found the date on which the employer first had notice of the

necessity for such treatment and should have made its award for the cost of treatment run only from that date.

[6,7] The most serious question concerns the reception in evidence of a report of Dr. Steinbergh, one of applicant's medical experts. Attached to applicant's petition for reconsideration was this medical report. In its answer petitioner objected to the consideration of this report. The Panel made no ruling on this objection until it filed its findings and award and as a part thereof it "ordered that the report of S. S. Steinbergh, M.D., dated November 21, 1951, be, and it is hereby, admitted into evidence."

In its report preceding its findings and award the Panel said:

"The medical report of Dr. Steinbergh, dated November 21, 1951, is very persuasive that there was an injury from the incident recited by the employee, and the doctor logically explains how it occurred."

When petitioner complained in its petition for reconsideration of the use of this report, without opportunity to cross-examine or rebut, the Panel said in denying the petition that it "did not make its decision upon the supplemental report of Dr. Steinbergh. It considered * * * all of the testimony * * * the report of Dr. Steinbergh is merely a reiteration of what he has heretofore said and it contains no new matter."

The referee had found Dr. Steinbergh's original report unsatisfactory and unconvincing. The supplemental report was stated to be to clarify the earlier report and to meet the referee's criticisms of it. The Panel stressed this report as "very persuasive" and said that it "logically explains" how the injury occurred. We are not impressed by the Panel's later disclaimer of the importance of this report in arriving at its decision.

It is a deprivation of constitutional due process to receive evidence without the opportunity to rebut and cross-examine. Langendorf, etc., *Bakeries v. Industrial Acc. Com.*, 87 Cal.App.2d 103, 195 P.2d 887;

Massachusetts, etc., *Ins. Co. v. Industrial Acc. Com.*, 74 Cal.App.2d 911, 170 P.2d 36.

Petitioner was not required to ask for the right to rebut or cross-examine before its objection had been ruled upon and the report was actually admitted and it took the first opportunity presented after the ruling to raise the question in its petition for reconsideration.

The award is annulled with directions to the Commission to proceed in accordance with this opinion.

NOURSE, P. J., and GOODELL, J., concur.



Ex parte HOLY FAMILY ADOPTION SERVICE.

Civ. 4984.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1953.

Proceedings on application by adoption agency for writ of habeas corpus to obtain custody of child from surviving spouse of persons with whom child had been placed for adoption. The District Court of Appeal denied application.

Application denied.

White, P. J., dissented.

Habeas Corpus ☞99(1)

Application of adoption agency for writ of habeas corpus to obtain custody of child from surviving spouse of persons with whom child had been placed for adoption, under agreement reserving right of removal in agency until legal adoption, would be denied.

Clock, Waestman & Clock, E. W. Sheridan, Long Beach, Dockweiler & Dockweiler, Frederick C. Dockweiler, Joseph G. Gorman, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., and Ariel C. Hilton, Deputy Atty. Gen., for the State of California.

PER CURIAM.

The application for a writ of habeas corpus is denied.

WHITE, P. J., is of the opinion that the writ should issue.

WHITE, Presiding Justice (dissenting).

I am convinced that the writ here sought should be granted. Petitioner asks by its application for a writ of habeas corpus to have restored to it the custody of Patricia McDonald, a minor child, hereinafter referred to as the child. A similar application made to the Superior Court of the State of California in and for the County of Los Angeles was denied. It is alleged in the petition that Holy Family Adoption Service is an adoption agency or organization licensed by the State of California to find homes for children and to place children for adoption, as such an organization is referred to in sections 224, 224m et seq. of the Civil Code; that petitioner is licensed by the State Department of Social Welfare (hereinafter referred to as the Department) pursuant to the provisions of subdivision (b) of section 1620 of the Welfare and Institutions Code; that petitioner is a nonsectarian institution, serving persons without discrimination as to race, color or creed; that its functions and obligations are under the supervision and control of the Department and subject to the rules and regulations of such Department, as promulgated pursuant to the provisions of section 1621 of the Welfare and Institutions Code for the government of adoption agencies and for the performance of their services, as set forth in Manual of Adoption Policies and Procedures (sometimes called "Adoption Manual"), and referred to in note appended to Welfare and Institutions Code, Annotated, section 1621.

It is alleged that the child whose custody is herein sought by petitioner was born in the City of Los Angeles, California, on February 27, 1952, and was relinquished

to petitioner for adoption by her unmarried mother on March 13, 1952; that said relinquishment was accomplished through the medium of a written instrument executed in accordance with the provisions of section 224m of the Civil Code, a copy of said relinquishment agreement being attached to the petition as an exhibit. That prior to the acceptance of the relinquishment, petitioner "performed the basic study requirements of the child as specified in section 2430-00 of the Adoption Manual, including birth information, medical care, reports and examinations, and its legal status, and upon concluding that the child was adoptable, proceeded in accordance with sections 2450-00 of the Adoption Manual to make basic study requirements of applicants desiring to adopt children to the end that a selection of home and placement for adoption for the child could be made in accordance with section 2470-00 of the Adoption Manual; that pursuant to section 2460-00-C-2 no application was considered from a single applicant, 'whether unmarried, widowed, or divorced.'"

The petition then avers that on March 20, 1952, petitioner selected applicants Clement C. James and Edna M. James, husband and wife, as a family "that offered the best potentialities for the full development of the child; and on the same day placed the child with said family with the express understanding and agreement as required by said section 24700-00 in its final sentence, that your petitioner might 'remove the child for cause at any time prior to completion of the adoption'; that said agreement, copy of which is annexed hereto as 'Exhibit B', was executed by both Clement C. James and Edna M. James, and provides, among other things, the following:

" 'Holy Family Adoption Service places a child in a family for the purpose of providing a permanent home for it. After one year or more has elapsed, and the child is entirely satisfactory to the family and Holy Family Adoption Service is fully satisfied as to the care and training of the child, and character of the home, legal adoption is permitted. * * *

"Holy Family Adoption Service places the child in a family for the purpose of providing it a home, and with the intention and full expectation of leaving the child in the home, but it reserves the right to remove the child previous to legal adoption, if at any time the circumstances make it necessary to do so." (Emphasis added.)

It is further alleged that petitioner "supervised the placement as it was required to do under section 2475-00 of the Adoption Manual, the child was brought to the clinic for tests and observations, and periodic visits were made to the home of said family by a social worker on the staff of your petitioner;

"That on or about November 15, 1952, said Clement C. James came to his death as a result of his suicide; that on December 4, 1952, your petitioner, having previously determined that said Edna M. James, as a widow, could not provide a permanent home for the child to the satisfaction of your petitioner, or as required by the policies of the State of California in its relinquishment program as established in the Adoption Manual, or as required by the policies of your petitioner, demand was made upon Edna M. James to return the child forthwith to your petitioner."

It is then set forth that said Edna M. James having persisted in her refusal to return the child to petitioner, the latter, on December 15, 1952, filed in the Superior Court of Los Angeles County a petition for a writ of habeas corpus, to the end that said child might be returned to petitioner. That upon a hearing of said application, on February 6, 1953, the superior court "decided as a matter of law that in all habeas corpus proceedings involving a minor the Court could determine what home will best promote the interests of the child, and since no issue was made nor evidence introduced as to the fitness of Edna M. James to retain the child, he ordered that the child be left with Edna M. James and its disposition determined on the petition for adoption filed by Edna M. James on February 5, 1953, or in proceedings subsequent thereto; and thereupon discharged said application of your petitioner." (Emphasis added.) There-

upon the instant proceeding was instituted in this court.

It is true that as a general rule the District Court of Appeal has no jurisdiction to attempt by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired in a habeas corpus proceeding unless the prior jurisdiction has been terminated. In re Owen, 82 Cal.App. 280, 255 P. 541; In re Shaw, 84 Cal.App. 24, 257 P. 585. If it be conceded because of the character of the order made by the superior court in this matter, that its jurisdiction has not been terminated, nevertheless this court may assume jurisdiction of a proceeding pending in the superior court when only an issue of law is involved and that court has not ruled thereon. In re Browning, 99 Cal.App.2d 337, 338, 221 P.2d 736; In re White, 49 Cal.App.2d 160, 121 P.2d 100; In re Barents, 99 Cal.App.2d 748, 222 P.2d 488. The petition herein recites that at the former hearing no evidence was introduced relating to the fitness of any of the parties to have the custody of the minor child or of environment. The court made no findings, but merely denied the writ. The question decided by the superior court was therefore one of law alone. The prior hearing in the latter court and its decision being based on questions of law alone, such decision cannot be *res judicata* in an appellate court.

The power to adopt minor children is a creation of statute which was unknown to the common law, and the mode must be held to be the measure of the power. When therefore, the Legislature, exercising its well-nigh plenary power over the subject of adoptions, provided in section 224m of the Civil Code for the relinquishment of a child by its father or mother for adoption to any agency licensed by the State Department of Social Welfare to find homes for children and place children in homes for adoption, it follows that where, as in the instant case, the provisions of said section were adhered to, the right to the care, custody and control of said minor was by such relinquishment transferred from the natural mother to the adoption agency. When the relinquishment of the child to the licensed adoption agency was accomplished in the man-

ner and form provided by section 224m of the Civil Code, such agency became invested not only with the right of custody and control of said child, but with the right by habeas corpus to obtain actual custody in the event that prior to entry of an adoption decree the person having actual custody refuses to surrender the minor.

It is my opinion that the superior court was in error in holding that the remedy of habeas corpus was not available to the adoption agency because disposition of the custody of the child could be determined on hearing of the petition for adoption of the child filed by Mrs. James subsequent to the filing of the petition for the writ of habeas corpus by the adoption agency. This I say because, under the provisions of sections 224m and 226 of the Civil Code, the child cannot be adopted unless the adoption agency, in its discretion, joins in the petition for adoption. Under a situation analogous to that here presented and under laws similar to those now in effect, such was the holding as far back as *Ex parte Chambers*, 80 Cal. 216, 218, 219, 22 P. 138.

For the foregoing reasons, I would issue the writ of habeas corpus prayed for.



115 Cal.App.2d 866

PEOPLE v. FOSTER et al.

Cr. 2860.

District Court of Appeal, First District,
District 2, California.

Feb. 10, 1953.

Rehearing Denied Feb. 25, 1953.

Hearing Denied March 9, 1953.

Three defendants who had been occupants of front seat of automobile from which police officers saw thrown a narcotic user's outfit with heroin were tried jointly for and found guilty of possession of narcotics. The Superior Court, City and County of San Francisco, Twain Michelsen, J., granted motion for new trial of driver of automobile, but denied similar motions by the other two, and they appealed. The District Court of

Appeal, Dooling, J., held that there was evidence to sustain finding that the defendant who had been in middle of seat had possession of the heroin.

Judgment and order affirmed as to one defendant; reversed and remanded as to the other defendant.

1. Criminal Law ⇨59(3)

The fact of mere presence at the scene of a crime, standing alone, is not sufficient to justify a finding of guilt.

2. Poisons ⇨4, 9

The crime of possession of narcotics requires a physical or constructive possession with actual knowledge of the presence of the narcotic substance, and to show such knowing possession, conduct of parties, and admissions or contradictory statements and explanations are frequently sufficient. Health and Safety Code, § 11500.

3. Poisons ⇨9

In prosecution for possession of narcotics, against three occupants of front seat of an automobile from which police officers saw thrown a narcotic user's outfit with heroin, certain contradictory testimony by defendant who had been sitting in middle of front seat was sufficient to sustain finding that such defendant had possession of the heroin. Health and Safety Code, § 11500.

C. L. Shinn, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., and Wallace G. Colthurst, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Two defendants, Foster and Phillips, appeal from a conviction of possession of narcotics, sec. 11500, Health and Safety Code, and from the order denying their motions for new trial. Three defendants were tried jointly, the jury returned verdicts of guilty against all three but the trial court granted the motion for new trial of the third defendant, Dabney.

On December 22, 1951 two police officers of the City and County of San Francisco at about 1 o'clock a. m. observed a La Salle

automobile in which the three defendants were riding and followed it because of a suspicion that it had been used in the commission of thefts from other automobiles. They flashed the red light on their patrol car and sounded the siren thereby causing Dabney, who was driving the La Salle, to bring it to a stop. As one of the officers was alighting from the patrol car he saw a small object come from the right front window of the La Salle and fall to the street. This proved to be a narcotic user's outfit, consisting of an eye-dropper fitted with a hypodermic needle, and 1½ grains of heroin, wrapped in a small piece of paper held in place by a rubber band. Upon questioning all three defendants denied any knowledge of the package and its contents.

All three defendants were riding in the front seat; Dabney driving the car, Foster in the middle and Phillips on the right side. The officers saw all three defendants moving about in the car but did not see any of the three make any throwing motion. All three both before trial and on the witness stand denied any knowledge of the packet containing heroin and each denied that he had thrown it from the car or seen anything thrown from the car by either of the others.

In this state of the record it is perfectly clear that one, if not more, of the defendants was guilty of the possession of the heroin, the problem presented by the record being whether the state proved facts sufficient to justify the jury's finding that either Foster or Phillips was the guilty person or, as it actually found, that both were guilty.

[1,2] Mere presence at the scene of the crime standing alone is not sufficient to justify a finding of guilt. *People v. Le Grant*, 76 Cal.App.2d 148, 153, 172 P.2d 554. The crime of possession of narcotics requires a physical or constructive possession with actual knowledge of the presence of the narcotic substance. *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433.

To show such knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient. *People v. Gory*, su-

pra, 28 Cal.2d at page 456, 170 P.2d 433; *People v. Bigelow*, 104 Cal.App.2d 380, 231 P.2d 881; *People v. Rumley*, 100 Cal.App.2d 6, 222 P.2d 913; *People v. Torres*, 98 Cal.App.2d 189, 219 P.2d 480; *People v. Sinclair*, 129 Cal.App. 320, 19 P.2d 23.

Against Phillips the People argue that sitting where he was he must have seen the object thrown from the window if he did not throw it himself and therefore his denial of all knowledge of it is sufficiently inculpatory. We cannot agree that any person should be convicted of a crime on such a tenuous theory. The defendants were all moving around in the seat, their attention had been attracted to the police car behind them and a tightly wrapped eye-dropper is a very small object. To infer guilty knowledge in Phillips from the fact, standing alone, that he testified that he did not see the package thrown from the car would be to permit a conviction on the wildest sort of surmise and conjecture.

The case against Foster is stronger. He testified very positively both on direct and cross-examination that the right front window out of which the officers saw the package thrown was tightly closed and that he was positive of this fact because the night was cold. The next day he changed this testimony with the explanation that he had been confused by the prosecutor's questions and manner. The trial judge remarked that he had observed no evidence of confusion and this remark was not challenged or objected to. The record indicates no evidence of confusion and the first testimony that the window was closed was brought out by Foster's own attorney on direct examination.

[3] We cannot say that the jury was not entitled to conclude that this defendant first testified falsely that the window was closed in an attempt to disprove the possibility of the package having been thrown from the window and later, for whatever reason, decided to correct this testimony to tell the truth. From this clumsy attempt to manufacture a defense the jury might reasonably infer the guilty knowledge necessary to find that Foster was the one of the three defendants who had possession of the

heroin. *People v. Torres*, supra, 98 Cal. App.2d 193, 219 P.2d 480.

The jury's finding all three guilty suggests that they did not clearly understand the quantum of proof required to fix guilt upon any particular defendant, but our function ends when we find evidence sufficient to support the verdict as to any defendant. 8 Cal.Jur. 586-587.

The judgment and order denying a new trial are affirmed as to appellant Foster and reversed and remanded as to appellant Phillips.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



115 Cal.App.2d 822

GELLER v. GELLER.

Civ. 19126.

District Court of Appeal, Second District,
Division 1, California.
Feb. 9, 1953.

Hearing Denied April 8, 1953.

Divorce action. The Superior Court, Los Angeles County, Joseph Marchetti, J., entered an interlocutory judgment favorable to the plaintiff-wife, and the husband appealed. The District Court of Appeal, White, P. J., held that the evidence sustained finding that the home of the parties was community property.

Affirmed.

1. Divorce ⇨249(1)

Divorce court is justified in awarding all of community property to innocent spouse. Civ.Code, § 146, subd. 1.

2. Husband and Wife ⇨264

Intention of parties, with regard to whether property is to remain separate or become community property, may be shown by circumstantial as well as by direct evidence.

3. Husband and Wife ⇨249

Act of turning over pension check to wife for support of family evinced an in-

tention of husband to treat proceeds of pension check as community property.

4. Husband and Wife ⇨264

Evidence in divorce case sustained finding that home of parties was community property.

5. Divorce ⇨203

There was no error in awarding \$350 attorney's fees to wife after trial of contested divorce action, notwithstanding fact that complaint, to which no formal amendment was made prayed for attorney's fees in the sum of only \$150, based on an assumed uncontested action.

6. Divorce ⇨227(1), 240(2)

Award of \$25 per month on attorney's fees, \$60 per month alimony, and \$36.07 per month for payments on trust deed on home property would be affirmed, notwithstanding husband's testimony that his gross income was less than \$170 per month, where precise amount of husband's income was left in doubt because of his failure to make a full disclosure to the trial court

Edward H. Blixt, Los Angeles, for appellant.

Louis P. Pink, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant husband appeals from an interlocutory judgment of divorce granted to the plaintiff wife, asserting as grounds for reversal that the court erred (1) in finding the home of the parties to be community property and awarding it to the wife; (2) in awarding attorney's fees in excess of the amount prayed for in the complaint; and (3) in ordering excessive monthly payments of alimony and attorney's fees.

[1] The findings of extreme cruelty by the husband toward the wife are not attacked, are amply supported by the evidence, and justified the court in awarding the property in dispute to the wife, if the property was properly found to be community. Civ.Code, § 146, subd. 1; *Barham v. Barham*, 33 Cal.2d 416, 431, 202 P.2d 289, and cases cited.

The parties were married in New York City in 1920 and separated in Los Angeles in 1951. They had three children, two of whom at the time of trial had reached majority, the third child then being 18 years of age. Custody of the minor child was awarded to the mother, with visitation rights in the father.

It appears that in September 1943, the parties purchased a home in Los Angeles for \$4,750, making a down payment of \$1,500, the balance of the purchase price being represented by a note and deed of trust. (The fact that title was not taken in the names of the parties, but was held for their benefit by one Blankenship is of no importance in determining the issues presented by this appeal.) Of the \$1,500 down payment, the wife contributed \$750, her separate property acquired from the estate of her father, and the husband furnished \$750 from accumulated earnings. The monthly payments on the deed of trust were \$36.07, and these payments were made regularly from September, 1943, until the time of trial in October, 1951. The monthly payments were on account of principal and interest only and did not cover insurance or taxes. At the time of trial there still remained a principal balance on the trust deed of \$2,430, indicating that there had been a reborrowing or refinancing of the loan, although the record does not disclose the facts in this regard.

Appellant asserts that there is "absolutely no evidence" justifying the finding that the real estate in question was community property; that all the monthly payments from 1943 to 1951 were made from defendant's pension check. "This pension check," it is asserted, "was the separate property of the defendant, as it was for personal injuries he suffered in World War I, two years before he was married." Further discussing the evidence, appellant states: "The defendant was an epileptic because of his injuries received out of World War I, and was subjected to periodic seizures. He was physically unable to work steady. On the other hand there was no evidence at the time of trial that the plaintiff was unable to work, or that she was unable to support herself either from her earnings or her

own separate property. There was some evidence that she inherited property from her father in the State of Washington, but there was no evidence as to the extent of this property she holds. The uncontroverted evidence also established that the defendant had an income of approximately \$90.00 to \$100.00 a month, plus his \$72.00 monthly pension check." Appellant further argues that the court awarded separate property of the defendant to the wife, referring, however, only to some remarks of the court contained in the reporter's transcript and not to any findings of fact or conclusions of law.

In contrast to appellant's version of the record, there was substantial evidence to support findings of acts of mental and physical cruelty by the defendant over a period of many years, the court finding as follows: "That the defendant has, for many years prior to their separation as aforesaid, remained away from his home and from his family for nights at a time during which he engaged in gambling. That continuously during a period of many years prior to the separation of the parties hereto the defendant has been a chronic and incurable gambler and has lost or dissipated his earnings and any other money which has come into his possession: by betting on horse races, and at card games, and that he has, during said period, gambled and lost money which was necessary to feed the plaintiff and the children of the parties hereto, as well as money which he received but which did not belong to him and that by reason thereof, it becomes necessary for the plaintiff to, and that she sought and obtained employment at cleaning homes, taking in sewing for others so as to thereby earn enough money with which to feed the defendant and their children."

With reference to the assertion that the monthly payments on the purchase of the home property were made from defendant's separate funds, to-wit, his pension check, the court found as follows:

"That defendant received, at the time when said real estate was purchased as aforesaid, and ever since has received, and now receives, the sum of \$72.00 monthly as disability benefits from the

United States Government, and that defendant has paid said \$72.00 each month as well as certain other sums of money which were earned by him to plaintiff and that said monies were commingled so that each is indistinguishable from the other, and that from said commingled funds she has paid \$36.07 each month as a payment on principal and interest on the aforesaid bank loan thereby keeping said bank loan in good standing and thus providing a home and shelter for his wife and children. * * *

[2-4] The evidence adduced at the trial amply supports a finding that the funds were commingled. It further presents the picture of a husband who over a long period of years persistently refused to meet his family obligations of support, dissipating his earnings at gambling. Aside from the pension check, the husband's contributions to the support of his family of a wife and three children were only what few dollars the wife could persuade him to part with from time to time for food, most of his earnings being reserved for his gambling. There was evidence that on occasions he had large sums of money on his person, but his family derived no benefit therefrom. The evidence further supports the finding made by the court that the family of the parties was only held together "by the unselfish efforts and sacrifices of the plaintiff." From the evidence as disclosed by the record, it was reasonable to conclude that the monies represented by the pension check were handed over to the wife in lieu of funds which should have been furnished by the defendant from his earnings for the support of his family. Moreover, the manner in which the property was acquired, by contributions from both parties during marriage, and their clear intention thereby to provide a home for themselves and their children, further support the conclusion that it was their mutual intention that the property should be community. The intention of the parties in this respect may be shown by circumstantial as well as direct evidence. *Frymire v. Brown*, 94 Cal.App.2d 334, 339, 210 P.2d

707. Further, the act of turning over the check to his wife for the support of the family evinces an intention on the part of the husband to treat the proceeds of the check as community property. There was substantial evidence to support the trial court's conclusion that the husband had failed to sustain the burden of showing that property which under the usual and ordinary presumptions would be community was in fact his separate property.

The decision of this court is made without regard to respondent's contention that appellant failed in his proof because he failed to show by a preponderance of the evidence that his pension was in his separate property in that, under various laws of the United States, it might appear that the monies due thereunder were property of the community. No evidence of any importance was adduced on this subject. A decision on this point if one could be made under the evidence presented, is unnecessary in view of this court's conclusions as hereinbefore expressed.

[5] There is no merit whatever to the contention that the court erred in awarding \$356 attorney's fees after the trial of a contested action. The plaintiff's complaint contained a prayer for attorney's fees in the sum of \$150, based on an assumed uncontested action. The sole case cited by appellant, *Buswell v. City and County of San Francisco*, 89 Cal.App.2d 123, 200 P.2d 115, supports the court's action in this regard, holding that it was immaterial that a formal amendment to the complaint was not made. No contention is offered that the award of fees was excessive or constituted an abuse of discretion.

[6] Appellant's final contention is that the court could not equitably order the husband to pay \$25 per month on attorney's fees, \$60 per month alimony and \$36.07 per month for payments on the trust deed on the home property, when his (the husband's) gross income was less than \$170 per month. This contention is based upon appellant's version of the evidence. The precise amount of appellant's income was left in doubt because of his failure to make

a full disclosure to the court, and further because of his unreliability as a witness. Better evidence than his testimony was available, but appellant chose not to produce it.

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



115 Cal.App.2d 869

In re VIERRA'S GUARDIANSHIP.

VIERRA v. MURPHY.

Civ. 8173.

District Court of Appeal, Third District,
California.

Feb. 10, 1953.

Petition by maternal uncle of minor to be appointed as minor's guardian, alleging that the minor's maternal grandfather, who had been originally appointed guardian by court of another county, had resigned. The minor's father objected to petition on ground that letters of guardianship had been issued to him in a third county. The Superior Court, Mendocino County, Gibson, J., entered order appointing the maternal uncle as guardian, and the father appealed. The District Court of Appeal, Peek, J., held that where there was no substantial evidence of a termination of the original guardianship proceeding by which the maternal grandfather was appointed guardian, courts of counties other than that wherein original proceeding was held had no jurisdiction to appoint a guardian for the minor.

Order reversed.

1. Courts ⇐475(6)

Court which first assumes jurisdiction of guardianship proceeding retains it to exclusion of all other courts in which the action, at its inception, might have been initiated.

2. Courts ⇐475(6)

So long as a guardianship continues in a particular court, no other court, by

entertaining a like proceeding, can interfere with the guardian's custody.

3. Courts ⇐475(6)

Where there was no substantial showing of a termination of the original guardianship proceeding by which minor's maternal grandfather was appointed his guardian, courts of counties other than that wherein original proceeding was held had no jurisdiction to appoint guardian for such minor. Probate Code, § 1582.

Robley E. Morgan, Santa Clara, for appellant.

Broadbuss & Golden and Burke & Rawles, Ukiah, for respondent.

PEEK, Justice.

This is an appeal from an order of the Superior Court of Mendocino County appointing Patrick G. Murphy, a maternal uncle, as guardian of the person of Gerald Vierra, a minor of the age of eight years. The appellant is the father of the boy.

The petition alleges that following the divorce of the child's parents his custody remained with his mother who is now confined in the Mendocino State Hospital as an insane person. It is further alleged that subsequent to her confinement, Joseph R. Murphy, the boy's maternal grandfather was appointed guardian (although not shown by the petition the evidence shows said appointment to have been made by the Superior Court of Shasta County); that said guardian has now resigned; that said minor, although in need of attention and care, has no guardian legally appointed by will or otherwise to so act; and that the minor is presently under the care of and is residing at the Albertinium Home in Ukiah, Mendocino County. Appellant in his objections to the petition does not deny the appointment of the grandfather or his resignation or that the child now has no guardian. But he affirmatively alleges the residence of the boy was in Santa Clara County; that letters of guardianship were issued to him in Santa Clara County on June 7, 1953; that he is a fit and proper person to be appointed guard-

ian and prays that the petitioner's request for letters be denied and that he be appointed guardian of his minor son.

The hearing on the petition was set for June 1, 1951, upon notice to all parties in interest, among whom were the grandfather, the petitioner, and the appellant. At the request of counsel for appellant the matter was continued for one week. While the Mendocino County proceeding was so held in abeyance a petition for letters of guardianship was filed in Santa Clara County on June 6, 1951 on behalf of the father. According to counsel for appellant, the only notice which he gave of the Santa Clara County hearing was a letter addressed to the mother of the child who, as noted, was then and still is an insane person confined in the Mendocino State Hospital. On the following day, June 7, 1951, the Santa Clara County Superior Court granted letters of guardianship to appellant and he immediately took his son from the home in Ukiah to his residence in Santa Clara County. On August 17, 1951, the appellant filed his objections to respondent's petition and on August 30, 1951, following a hearing thereon, the Superior Court of Mendocino County granted letters of guardianship to Patrick G. Murphy, the respondent, and the present appeal followed.

It is thus apparent that at the outset this court is presented with one basic question: Did the Superior Court of Shasta County by reason of the original guardianship proceedings in that county retain jurisdiction at the time of the subsequent proceedings and orders, first in Santa Clara County and next in Mendocino County?

As previously noted, although the petition alleged and all parties appear to have assumed that the original guardian had resigned or that the guardianship in Shasta County had been terminated, the record is wholly devoid of evidence to substantiate that fact and we must conclude that the Superior Court of Shasta County still retained jurisdiction of the guardianship.

While a guardian may resign, his action is subject to approval of the court if "it appears proper to allow it", and if allowed

the court "may appoint another in his place, after notice and a hearing as in the case of an original appointment." Probate Code, § 1582.

[1] It is also the rule that the court which first assumes jurisdiction retains it to the exclusion of all other courts in which the action, at its inception, might have been initiated. The primary purpose of the rule, the court said in *Greene v. Superior Court*, 37 Cal.2d 307, 231 P.2d 821, 823, was to prevent just what has happened here—conflicting and contradictory custody awards. Furthermore the jurisdiction of the original court "is a continuing one, and though no motion, petition or other such incidental proceeding may be pending at any particular time, the court still has jurisdiction over the guardianship. No other court * * * has power to interfere with that continuing control over the guardian". *Browne v. Superior Court*, 16 Cal.2d 593, 598, 107 P.2d 1, 131 A.L.R. 276.

[2] This does not mean that an interested party is forever foreclosed from proceeding in any court but the one where jurisdiction first attached. As the court observed in *Greene v. Superior Court*, supra, if, for instance, change of residence makes it desirable that a court of another county have jurisdiction to modify the order, the objective may be attained by a change of venue. See also *Cooney v. Cooney*, 25 Cal.2d 202, 153 P.2d 334. But so long as a guardianship continues in a particular court no other court, by entertaining a like proceeding, can "interfere with the guardian's custody so long as the guardianship continues." *Greene v. Superior Court*, supra, 37 Cal.2d at page 311, 231 P.2d at page 823.

[3] It necessarily follows that in the absence of any substantial showing of a termination of the guardianship proceeding in Shasta County neither Santa Clara County nor Mendocino County could "interfere" with that proceeding.

The order is reversed, each party to bear his own costs.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

CELLA v. COSGRO et al.

Civ. 18694.

District Court of Appeal, Second District,
Division 1, California.

Feb. 9, 1953.

Rehearing Denied March 3, 1953.

Hearing Denied April 8, 1953.

Suit to cancel certain deeds covering plaintiff's dwelling property. The Superior Court of Los Angeles County, Ingall W. Bull, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Doran, J., held that evidence sustained conclusion that plaintiff had been the victim of an unconscionable transaction designed to defraud, and that he had relied upon the representation of the defendants.

Judgment affirmed.

I. Appeal and Error ⇨1011(1)

Where the record discloses substantial evidence, and reasonable inferences therefrom, in support of the findings and judgment of the trial court, an appellate court will not enter into review of the evidence or retry factual issues, even though the evidence is conflicting and the trier of fact was confronted with divergent theories.

2. Deeds ⇨78

In action for cancellation of certain deeds covering plaintiff's residential property on ground that defendants had been guilty of undue influence and fraud in procuring deeds, evidence made question for trier of fact as to whether presumption of undue influence arising from a confidential relationship between plaintiff and defendant had been satisfactorily rebutted.

3. Cancellation of Instruments ⇨53

Finding in action to cancel deeds that the property involved was worth \$5,000 was not improper on ground that it was not responsive to allegations in the complaint that value was \$3,500, when record disclosed evidence of actual value sufficient to establish value as found.

4. Contracts ⇨270(1)

The right to rescind an agreement must be exercised promptly, but what is a reasonable time depends upon the particular circumstances of the case.

5. Cancellation of Instruments ⇨34(3)

Where agreement by which plaintiff conveyed his residential property to defendant in consideration of exclusive use and right of occupancy of portion thereof during his lifetime was made in 1943 without advice concerning transaction until 1948, action to cancel deeds, commenced within six months after plaintiff became aware that the house was to be sold and that agreement was unenforceable was not barred by laches.

6. Limitation of Actions ⇨19(3)

Statute requiring actions to recover real property to be brought within five years is limited to cases involving the features of an action in ejectment or to quiet title, and did not apply to suit presenting a simple question of fraud or mistake and seeking cancellation of deeds, with no attempt to recover possession or establish title otherwise than by nullifying the act procured by the fraud or mistake. Code Civ.Proc. § 318.

7. Deeds ⇨211(3)

In suit to cancel deeds conveying 77 year old plaintiff's dwelling property on ground of undue influence and fraud on part of defendants, evidence sustained conclusion that plaintiff was the victim of an unconscionable transaction designed to defraud, and relied upon by plaintiff, resulting in the deprivation of his property and possessory rights.

Prentiss Moore, and George E. Lindelof, Jr., Los Angeles, for appellants.

Keane & Wickhem, Frank Wickhem, Los Angeles, for respondent.

DORAN, Justice.

The complaint herein seeks the cancellation of certain deeds covering the respondent's home property located at 1167-1169 Bonnie Beach Place, Los Angeles County. In three counts, appellants are charged with undue influence and fraud in the procuring of an agreement and deed from the respondent who was then of the age of 77 years. Mistake of law is also alleged. The trial court found in favor of respondent.

It appears from the record that on April 23, 1940, taxes on the property having become delinquent, in the amount of \$464.31, plus interest and penalties, respondent made a payment thereon of \$217 and arranged for payment of the balance under the so-called ten year plan. The appellant Leah Porter Cella, denominated "the principal defendant", respondent's daughter-in-law, thereafter took the respondent to the office of an attorney in Huntington Park where an agreement was drawn and executed, dated April 1, 1943. The respondent thereby agreed to convey the Bonnie Beach property to appellant Mary Barr Cosgro, the mother of Leah Cella, who agreed to pay the delinquent taxes.

It was further agreed that the respondent John A. Cella, "shall during his lifetime have the exclusive use and right of occupation of three back rooms in the house now located upon said premises and now occupied by him * * * all without expense to him; and * * * shall have the exclusive right to use and occupancy of the garage located upon said premises during his lifetime and without cost and expense to him". Mary Barr Cosgro also agreed to "at all times keep said real property free and clear of liens of whatever nature", and not to "sell or otherwise dispose of said real property during the lifetime of" respondent.

The trial court found that prior to execution of the agreement, Leah Cella and Mrs. Cosgro had applied to one Sims for a loan of \$1,000, and that in the latter part of April, 1943, Mrs. Cosgro, then being record owner of the property, executed a trust deed to Sims to secure said loan. This trust deed remained a lien on the property until July 1, 1946 when it was superseded by a new trust deed for \$2,600 in favor of Atlantic Savings and Loan Association.

Previous to the execution of the \$2,600 trust deed, and on June 8, 1945, Mary Barr Cosgro, then being about 80 years of age, executed a grant deed of the property in question to Leah Porter Cella. The \$2,600 trust deed was then executed by Leah Porter Cella, and the trial court found "at the instance and urging of said defendant Leah Porter Cella, and without legal or other

independent advice, and not comprehending the nature and effect of signing said note and deed of trust, the plaintiff (John A. Cella) did join with said Leah Porter Cella in the execution of said note and deed of trust". John A. Cella "did not at the time of making said loan, nor at any time thereafter, receive any of the proceeds of said loan".

Beginning with April 2, 1943, appellant Leah Cella collected rent on the part of the premises not occupied by the respondent, at the rate of \$22.50 per month, and paid taxes and upkeep. As a result of an accounting in open court, it was determined that up to October 31, 1950, defendants had collected rents in the sum of \$2,025, and "had expended in connection with the said property the sum of \$2,078.61, leaving a balance due from the plaintiff to the defendants of \$53.61".

On June 30, 1948, the respondent married a second wife, Delilah Cella, and thereafter, as stated in appellants' brief, "friction developed", which finally led to the present action to rescind the transaction and recover back the property, which was filed on December 1, 1948. Shortly after the new Mrs. Cella started to live with respondent, Leah Cella collected \$15 per month from Mrs. Cella, which, however, was later returned. Leah Cella also told the respondent and Mrs. Cella that the property was going to be sold to the tenant of the front portion, one John Sardini, whereupon John Cella notified the prospective purchaser of respondent's interest, and for the first time, consulted an attorney in regard to the matter.

The trial court found that previous to making an agreement with Mary Barr Cosgro, the respondent "by reason of said advanced years * * * had been unable unassisted properly to manage or take care of his property and was likely to be deceived by designing persons". It was further found that the reasonable and market value of the property was \$5,000; that "the defendant Leah Porter Cella maintained a close, intimate and confidential relationship with the plaintiff", and that "well knowing the plaintiff's physical and mental condition as a result of his advanced years, and well

knowing the plaintiff's economic status, procured the plaintiff to execute" the agreement in question; that respondent had no independent advice, and did not fully comprehend "the nature and effect of said agreement".

The court further found that notwithstanding the agreement that the property should not be sold or disposed of during respondent's lifetime, and should be kept "free and clear of liens of whatever nature", the property was conveyed by Mary Barr Cosgro to the latter's daughter, Leah Porter Cella; that as hereinbefore stated, a trust deed for \$1,000 had been placed on the property, this encumbrance being later succeeded by a trust deed for \$2,600 in which the respondent was induced to join, "not comprehending the nature and effect" thereof. The \$2,600 loan was later paid off "but no funds of the plaintiff were used in the repayment of said loan".

The findings also declare that the defendants, at the time of making said agreement, "did not intend to perform" the agreement against encumbering or disposing of the property; that "the consideration given by the defendants for the execution of said agreement and the transfer of title * * * was grossly inadequate"; and that when the agreement was executed, it was believed that the provision against disposing of the property "was a valid and legally enforceable provision". From these findings the trial court concluded "That the defendant Leah Porter Cella took advantage of her close, intimate and confidential relationship with the plaintiff"; that there was a mutual mistake of law as to enforceability of the provision against disposing of the property; that since an accounting was necessary, it was not necessary for plaintiff to make an offer of restoration of consideration.

[1] Appellants' contention that the findings of the trial court are unsupported is without merit. The record discloses substantial evidence, and reasonable inferences therefrom, in support of the findings and judgment. Under these circumstances, an appellate court does not enter into review of the evidence or retry factual is-

sues. The fact that evidence presented by the contending parties is in conflict and that the trier of fact is confronted with divergent theories, justifies no departure from the above rule.

The complaint in the instant case is predicated upon a combination of events which served to deprive the plaintiff of valuable real property. By amendment, plaintiff sought relief on the theories of fraud, undue influence, and mutual mistake. The trial court found that all three were present, although any one, standing alone, would have been sufficient to void the agreement. Appellant's assertion that "The principal issue below was that of undue influence", is hardly justifiable since this was only a part of the story.

[2] A gradual weakening of powers, both mental and physical, is not unusual in the aged, and furnishes a condition favorable to the practice of either fraud or undue influence, or as in many such cases, an adroit combination of the two. The present record, viewed in the light most favorable to the respondent, presents such a situation.

As stated in respondent's brief, there is evidence of "a close, intimate and confidential relationship" between Leah Porter Cella and the aged father-in-law. The respondent advised with the daughter-in-law concerning business affairs, and, said Mrs. Cella, "He had confidence in me". At the time of trial, Mrs. Cella had some of the respondent's papers. Respondent's daughter, Mrs. Helen Childers, testified that with the father, Leah Cella's "opinions came first", and that "it would turn out whatever she told him to do in the end". Whether the presumption of undue influence arising from a confidential relationship has been satisfactorily rebutted, is, of course, a question of fact, which in this case was resolved by the trial court in respondent's favor.

[3] Appellant complains of the finding that the property was worth \$5,000 as not being responsive to allegations in the complaint that the value was \$3,500. However, the record discloses evidence of actual value, including the fact that a loan

association deemed the property to be of sufficient value to support a loan of \$2,600. Likewise, appellant argues that respondent was not damaged by the transaction. The respondent's brief answers this by calling attention to the fact that during the period in question, Mr. Cella, by reason of appellants' acts, was denied any control over the property.

[4,5] It is also contended that the plaintiff was guilty of laches, and that the action is barred by the statute of limitation. Neither of these arguments has merit. It is conceded that the right to rescind must be exercised promptly. What is a reasonable time depends, as in other situations, upon the particular circumstances of the case. In the present case, although the agreement was made about April 1, 1943, respondent, according to the evidence, never discussed the matter with anyone nor had any advice concerning it until about July, 1948. At that time appellant Leah Cella collected rent from respondent's new wife, and respondent became aware that the house was to be sold. An action was commenced the following month, which was later dismissed and the present action instituted on December 1, 1948. The trial court properly found that there was no laches.

[6] The contention that respondent's action is barred by section 318 of the Code of Civil Procedure, requiring that actions to recover real property be brought within five years, is answered in 16 Cal.Jur. 438, limiting such rule "to cases which involve the features of an action in ejectment or to quiet title. The rule clearly does not apply where the case presents a simple question of fraud or mistake, and there is no attempt to recover possession or establish title otherwise than by nullifying the act procured by fraud or mistake". As said in *Lewis v. Beeks*, 88 Cal.App.2d 511, 519, 199 P.2d 413, involving a situation not dissimilar from the present case, the action herein is one for relief on the ground of fraud.

[7] The trial court, with first-hand opportunity to judge of the credibility of witnesses, the mental alertness of the plaintiff,

and all other facts illuminating the transaction, came to the conclusion that John A. Cella was the victim of an unconscionable transaction designed to defraud, and relied upon by the victim, resulting in the deprivation of property and possessory rights. Since the record discloses substantial evidence in support of such conclusion, it cannot be said that the findings and judgment are improper.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



116 Cal.App.2d 139

In re WASHINGTON'S ESTATE.

FINN et al. v. WASHINGTON.

Civ. 19173.

District Court of Appeal, Second District,
Division 1, California.

Feb. 17, 1953.

Rehearing Denied March 9, 1953.

Hearing Denied April 15, 1953.

Jury brought in special verdict that will was procured by undue influence of proponent, and the Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment denying probate of will, and proponent appealed. The District Court of Appeal, Drapeau, J., held that evidence produced by contestant sustained finding of jury that will was procured by undue influence.

Judgment affirmed.

1. Wills ⇨384, 386

On appeal from a judgment in a will contest, evidence most favorable to respondent should be accepted as true and that which is unfavorable should be disregarded.

2. Wills ⇨386

In will contest, the trier of facts is the sole judge of the credibility of witnesses and of the weight of the evidence.

3. Wills ⇨324(3)

The issue of undue influence in procuring execution of a will presents a question of fact for jury under proper instructions.

4. Wills ⇨166(12)

Circumstantial evidence, without any direct evidence, may be sufficient to support a finding of undue influence in execution of will.

5. Wills ⇨166(7)

Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in absence of testimony that there was pressure operating directly on the testamentary act.

6. Wills ⇨166(12)

Fact that one, who allegedly exercised undue influence on testator, had power or ability to control the testamentary act may be established by a variety of circumstances, such as control over testator's business affairs, dependency of testator on one, who allegedly exercised undue influence, for care and attention, or domination on part of one, who allegedly exercised undue influence, and subserviency on part of testator.

7. Wills ⇨166(12)

Unless explained, a transfer of property by testator to one, who allegedly exercised undue influence on testator, has a tendency to establish the charge of undue influence.

8. Wills ⇨165(1)

Declarations of testator may be proved for purpose of showing a subordination of testator to the will of one who allegedly exercised undue influence on testator.

9. Wills ⇨158

In will contest, on ground of undue influence, evidence must be produced that pressure was brought to bear directly on testamentary act.

10. Wills ⇨166(12)

In will contest, evidence to show undue influence need not be direct, and circumstantial evidence is sufficient.

11. Wills ⇨166(12)

In will contest, evidence to establish undue influence must do more than raise a suspicion, and must amount to proof, and such evidence has a force of proof only when circumstances are proven which are

inconsistent with the claim that the will was the spontaneous act of a testator.

12. Wills ⇨166(1)

In will contest, evidence was sufficient to sustain a finding that will was the product of undue influence.

13. Wills ⇨360

In absence of objection to a certain line of questioning in will contest and a request that jury be admonished to disregard it, contention that it was prejudicial could not be raised for first time on appeal.

Bent & Clapp, Los Angeles, for appellant.

Jerrell Babb, Los Angeles, for respondent.

DRAPEAU, Justice.

This case involves a contest before probate on the last will of Tennessee M. Washington, deceased. Contestant is the son of testatrix' predeceased husband, Bishop William Washington. The proponent of the will, Ethel A. Finn, a niece of testatrix, is one of a number of devisees thereunder and is named executrix of the will. All the devisees or legatees named in the will are relatives of either testatrix or her deceased husband.

Grounds of the contest were: (1) Testamentary incapacity of testatrix; (2) Improper execution of the will; and (3) Undue influence of Ethel A. Finn.

The first trial resulted in a verdict for contestant. The trial court granted a motion for a new trial on the issue of undue influence. As result of this, the second trial, the jury brought in a special verdict that the will was procured by the undue influence of Ethel A. Finn. Accordingly, judgment denying probate of the will was entered, and a motion for new trial was denied.

This appeal followed.

It is here urged that there is no substantial evidence in the record to support the verdict and judgment. Also, that counsel for contestant was guilty of prejudicial misconduct.

Decedent's husband, William Washington, was a Bishop and head of the Bethel Church of Christ of Los Angeles. He died on May 12, 1949. The widow was then 66 years of age, suffered from a heart ailment and was unable to attend the funeral. Proponent, Ethel A. Finn, had lived with her aunt and uncle as a young girl and when the Bishop died was living with her family in the upper apartment of a duplex, owned by the Washingtons, who occupied the lower floor.

After her husband's death, Mrs. Washington was ailing and her niece helped to nurse her and assisted her in her business affairs.

Mrs. Finn's husband, Morris, had worked for the Santa Fe Railway as a mail clerk for twenty-five years. Shortly after the Bishop's death, Mrs. Washington asked Morris if he thought the Santa Fe attorneys would "handle" her will. He said he would find out. Accordingly, he consulted Mr. William F. Brooks, an attorney for the Santa Fe, who agreed to prepare a will for Mrs. Washington. He gave Morris his business card to take to her. Neither of the Finns knew Mr. Brooks previously, although Morris had seen him around the office.

Thereafter, Mr. Brooks had several telephone conversations with Mrs. Washington regarding her will, and various memoranda in sealed envelopes were delivered to him by Mr. Finn. Attorney Brooks met Mrs. Washington and Mrs. Finn for the first time when he took the will to the home for execution on June 7, 1949.

Mr. Finn testified that Mrs. Washington occasionally requested him to deliver papers in sealed envelopes to Mr. Brooks.

In answer to the question: "Now, you did discuss the making of the will with Mrs. Washington, didn't you, prior to the 7th of June, 1949?" Mrs. Finn stated: "I didn't discuss it. I took some notes down. She asked me to take some notes down for her. Mrs. Washington was pretty weak sometimes and she would get quite a few people to write things for her. She made up her own mind what she wanted done and asked me to take notes down for her, and

she would read them back and she would correct them or make you rewrite them. If they weren't what she wanted, she would make you do them over again."

On June 7, 1949, the day the will was executed, Mr. Brooks was accompanied by his secretary, Mr. Pond. The latter testified that Mrs. Finn escorted them to Mrs. Washington's room, introduced them to Mrs. Washington and left. The testatrix was seated in a chair near a table. Mr. Brooks gave her a copy of the will and proceeded to read its contents to her. As he read descriptions of her properties, testatrix would stop him saying: "Just a minute, now", and inquire whether the particular description set up in the will had reference to the 2nd Avenue, the 32nd Street, the 41st Place or the Arizona property. Having read the document and discussed it with her, Mr. Brooks asked her if she wanted to sign it. The will was then executed, the two men signing as attesting witnesses. This took between 40 or 45 minutes. Mrs. Washington rang her bell and Mrs. Finn came into the room and escorted the two men from the house.

Mrs. Sill, a practical nurse previously employed by the testatrix, was visiting Mrs. Washington that morning. When the two gentlemen were announced, Mrs. Washington asked the witness "to leave the room because her attorney was there and she wanted to make a will." She testified that she saw the men when they came and when they left; that Mrs. Finn showed them in to Mrs. Washington's room and came out; that after about 45 minutes or an hour, she "heard Mrs. Washington ring her bell and Mrs. Finn came to her room and showed you out." During this period the witness "was in the next bedroom with Mrs. Finn waiting for them to leave."

The will here under review disposed of twenty acres of land in Arizona improved with a dwelling house, and three parcels of real estate in Los Angeles, to-wit:

(1) The duplex on Second Avenue where the Washingtons and the Finns resided;

(2) The family homestead on 32nd Street;

(3) A four-flat building on 41st Place.

The duplex was devised to the Finns and it developed at the trial that Mrs. Finn had loaned the Washingtons \$6,000 when they purchased this property and held a note for that amount.

In October of 1949, Mrs. Washington sold the four-flat building to the Finns for \$15,000. This was payable \$5,000 in cash, and the rentals of \$130 per month, which Mrs. Washington was then receiving, to apply on the balance. Mrs. Finn testified that she borrowed \$7100 from the Bank of America, out of which she gave Mrs. Washington \$5000 and used the balance to pay off a note on other property owned by the witness. The \$5000 was deposited to the credit of Mrs. Washington, who gave Mrs. Finn a check for \$5000 a day or two later. With regard to this, Mrs. Finn testified: "That was to enable me to pay the bank off because it was impossible for me to make payments of \$92 a month to the bank and \$130 to her, and that was so that she could receive the \$130. That enabled her to continue with the same income she had. * * * That is the only way we could plan it out at all, and in this transaction we agreed that that would take care of the \$6,000 that they owed me * * *."

The 32nd Street property was sold in December, 1949, for \$8,000.

As a result, when Mrs. Washington died on December 27, 1949, there remained in the estate the duplex on Second Avenue which was left to the Finns, and the Arizona property, ten acres of which were devised to James Wilson Washington, presumably the contestant; five acres to Mrs. Washington's nephew and five acres to the Bishop's nephew.

Contestant presented evidence to the effect that he and his father, Bishop Washington, met for the first time in Nebraska in 1947. At that time, the Bishop told him he would give him ten acres of land he owned in Arizona if the witness would come west to live. James and his wife came to California and were very friendly with testatrix. After his father's death, James had a conversation with her and she

told him: "I want you to have at my death your father's half of the estate. * * * You are his and I promised him that I would do the things that are right by you."

Reverend Gransberry Washington, a brother of the Bishop, testified that he talked to testatrix in the period between May 23rd and June 7, 1949; that she said she had thought of getting a lawyer, naming him, to make her will, but that "Ethel and Morris wanted me to use their lawyer. * * * Brother, there are so many folks telling me things, I just don't know what to do. * * * I want my husband's people to have something. * * * I don't think Ethel and them want them to have anything." Also, she said she wanted "James to have his father's estate."

Reverend James Manley testified that he visited testatrix around May 23rd and she told him she was worried about her business; that Mrs. Finn was worrying her about making a will and she did not know what to do about it; that she wanted to do the right thing, and wanted James to have his father's half.

Lonnie Smith, a nephew of Bishop Washington, testified that he lived with the Washingtons from 1922 to 1935. That after the Bishop died, he visited Mrs. Washington almost every day; that prior to June 7, 1949, "She asked me confidentially not to mention it, but she said that Ethel didn't want James to have half of my uncle's estate. * * * But she (testatrix) did not want her people to have everything my uncle accumulated, and it would be right for James to have half of his daddy's estate."

Mrs. Hazel Washington, wife of contestant, testified that she was in the Washington home on June 7, 1949, the day the will was executed; that she saw Mr. Brooks and another gentlemen come out of Mrs. Washington's room and that Mrs. Finn was following them; that she (the witness) then went into Mrs. Washington's room and found testatrix sitting in a chair; that Mrs. Washington "thought I was Mrs. Finn. She looked up with a piece of paper in her hand and * * * she said, 'Ethel, what have you and your lawyers got me to

sign?' She was quite nervous. * * * I just turned around after she said that. She not knowing me, I walked out."

Mrs. Carolyn Bell Brown testified that she visited testatrix on July 15, 1949, and that the latter asked her if she knew a good lawyer. "I asked her the reason why, because it kind of aroused my curiosity. She said that Mrs. Finn had had a will—had her to make a will, the contents of which she didn't know and hadn't seen, and * * * when she asked Mrs. Finn to let her see the will, Mrs. Finn told her, 'I have put it in your deposit box downtown * * *.' She said she didn't know the contents of the will, and she didn't know what was in it, and it was against her will, and as soon as she was able to get out she was going to look in her deposit box, and she was going to have a new will made herself.

"I says, 'I saw a copy of the will of yours in the newspaper.' She said, 'You might have seen one, but it was Mrs. Finn's will and not mine.' She says, 'It was Ethel Finn's will, my niece.'"

In this state of the record, the jury brought in a verdict in favor of contestant and the trial judge denied proponent's motion for a new trial.

[1-4] "On appeal from a judgment in a will contest, like any other civil action, the evidence most favorable to the respondent should be accepted as true, and that which is unfavorable should be disregarded. Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384. The trier of facts is the sole judge of the credibility of witnesses and of the weight of the evidence in a will contest just as he is in any other case. Estate of Teel, *supra*, 25 Cal.2d at page 526, 154 P.2d 384. * * * The issue of undue influence in procuring the execution of the will presents a question of fact for the determination of the jury under proper instructions. 2 Page on Wills, p. 251, sec. 661. Circumstantial evidence, without any direct evidence, may be sufficient to support a finding of undue influence. 2 Page on Wills, *supra*; 26 Cal. Jur., p. 726, sec. 76." Estate of Abert, 91 Cal.App.2d 50, 52, 60, 204 P.2d 347, 348.

[5] And, as stated in 26 Cal. Jur. 651, sec. 21, citing Estate of Kilborn, 162 Cal.

4, 11, 120 P. 762; Estate of Sproston, 4 Cal. 2d 717, 52 P.2d 924; Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25; Estate of Hull, 63 Cal.App.2d 135, 146 P.2d 242; Estate of Abert, 91 Cal.App.2d 50, 204 P.2d 347; Estate of Leonard, 92 Cal.App.2d 420, 207 P.2d 66, and Estate of Merrick, 93 Cal.App. 2d 624, 209 P.2d 666: "Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony that there was pressure operated directly upon the testamentary act."

[6-8] However, in 26 Cal. Jur. 653, sec. 23, citing many cases, among which are Estate of Monks, 48 Cal.App.2d 603, 120 P.2d 167; Estate of Wolleb, 56 Cal.App.2d 488, 132 P.2d 864, and Estate of Rabinowitz, 58 Cal.App.2d 106, 135 P.2d 579, it is stated: "That the alleged wrongdoer had power or ability to control the testamentary act may be established by a variety of circumstances,—such as control over the decedent's business affairs, dependency of the decedent upon the beneficiary for care and attention, or domination on the part of the beneficiary and subservency on the part of the deceased. Unless explained, a transfer of property by the decedent to the alleged wrongdoer has a tendency to establish the charge of undue influence. Declarations of the decedent may be proved for the purpose of showing a subordination of the decedent to the will of the proponent. * * *"

[9-11] In the old case of *In re McDevitt's Estate*, 95 Cal. 17, 33, 30 P. 101, 106, the rule is stated as follows: "Evidence must be produced that pressure was brought to bear directly upon the testamentary act, but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator."

[12] Viewed in the light of the foregoing, there is sufficient evidence in the record produced by contestant to sustain the

verdict of the jury and the judgment based thereon.

Appellant urges that counsel for contestant committed prejudicial misconduct in his cross-examination of Mrs. Sill at the instant trial. She had testified on direct examination regarding what occurred in the Washington home on the morning of June 7, 1949. This witness admitted having had a conversation with Mr. Babb, contestant's attorney, who then asked her: "Q. And you also stated to me, did you not, that you helped prepare Mrs. Washington to receive Mr. Brooks and his secretary, didn't you? A. I did not. Q. You also stated to me at that time, did you not, that Ethel Finn gave you a hypo needle and asked you to administer it to Mrs. Washington, didn't you? A. No."

Appellant's objection to these questions "as not proper cross-examination" was overruled.

In rebuttal, respondent's attorney offered a transcript of all of Mrs. Sill's testimony taken at the first trial. To this, appellant's attorney expressed himself as being "agreeable to anything with respect to Mrs. Sill's testimony. However, if it is to be admitted, I want the entire testimony read."

This transcript was read to the jury, including the following: "And do you remember that you told me that just before the attorneys came into the room that Ethel gave you a hypodermic needle, you being a registered nurse, for you to inject into Mrs. Washington's body? A. I did not, because I wasn't even on duty. I was not on duty that day and I do not give hypodermics, only under the doctor's instructions when I am hired."

Following this, Reverend Gransberry Washington took the stand and testified that he called on Mrs. Sill after Mrs. Washington's death in order to find out what transpired in the Washington home on the day the will was executed. In his conversation with Mrs. Sill he asked her about Mrs. Washington's condition that day, and she replied: "I don't know. 'I didn't wait no longer after the 7th.' She said, 'That was my last day with Mrs. Washington, and she

was a very sick woman, and I gave her a hypo.' Q. On June the 7th? A. On June the 7th."

[13] In the absence of objection to this line of questioning and a request that the jury be admonished to disregard it, the contention that it was prejudicial cannot be raised for the first time on appeal.

For the reasons stated, the judgment appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.



116 Cal.App.2d 55

In re Adoption of AYERS.

AYERS et al. v. SMOCK et ux.

Civ. 19148 and 19147.

District Court of Appeal, Second District,
Division 2, California.

Feb. 13, 1953.

Consolidated proceedings for adoption of minor and to have minor declared free from custody and control of natural parents. The Superior Court, Los Angeles County, A. A. Scott, J., entered judgment for petitioners, and parents appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to support findings that parents left minor with petitioners for period of more than one year without provision for minor's support, and that parents intended to abandon minor.

Affirmed.

I. Adoption ☞ 13

In proceedings for adoption of minor and to have minor declared free from custody and control of natural parents, evidence was sufficient to sustain findings that parents left child with petitioners for period of more than one year without provision for support, and that parents intended to abandon child. Welfare and Institutions Code, § 701(a).

2. Infants ⇐ 16.15

In proceeding to have minor declared free from custody and control of natural parents, whether presumption that there was intent of parents to abandon minor because they failed for one year to provide for minor has been overcome by other evidence is question of fact for trial court. Welfare and Institutions Code, § 701(a).

3. Infants ⇐ 16.15

In proceeding to have minor declared free from custody of natural parents, question whether the intent to abandon a minor child has existed for a period of one year is a question of fact for the trial court. Welfare and Institutions Code, § 701(a).

4. Infants ⇐ 16.15

In proceedings for adoption of minor and to have minor declared free from custody and control of natural parents, it was province of trier of fact to pass on weight to be given evidence and credibility of witnesses, and decision of trier of fact when supported by substantial evidence would be binding upon appellate court. Welfare and Institutions Code, § 701(a).

Hornwood & Seltzer, Los Angeles (Herbert J. Beck, Los Angeles, of counsel), for appellants.

Jones & Green, Los Angeles (Robert Miller Green, Los Angeles, of counsel), for respondents.

McCOMB, Justice.

From (1) a judgment that Miss Ayers, a minor, be declared and adjudged to be free from the custody and control of her parents, appellants, pursuant to the provisions of Subdivision A, Section 701, Article VI of the Welfare and Institutions Code, and (2) an order of adoption awarding the custody of said minor to respondents, the parents appeal.

Chronology: i. March 28, 1950, a baby daughter was born to Mary and Leo Ayers in Los Angeles. Pursuant to previous arrangement the mother left the child with respondents, who have since cared for and reared her.

ii. March 30, 1950, respondents filed a petition for adoption of the minor.

iii. May 8, 1951, respondents filed a petition in the Juvenile Court of the County of Los Angeles to have said child declared free from the custody and control of her natural parents, appellants, pursuant to Section 701, Article VI of the Juvenile Court Law.

iv. May 23, 1951, appellants refused to give consent to the adoption of the minor and on June 12, 1951, they filed a petition objecting to the adoption proceedings.

v. The foregoing petitions were consolidated for trial and on November 15, 1951, the court found the minor was a person defined in Subdivision A of Section 701, Article VI of the Welfare and Institutions Code, and that she had been left in the custody of respondents by her parents for more than one year prior to the filing of the petition without provision for her support and maintenance, with the intent of the parents to abandon her. Accordingly the court entered judgment that the minor was declared and adjudged to be free from the custody and control of her parents, and on November 19, 1951, entered an order of adoption whereby the custody of the minor was awarded to respondents.

[1] *Question: Was there substantial evidence to sustain the court's findings that (a) appellants left their minor child with respondents for a period of more than one year without provision for her support, and (b) with intent to abandon her?*

Yes. Section 701 of the Welfare and Institutions Code provides in part:

"The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions:

"(a) Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the

intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him."

(a) The uncontradicted testimony disclosed that the child had been left voluntarily with respondents by appellants for more than one year; that they had never made any provision for or contributed anything to her support.¹ This evidence supported the first questioned finding.

(b) The undisputed evidence disclosed that appellants had never taken any steps to reclaim their child until more than one year had elapsed after they had placed her with respondents and until after the petition for adoption was filed. Also, appellant Mary Ayers had stated to respondent, "You have absolutely nothing to worry about. We don't intend to ever take the child away from you. It is yours and we have no intentions of ever taking her away." This evidence in addition to the presumption that failure to provide for a minor for one year is evidence of intent to abandon a minor (In re Welch, 108 Cal.App.2d 466, 473 [3], 238 P.2d 1031), amply sustains the trial court's finding that appellants left their child with respondents "with intent to abandon" her.

[2-4] The rules are established that (1) whether the presumption that there was intent of the parents to abandon the minor because they have failed for a year to provide for the child has been overcome by other evidence is a question of fact for the trial court (In re Sanders, 88 Cal.App.2d 251, 254 [1], 198 P.2d 523), (2) the question whether the intent to abandon has existed for a period of one year is also a question of fact for the trial court (In re Welch, supra, 108 Cal.App.2d 473, 238 P.2d 1031), and (3) it is the province of the

trier of fact to pass on the weight to be given the evidence and the credibility of witnesses in a proceeding pursuant to the provisions of Section 701 of the Welfare and Institutions Code, and the decision of the trier of fact supported by substantial evidence, as in the instant case, is binding upon the appellate court. (In re Peterson, 56 Cal.App.2d 791, 794, 133 P.2d 831.)

In re Cattalini, 72 Cal.App.2d 662, 165 P.2d 250, relied on by appellants, is consistent with the authorities cited above, such case merely holding the failure to provide or communicate for one year with a minor child is only presumptive evidence of the intent to abandon, and the intent must be shown.

Likewise Moch v. Superior Court, 39 Cal. App. 471, 179 P. 440, is authority for the proposition that it is the duty of the trial court to determine from the evidence whether or not the actual intent to abandon exists in any particular case.

In re Cordy, 169 Cal. 150, 146 P. 532, 534, also relied on by appellants, is factually distinguishable from the present case. In that case the natural mother with three children was deserted by her husband. The child involved was injured in the San Francisco earthquake of 1906, found by the mother after search on her part and nursed back to health by her. The mother placed the child in the temporary care of various other persons on account of her financial position but never with the intent to abandon her. The child was finally placed with people who moved from San Francisco. There is no evidence in the Cordy case of the slightest word or act on the part of the natural mother that can be construed or interpreted as an intention of abandoning the child. Therefore the case has no application here.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

1. Respondent Smock testified:

"Q. By Mr. Green: Did Mr. or Mrs. Ayers ever make any provision for the support of the child? A. No, they

never contributed anything at all. Never.

"Q. Did they ever contribute any money for the support of the child? A. No, no money at all."

CHRYSLER CORP. v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.
Civ. 19273.

District Court of Appeal, Second District,
Division 2, California.
Feb. 10, 1953.

Rehearing Denied March 6, 1953.

Hearing Denied April 8, 1953.

Mandate proceedings brought by employer to secure removal of charges made against its account for unemployment benefits paid to office workers laid off by plaintiff when its plant was paralyzed by production workers' strike. The Superior Court, Los Angeles County, Frank G. Swain, J., granted the relief sought, and the defendants appealed. The District Court of Appeal, Fox, J., held that those office workers who were members of the union which represented all groups of employees in plant and which had called strike had not been entitled to benefits, but that the nonunion office workers had been entitled to benefits.

Reversed with directions.

1. Social Security and Public Welfare ⇨539

The unemployment insurance appeals board is a statutory agency with state wide jurisdiction but without constitutional authority to make final determination of facts. Gen.Laws, Act 8780d, §§ 39-41, 56(a).

2. Constitutional Law ⇨284(1)

Imposition of an erroneous charge against an employer's account, with the attendant consequences of its having to make increased contributions, amounts to a wrongful deprivation of property. Gen. Laws, Act 8780d, §§ 39-41, 56(a).

3. Social Security and Public Welfare ⇨658

Employer complaining of board's award of unemployment benefits is entitled to a limited trial de novo in the Superior Court. Gen.Laws, Act 8780d, §§ 39-41, 56(a).

4. Mandamus ⇨174

In mandate proceedings to require removal of charges made against employer's account for unemployment benefits paid to office workers laid off because of lack of work when production workers' strike

paralyzed plant, Superior Court properly exercised its independent judgment in making determination of facts, even though unemployment insurance appeals board had determined that claimants had not left their employment because of a trade dispute. Gen.Laws, Act 8780d, §§ 39-41, 56(a).

5. Mandamus ⇨168(4)

In mandate proceedings to require removal of charges made against employer's account for unemployment benefits paid to office workers laid off because of lack of work when production workers' strike paralyzed plant, evidence sustained Superior Court's determination that those office workers who were members of union which represented all groups of employees in plant and which had called strike had not been entitled to unemployment benefits. Gen. Laws, Act 8780d, § 56(a).

6. Social Security and Public Welfare ⇨435

Under the "volitional test" as to right of an employee to unemployment compensation benefits during a labor dispute, right to benefits depends upon whether employee left his job of his own free will or was forced to do so because of acts of others. Gen.Laws, Act 8780d, § 56(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Volitional Test".

7. Social Security and Public Welfare ⇨271

The Unemployment Insurance Act was designed to cushion the impact of such impersonal industrial blights as seasonal, cyclical and technological idleness by furnishing benefits for persons unemployed through no fault of their own. Gen.Laws, Act 8780d, § 1.

8. Social Security and Public Welfare ⇨440

Status of non-union workers, for purposes of Unemployment Insurance Act, would be in no way compromised by virtue of fact that, under provisions of Taft-Hartley Act union calling strike, which paralyzed plant and resulted in their unemployment was their collective bargaining agent. Gen.Laws, Act 8780d, § 56(a); National Labor Relations Act, § 9(a), as amended, 29 U.S.C.A. § 159(a).

9. Social Security and Public Welfare 440

Where union representing all groups of workers employed in plant called strike of production workers which paralyzed plant and forced employer to lay off office workers, non-union office workers, as distinguished from union office workers, were entitled to unemployment benefits. Gen. Laws, Act 8780d, § 56(a).

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for appellants.

Wright, Wright, Green & Wright, Loyd Wright and Charles A. Loring, Los Angeles, for petitioner.

FOX, Justice.

The judgment appealed from vacated the decision of the Unemployment Insurance Appeals Board granting unemployment insurance benefits to certain claimants, employees of petitioner, and directed the insurance of a writ of mandate ordering that all charges made to or against the account of petitioner because of such payments be removed from the books of the California Employment Stabilization Commission.

Petitioner manufactures and sells automobiles. Its domicile and principal factory are in Michigan. One of its assembly plants is at Los Angeles where the claimants are employed. In April, 1949, they applied to the Department of Employment for unemployment benefits on the ground that they had been laid off by petitioner. The latter protested the granting of the claims on the ground that they had left their employment because of a trade dispute. The Department of Employment ruled claimants were eligible for unemployment benefits. This decision was upheld by a Referee and the Unemployment Insurance Appeals Board. Thereupon, petitioner sued out a writ of mandate in the court below where the controversy was submitted on the record of the administrative tribunal.

The trial court made independent findings of fact based on the administrative

record prepared by the Commission. In the main these findings are largely in accord with those made by the administrative officers as far as the objective circumstances resulting in the claimants' loss of employment are concerned. However, the trial court included a crucial finding, not only absent from the written opinion of the Appeals Board but diametrically opposed to its determination, that the claimants were, in effect, responsible for their own unemployment and hence disqualified from receiving benefit payments.

Petitioner employs both union and non-union workers in its Los Angeles plant. All of petitioner's employees are divided into four separate groups for the purpose of bargaining collectively, to wit: (1) production and maintenance workers; (2) engineers; (3) office workers; (4) cafeteria workers. The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (hereinafter referred to as the UAW), an affiliate of the Congress of Industrial Organizations (C.I.O.), is the collective bargaining agent for each of the categories of workers above named. The four groups of workers employed by petitioner at its Los Angeles plant are represented by Local 230 of the UAW, although in other geographical areas where there is a greater concentration of workers each group is represented by separate local organizations of the same union. All of the claimants for benefits here involved are office workers, some of them members of Local 230, the rest non-members. The office workers' unit of Local 230 was the bargaining agent for all such workers, union and non-union. Each of the four groups of workers had entered into separate bargaining agreements with petitioner, although each agreement was negotiated through the National Negotiating Committee of the UAW, which committee is the representative negotiating agency of all petitioner's employees.

In June, 1949, the labor relations between petitioner and its employees were governed by its written agreement with the UAW dated April 26, 1947, as amended May 28, 1948. On June 23, 1949, the

UAW, through its representative, Mr. Norman Mathews, Director, National Chrysler Department of the said union, served upon petitioner at its head office in Detroit, Michigan, written demands for changes in the basic labor agreement between petitioner and employees in behalf of all the individual categories of workers, including the claimants herein. Petitioner's refusal to accede to these demands engendered a labor dispute involving protracted negotiations. Under the provisions of the constitution of the UAW, such negotiations are conducted between the National Negotiating Committee of said union and the particular employer affected. The National Negotiating Committee, in its bargaining conferences with petitioner, consisted of the presidents of all the local unions within petitioner's establishments across the nation, including the president of Local 230, and was headed by Mr. Mathews in his capacity as director, National Chrysler Department. The negotiations having proved abortive, the National Negotiating Committee recommended that a vote be taken among the membership of the various local unions to determine whether or not the members would strike if called upon to do so at the discretion of the UAW in support of the demands made upon petitioner. On August 16, 1949, the production worker members and office worker members of Local 230 (as well as the other categories) voted, by secret ballot, to strike petitioner's Los Angeles plant if requested to take such action by the UAW. This same decision was reached by members of all other locals of the said union employed in petitioner's plants throughout the United States.

Negotiations between the parties continued sporadically until January 23, 1950, at which time the National Chrysler Conference and the National Negotiating Committee arrived at a determination that, as a matter of strike strategy and policy, only the production workers would be directed to strike, while the office workers would remain at their jobs together with other units of petitioner's employees. This recommendation was approved and adopted by the

Executive Board of the UAW on January 24, 1950, and its decision was immediately reported to the various local unions of the organization. On the same day on which it was advised of the Executive Board's strike policy, office worker members of Local 230 attended a general meeting where they voted to conform to and abide by this decision. On January 25, 1950, the production workers employed by petitioner, acting in pursuance of the Executive Board's policy decision, went out on strike until the settlement of the dispute on May 4, 1950. The office workers as a group continued to work for petitioner, passing through the picket lines established by the production workers at the main gate of petitioner's plant. The petitioner utilized the services of the office workers both to complete work already undertaken and in expectation of an early settlement of the dispute, but within three weeks after the production workers launched their strike, there occurred a gradual diminution of work for the office personnel. Finally, on or about April 19, 1950, petitioner notified its office workers that as a consequence of the strike, operations had been paralyzed at the Los Angeles plant and advised them that their services were no longer required because of a lack of work. Some of the claimants testified that for some weeks before April 19, 1950, operations had been so drastically curtailed that they sat around either in idleness or engaged in knitting to occupy their time.

The strike against petitioner, which was concluded on or about May 4, 1950, with both sides agreeing to new contracts, was intended to procure broad economic benefits for all groups of its employees. Each category of worker had a direct interest in the outcome of the strike, and the contracts negotiated in behalf of each bargaining group, as a prelude to the termination of the production workers' strike, contained changes which were practically identical in terms and resulted in substantially similar benefits.

As already appears, the trial court, in making findings of fact in consonance with the narrative of events set forth above, made the additional finding that all of the claimants (exclusively office workers) had

voluntarily participated in a trade dispute with petitioner and had engaged in conduct which set in motion a chain of events culminating in the closing of petitioner's Los Angeles plant, thus causing their own unemployment. The court found further that as a result of their actions in connection with the trade dispute, the claimants had left their work within the meaning of section 56(a) of the Unemployment Insurance Act, Gen.Laws, Act 8780d, and were therefore ineligible for benefits under said act. The court, thereupon, granted a writ of mandate which in effect vacated the decision of the Appeals Board and directed that all charges made to the petitioner's account because of its award of benefits to claimants be stricken.

In determining the merits of this appeal, we are confronted with three questions requiring separate consideration: (1) was the trial court entitled to exercise its independent judgment on all the evidence before the administrative tribunal; (2) did the court correctly determine that the union office workers are excluded from benefits under section 56(a) of the Unemployment Insurance Act; (3) was the court correct in its decision that the non-union office workers left their employment because of a trade dispute with reference to section 56(a) of the aforesaid act?

[1-4] Appellants contend that the trial court was without power to reweigh the evidence; that under the restricted review procedure outlined in section 1094.5, Code of Civil Procedure, the court is confined to the question of whether the Appeals Board's decision is supported by substantial evidence. While this question has been enshrouded in some uncertainty, some of the doubt as to the scope of review by the trial court over the decisions of the Unemployment Insurance Appeals Board in a mandate proceeding, has been dissipated by the clarifying pronouncement of the Supreme Court in the recent case of *Thomas v. California Employment Stabilization Comm.*, 39 Cal.2d 501, 247 P.2d 561. The *Thomas* case involved a proceeding in mandamus brought by claimants for unemployment insurance benefits to compel the Appeals Board to authorize

benefit payments. The Board had issued an administrative order denying benefits on the grounds that claimants had disqualified themselves by leaving their employment in connection with a trade dispute. In ruling upon the issue of the extent of judicial review of adjudications of the Unemployment Insurance Appeals Board, the court spoke in the following language: "The appeals board is a statutory agency with statewide jurisdiction, and it does not have constitutional authority to make final determinations of fact. For general statutory provisions see Unemp.Ins.Act, [3] Deering's Gen.Laws [1949 Pocket Supp.], Act 8780d, §§ 1, 77 et seq. Any person deprived of a property right by such an administrative body is entitled to a limited trial de novo in the superior court. *Laisne v. State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457; *Moran v. [State] Board of Medical Examiners*, 32 Cal.2d 301, 196 P.2d 20; *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 136 P.2d 304. In our opinion the benefits provided for by the Unemployment Insurance Act are property rights within the meaning of the term as used in the cases requiring a trial de novo." *Thomas v. Calif. Emp. Stab. Comm.*, supra, 39 Cal.2d at page 504, 247 P.2d at page 562.

By a parity of reasoning, it seems clear that under the procedure established by the Unemployment Insurance Act for contributions by employers to the unemployment fund, petitioner has a direct pecuniary interest in any payments made to a claimant which may be charged against his reserve-account. As an inducement for uninterrupted business operations and to minimize labor turnover, the Act provides for a rate of contributions by an employer based upon the ratio of the employer's average base payroll to the amount of revenue with which he is credited on the books of the Employment Stabilization Commission. This is the so-called merit rating provision of the statute. Thus, an employer who provides continuous employment is required to make contributions to the fund at a rate lower than the 2.7 percent which the statute fixes as the maximum contribution; and if his employment experience is favorable enough, as where

his account on the commission's books reflects a prescribed excess of contributions over benefits paid, he is not required to make any contribution. See secs. 39, 40, 41. Any final decision of the administrative tribunal which awards benefits to a claimant has the effect of depleting an employer's reserve-account, and may thereby adversely affect his rate of contributions to the fund during a particular rating period. It is of direct financial advantage to an employer to prevent inroads on his reserve account chargeable to benefit payments in order to protect his merit rating or to become eligible for a reduced rate of contribution. The imposition of an erroneous charge against an employer's account, with the attendant consequence of his having to pay an increased contribution, amounts to a wrongful deprivation of property. The petitioner, as a contributing employer, has a vital interest in the status or condition of its reserve account and since the administrative decision here in question may affect its financial responsibility to the unemployment fund, a sufficient right of property is involved to entitle it to a limited trial de novo as to the propriety of the charges made against its account.

[5] There is sufficient evidence to sustain the trial court's determination that the union office workers are disqualified from receiving unemployment insurance benefits. Section 56(a) of the Unemployment Insurance Act, as amended in 1945, provides that a claimant is ineligible for unemployment benefits: "If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed." Stats. 1945, ch. 1178, p. 2225, as amended, 3 Deering's Gen.Laws, 1949 Pocket Supp.Act 8780d, sec. 56(a).

[6] Although a literal reading of this language might suggest that eligibility for benefits was dependent on the objective ascertainment of the ultimate act which resulted in the cessation of employment, this section has been interpreted by the courts

to require an analysis of whether the unemployment resulted from "the fact of voluntary action" by the claimant or whether he was compelled to leave his job because of the acts of others. *Bodinson Mfg. Co. v. California, Emp. Comm.*, 17 Cal.2d 321, 327, 328, 109 P.2d 935; *Matson Terminals, Inc. v. California Emp. Comm.*, 24 Cal.2d 695, 703, 151 P.2d 202. This "volitional" test postulates the need for an inquiry into the dynamics of the circumstances which have created the unemployment, the criteria for denial or awarding of benefits being the personal responsibility of the claimant for his unemployment in the former case, *McKinley v. California Emp. Comm.*, 34 Cal.2d 239, 209 P.2d 602, or the fault of the employer in the latter case. *Bunny's Waffle Shop v. California Emp. Comm.*, 24 Cal.2d 735, 741, 151 P.2d 224. "The volitional test itself is based upon a just analysis of a substantial subjective element, and it cannot properly be extended or perverted by insistence upon mere form." *McKinley v. California Emp. Comm.*, supra, 34 Cal.2d at page 245, 209 P.2d at page 606. This language epitomizes the crucial essence of the "volitional" test, clearly refuting a mechanical reading of the statute, and requiring a searching evaluation of the economic realities involved in a particular trade dispute, a study of the interplay of pressure and counter-pressure by the contending factions, and a weighing of all the anterior events which have moulded and inexorably evolved the pattern of resultant unemployment. Only by the equitable application of such a standard may we achieve the fundamental purpose of unemployment insurance, which is designed to cushion the impact of such impersonal industrial blights as seasonal, cyclical and technological idleness, and realize the policy expressed in the act of furnishing "benefits for persons unemployed through no fault of their own". Stats.1935, p. 1226, as amended, Stats.1947, ch. 651, sec. 1, 3 Deering's Gen.Laws, 1949 Pocket Supp. Act. 8780d, sec. 1.

In applying these principles of law, which have been developed in harmony with the

legislative objective of providing only for the innocent victims of trade disputes, the conclusion is inevitable that the union office workers are disqualified from receiving benefit payments. The facts clearly demonstrate that their unemployment was not involuntary in the sense demanded by a realistic application of the "volitional" test "based upon a just analysis of a substantial subjective element." The record indicates that as members of Local 230, UAW, the union claimants were involved in a labor dispute with petitioner and that a demand for a revision of the contracts of employment between petitioner and all categories of its employees was the crux of this dispute. By its representation on the national negotiating committee, Local 230 directly participated in the bargaining negotiations and it is undisputed that it had a direct and material interest in the successful outcome of these negotiations. In August of 1949, the union office workers voted to strike if necessary to enforce their demands for more favorable contract terms. However, as a matter of strike strategy and as a tactical maneuver in the contest between employer and union, the national leadership of the UAW exercised the authority with which it was vested by calling a strike only of the production workers. This decision was obviously dictated by the fact that such a tactic would not only bring to bear the maximum of economic pressure against petitioner in the struggle to attain the objectives in which all the workers were interested, but would result in a minimum of economic hardship and dislocation to the other workers. The union office workers voted to conform to this decision of its officers, and thereafter continued to work although they were fully aware that the strike, simultaneously called, of the production workers would strangle operations and squeeze to a trickle the amount of work available for them. In participating in the events leading up to the strike, in supporting the tactical decisions made by their union officials empowered to conduct negotiations and formulate strike policy, in acting in concert with the production workers at all stages of the con-

troversy, and, through identical union representatives, permitting the use of a production workers' strike as the instrumentality for the effective implementation of the over-all strike strategy, it is manifest that the union office claimants were protagonists in a struggle involving a calculated risk of paralyzing petitioner's operations before the new contracts, of which they would be beneficiaries, would be consummated.

That this identity of interest and concert of activity between union office and production workers was indeed a vivid reality unmistakably appears from a bulletin which was placed in evidence. The bulletin was issued by the executive board of Local 230 and circulated at the main gate of petitioner's plant. Its salient provisions are:

"Why didn't the office workers strike?"

Policy decisions were made by a national conference of Chrysler workers in Detroit. Office workers had their representatives there from most of the big plants in Detroit. It was decided at this conference that stopping of all production by production workers and stopping of development for the '51 models by the engineers would force a quicker settlement by Chrysler. The 'pulling' of the office workers would not materially hurt the corporation and would prevent hourly people and engineers from receiving pay due them. For these reasons it was determined that office workers would not strike 'at this time.'

"Will office workers be affected by the outcome of this strike?" Office workers have just as much, if not more, to gain by this strike than do other workers. Besides the direct economic issues that are at stake for all Chrysler workers, there is also the question of equalization of rates and classifications with Detroit, the question of automatic salary progression versus so-called 'merit and ability' increases, the question of tying down vacation and holiday payment, etc. Chrysler will never offer these changes on a silver platter. We have to scrap for them."

It is unmistakably patent that we are confronted here with an ingenious attempt of a group of workers to promote the demands of their union by choosing a weapon, in a trade dispute concerning all union workers, potent enough to annihilate the employer's efforts to maintain its operations, while adopting the position that union members, laid off by the employer's enforced suspension of activity, are unemployed through the fault of the employer.

Appellants argue that section 56(a) must be construed in the simple terms of the objective phraseology used, so that unless a worker "left" his employment because of a trade dispute, he is eligible for benefits. As indicated above, this is not the view taken by our courts. An example of the fallacy of this sterile, "last act" interpretation here contended for is presented by the decision in *McKinley v. California Emp. Comm.*, 34 Cal.2d 239, 209 P.2d 602. In that case, an employers' association of wholesale bakers in Sacramento was engaged in negotiating a new industry-wide master contract with the Bakery-Workers' Union. The employers' association had been formed in 1935, and since then had entered into work contracts with the union, whose local represented all the workers in the area. The association had agreed that a strike against any employer "would be treated" as a strike against all. The employee union members understood that a strike called against any member of the association would probably result in the other bakeries closing down. During the negotiations initiated by the union to amend the master contract the union members authorized a strike at one or more of the bakeries. When negotiations collapsed, the union called a strike against a single member employer and stationed pickets at the struck plant. A few days later the other member employers closed their doors. The employees who were locked out applied for and were granted unemployment insurance benefits. On petition by the seven employers who had shut down for a writ of mandate to strike out the charges made to their unemployment insurance account, the court held that since the employees authorized

a strike with full awareness of the possible consequences of shutting down one plant, they were voluntarily responsible for their subsequent unemployment. The court reiterated that "the form of the cessation of employment is not controlling and the determinative factor is the volitional cause of the work stoppage." *McKinley v. California Emp. Comm.*, supra, 34 Cal.2d at page 243, 209 P.2d at page 605.

So compelling are the analogous features of the *McKinley* case to the question here under consideration and so helpful the text last quoted, that we consider the principles there applied serve to control the instant case. There the court recognized that where a union uses the tactical maneuver of a strike against only one employer, and where a termination of employment is reasonably foreseeable by the use of such strategy, the consequent unemployment of non-striking workers who are members of the union must be regarded as voluntary. This is precisely the situation which, in the present case, could reasonably have been envisaged as a consequence of calling a strike of production workers whose interrupted employment was necessary to the functioning of the assembly plant. It may be remarked that in the *McKinley* case, the remaining employers were not impeded from continuing their operations by the strike called at one plant. In the present case, there is the stronger fact that the strike of the production workers brought petitioner's operations to a physical standstill. It would oblige us to completely ignore the realities to hold that the union office workers' employment was terminated by petitioner and not by a choice they themselves freely made by their participation in a labor dispute in which they and their representatives selected the economic weapons.

[7-9] The question remaining relates to the eligibility of the non-union office workers for benefits. In the light of the principles that govern this matter, the trial court erred in denying benefits to these claimants. So far as these workers are concerned, in no sense can it be fairly said

PEOPLE v. SICA,

Cr. 4942.

District Court of Appeal, Second District,
Division 2, California.

Feb. 13, 1953.

Hearing Denied March 12, 1953.

that their unemployment can be attributed to any voluntary action on their part. At no time did they share in the strike vote, or have a voice in the union councils, or perform any overt acts that would place them in league with the union workers. At all times they crossed the picket lines not as a part of the union strategy, which they had neither consented to nor authorized, but as individuals in the normal pursuit of their jobs. Their status is in no way compromised by virtue of the fact that under the provisions of the Taft-Hartley Act, 1947, 61 Stat. 143, 29 U.S.C.A. § 159(a), Local 230, UAW is their collective bargaining agent. That Local 230 had this power is not the result of any act on the part of non-union workers, but merely by operation of law, and this fact alone cannot be used to penalize non-union workers by fastening upon them responsibility for the unemployment flowing from a chain of events sparked and set in motion by union policy. *Rhea Mfg. Co. v. Industrial Comm.*, 231 Wis. 643, 285 N.W. 749, 753. The non-union workers did not leave their jobs, nor did their unemployment result from any fully exercised choice in the course of industrial strife. As non-participants and neutrals in the strike whose loss of work was due solely to factors over which they had neither control nor influence, the non-union workers are not within the class excluded by section 56(a) of the Unemployment Insurance Act. As helpless and inarticulate pawns situated in the no-man's land of the area of combat between employer and union, they belong, rather, to that very group for whom the benefits of the Act are provided to mitigate the financial rigors of idleness stemming from the accident of involuntary unemployment.

The judgment is reversed with directions to issue a writ of mandate ordering that all charges made to or against the account of petitioner because of unemployment insurance payments to union office workers of petitioner during the period April 19, 1950, to May 4, 1950, inclusive, be removed from the books of the California Employment Stabilization Commission.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

Proceedings on petition and motion to vacate and set aside judgment convicting defendant of conspiracy. The Superior Court of Los Angeles County denied motion and petition, and he appealed. On motion to dismiss appeal, the District Court of Appeal, Fox, J., held that under statute requiring that after judgment has been affirmed on appeal, proceedings in nature of petition for writ of error coram nobis to vacate judgment shall be addressed to court which affirmed judgment, and when hearing is not granted by Supreme Court, application shall be made to district court of appeals, when judgment of conviction had been affirmed and hearing had been denied by Supreme Court, Superior Court was without jurisdiction to enter same motion and petition.

Appeal dismissed.

1. Criminal Law ☞998

Under provision of Penal Code that if judgment has been affirmed on appeal, no motion shall be made or proceeding in nature of petition for writ of error coram nobis shall be brought to procure vacation of said judgment, except in court which affirmed judgment on appeal, and when hearing is not granted by Supreme Court, application shall be made to the District Court of Appeals, petition to have judgment of conviction set aside, filed after affirmation of defendant's conviction for conspiracy and denial of hearing by Supreme Court, was required to be filed in District Court of Appeal which affirmed judgment of conviction, and Superior Court was without jurisdiction. Pen.Code, § 1265.

2. Constitutional Law ☞56

Criminal Law ☞978

Amendment to Penal Code providing that if judgment has been affirmed on appeal, no motion shall be made or proceeding in nature of petition for writ of error coram nobis shall be brought to procure vacation of such judgment, except in court which affirmed judgment on appeal, is pro-

cedural in character and is not unconstitutional as a legislative encroachment on the original jurisdiction of the Superior Court. Pen.Code, § 1265; Const. art. 6, § 5.

3. Appeal and Error ⇐1

Criminal Law ⇐1004

The Legislature has power to regulate criminal and civil proceedings and appeals.

4. Criminal Law ⇐997

A petition for writ of error coram nobis is regarded, in practical effect, as a motion to vacate judgment, and is neither a new adversary suit nor an independent action, but simply a part of the proceedings in the case to which it relates, and it does not belong to that class of proceedings over which original jurisdiction is vested by the Constitution in the Superior Court. Pen.Code, § 1265; Const. art. 6, § 5.

5. Constitutional Law ⇐270

As a part of the protection afforded by the due process clause of the Fourteenth Amendment to the Federal Constitution, there must be available an effective judicial corrective process to enable a convicted person, even after appeal and affirmance of a judgment of conviction, to establish that in truth the judgment was procured under circumstances which offend the fundamental concepts of justice, but it is not required that the procedure provided shall encompass, as an absolute right in every case, a further trial on issues of fact. U.S. C.A.Const. Amend 14; Pen.Code, § 1265.

6. Constitutional Law ⇐270

Criminal Law ⇐978

Provision of Penal Code requiring that after a judgment has been affirmed on appeal, a proceeding in the nature of a petition for writ of error coram nobis to vacate judgment shall be addressed to court which affirmed judgment, and that when a hearing is not granted by the Supreme Court, the application for writ shall be made to the District Court of Appeal, is not violative of the Fourteenth Amendment to the Federal Constitution. U.S.C.A.Const. Amend. 14; Pen.Code, § 1265.

Edmund G. Brown, Atty. Gen., Frank Richards, Asst. Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

This is a motion to dismiss defendant's appeal.

In September, 1951, defendant was convicted, in the Superior Court of Los Angeles County, of conspiracy to violate section 337a of the Penal Code and sentenced to the county jail for one year. His appeal from the judgment was affirmed by this court, 112 Cal.App.2d 574, 247 P.2d 72, and a hearing was denied by the Supreme Court. In September, 1952, the remittitur affirming the judgment was filed in the superior court. Thereafter defendant filed in the superior court a petition and notice of motion, supported by affidavits, to vacate and set aside the judgment against him. He appeals from the order denying his motion and petition. The appeal, however, must be dismissed.

[1] Section 1265, Penal Code, so far as here material, provides "that if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error coram nobis shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal. When a judgment is affirmed by a district court of appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the district court of appeal." There can be no doubt that defendant's petition and motion in the superior court was "brought to procure the vacation of said judgment" against him. The superior court was, therefore, without jurisdiction to entertain defendant's motion and petition because the district court of appeal, under the plain language of the code section, had exclusive jurisdiction thereof. *People v. Ponce*, 103 Cal.App.2d 271, 272, 229 P.2d 77; *People v. Dunlop*, 102 Cal. App.2d 314, 318, 227 P.2d 281; *People v. Schunke*, 102 Cal.App.2d 875, 877, 228 P.2d 620.

[2, 3] Defendant challenges the quoted portion of section 1265, Penal Code, as an unconstitutional legislative encroachment

Russell E. Parsons, Los Angeles, for appellant.

on the original jurisdiction of the superior court as provided in Article VI, section 5, of the California Constitution. We are satisfied, however, that the amendment is procedural in character and therefore within the constitutional power of the Legislature. *Ex parte Harker*, 49 Cal. 465, 467; *In re Garner*, 179 Cal. 409, 412, 177 P. 162; *Sacramento, etc., D. Dist. v. Superior Ct.*, 196 Cal. 414, 432, 238 P. 687. "The power of the Legislature to regulate criminal and civil proceedings and appeals is undisputed." *Brydonjack v. State Bar*, 208 Cal. 439, 442-443, 281 P. 1018, 1020, 66 A.L.R. 1507.

[4] The amendment does not divest the Superior Court of any measure of the jurisdiction conferred upon it by the Constitution. A careful reading of Article VI, section 5, discloses no intimation that an application in the nature of a writ of error *coram nobis* belongs to that class of proceedings over which original jurisdiction is vested in the superior court. On the contrary, it has been held in this state that a petition for a writ of error *coram nobis* is regarded, in practical effect, as a motion to vacate a judgment, *People v. Butterfield*, 37 Cal.App.2d 140, 143, 99 P.2d 310, and is neither a new adversary suit nor an independent action, but simply a part of the proceedings in the case to which it relates. *In re Paiva*, 31 Cal.2d 503, 509, 190 P.2d 604. Far from being of constitutional origin, the "proceeding designated '*coram nobis*' in this state is a court-made proceeding * * *." *People v. Adamson*, 34 Cal.2d 320, 329, 210 P.2d 13, 17. It was contrived by the courts at an early epoch in the growth of common-law procedure to provide a corrective remedy "because of the absence at that time of the right to move for a new trial and the right of appeal from the judgment." *People v. Vernon*, 9 Cal.App.2d 138, 140, 49 P.2d 326, 327. The gradual development of remedies and forms of relief nonexistent at common law by legislative action designed to rectify judgments based upon a restricted class of errors has served to confine within narrow limitations the circumstances under which a trial court may grant motions in the nature of a writ of error

coram nobis. *People v. Shorts*, 32 Cal.2d 502, 512-513, 197 P.2d 330; *People v. Adamson*, *supra*; *People v. Reid*, 195 Cal. 249, 258, 232 P. 457, 36 A.L.R. 1435. It follows that where the action of the Legislature in providing new statutory remedies has been held to abridge or supersede the use of the writ of error *coram nobis*, *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325, the Legislature may introduce further procedural incidents to the availability of the writ (and its contemporary counterpart—the motion to vacate judgment) without in any way trenching on the jurisdiction of the superior court.

The Legislature in its wisdom has decided, in amending Penal Code section 1265, to require that after a judgment has been affirmed on appeal, the proceeding in the nature of a petition for a writ of error *coram nobis* to vacate the judgment shall be addressed to the court which affirmed the judgment; and when, as in the instant case, a hearing is not granted by the Supreme Court, the application shall be made to the District Court of Appeal. In the light of our previous discussion, it is clear that this section falls within the power of the Legislature to enact reasonable statutes regulating the procedural steps to be taken in exercising the relief afforded by the common law writ of error *coram nobis* and the statutory remedy of a motion to set aside a judgment. Whether the Legislature was animated by a desire to circumvent "the time consuming practice of making an application * * * in the trial court followed by an appeal from an adverse determination", see concurring opinion of Mr. Justice Edmonds in *People v. Adamson*, *supra*, 34 Cal.2d at page 338, 210 P.2d at page 22, and footnote thereto, or by some other cogent consideration we need not here speculate. The achievement of such a purpose is a legitimate legislative objective, and in amending section 1265 to its present form the Legislature has not transgressed into the zone of the jurisdiction allocated to the superior court by the California Constitution.

[5, 6] Defendant further contends that the complained of section is in violation of the due process clause of the Fourteenth

Amendment to the Constitution of the United States in that its operation takes from him the right to be heard in the trial court. It is established that as a part of the protection afforded by the due process clause of the Fourteenth Amendment there must be available an effective judicial corrective process "to enable a convicted person, even after appeal and affirmance of a judgment of conviction, to establish that in truth the judgment was procured under circumstances which offend 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' * * *." (Citing cases.) But * * * the necessity for such process does not require that the procedure provided shall encompass, as an absolute right in every case, a further trial on issues of fact * * *." *People v. Shorts*, 32 Cal.2d 502, 506, 197 P.2d 330, 332. This statement of principle clearly indicates that the legal machinery set up by section 1265 for the application for a writ in the nature of coram nobis to vacate a judgment after affirmance on appeal to the court in which the judgment was affirmed is not repugnant to the due process clause.

In order to prevent unwarranted delays in the execution of proper judgments of conviction, other states have long had in effect procedures bearing a similarity to the one here in question. In Alabama and Florida it is required that after the affirmance of a judgment of conviction, the defendant seeking to set it aside shall obtain permission to file the petition for the writ of error coram nobis in the trial court from the appellate court which affirmed the judgment. In a case originating in Florida, where this procedure was attacked, as here, as a violation of due process, the Supreme Court of the United States, in finding sufficient compliance with the due process clause, declared: "Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury." *Hysler v. State of Florida*, 315 U.S. 411, 417, 316 U.S. 642, 62 S.Ct. 688, 691, 86 L.Ed. 932.

In a subsequent case arising under the Alabama procedure, the United States Supreme Court, in *Taylor v. State of Alabama*, 335 U.S. 252, 68 S.Ct. 1415, 92 L.Ed. 1935, again had occasion to express itself on this same subject. It was there said: "The question in this case is whether the State of Alabama deprived the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States when the Supreme Court of that State denied him permission to file a petition for writ of error coram nobis in the Circuit Court of Mobile County, Alabama. We hold that it did not. * * * We hold further that the procedure of that State is in accordance with long-established common law practice and constitutes due process of law under the Fourteenth Amendment in requiring that the permission of the Supreme Court of Alabama be secured by a petitioner before filing such a petition for writ of error coram nobis, in a trial court of Alabama, if it appears that the trial court's judgment already has been affirmed by such Supreme Court. * * * [T]he writ of error coram nobis brings the error of fact directly before the trial court. However, when the judgment of the trial court already has been affirmed by the judgment of a superior court, then the trial court is bound by the mandate of that superior court. Under those circumstances, it is appropriate to require a petitioner to secure, from that superior court, permission to file his petition for writ of error coram nobis in the trial court where he seeks an order setting aside the judgment already affirmed by the superior court." 335 U.S. 252, 259-261, 68 S.Ct. 1415, 1416.

The cogency of this reasoning in passing upon a process so closely analogous to the procedural pattern created in Penal Code section 1265 makes it abundantly clear that there is no contravention of the Fourteenth Amendment and that defendant is not deprived of any essential attribute of due process.

The appeal is dismissed.

MOORE, P. J., and McCOMB, J., concur.

In re WERFEL'S ESTATE.**WERFEL v. STATE FRANCHISE TAX
BOARD et al.
Civ. 19153.**

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1953.

Rehearing Denied March 9, 1953.

Hearing Denied April 15, 1953.

The Superior Court of Los Angeles County entered orders directing executrix to make payments of family allowance to herself as widow, and executrix, in good faith, made such payments before the United States and the state filed income tax claims against the estate. The Superior Court of Los Angeles County, John Gee Clark, J., surcharged the executrix for some of the payments of family allowance, and the executrix, the United States, and the State of California Franchise Tax Board appealed. The District Court of Appeal, Doran, J., held that executrix could not be surcharged for any of the payments of family allowance, though assets of estate were not sufficient to pay tax claims.

Judgment in accordance with opinion.

1. States ⇨190**United States ⇨124**

Neither the United States nor the state is entitled to any special privileges with relation to the administration of the law, since each is just another litigant.

2. Judgment ⇨564(1)

When a court order or judgment becomes final, that ends the litigation as to all litigants.

3. Executors and Administrators ⇨200, 411

Where executrix in good faith and pursuant to valid orders of probate court made payments of family allowance to herself as widow before the United States and the state filed income tax claims against the state in probate court, executrix would not be surcharged for payments of family allowance, though assets of estate were not sufficient to pay tax claims.

4. Executors and Administrators ⇨411

Where executrix in good faith and pursuant to valid orders of probate court made payments of family allowance to herself as widow before the United States and the state filed income tax claims against estate

in probate court, neither section of Probate Code limiting time payments may continue in insolvent states, nor section of the Revenue and Taxation Code relating to personal liability of a fiduciary was applicable, and neither authorized surcharge of executrix for payments of family allowance, though assets of estate were not sufficient to pay tax claims. Probate Code, § 680; Revenue and Taxation Code, § 18204.

5. Executors and Administrators ⇨194(6)

Orders of probate court directing executrix to make payments of family allowance to herself as widow, were, in effect, judgments.

George I. Devor, Krystal & Paradise,
Stuart S. Hillman, Los Angeles, for appellant.

Eugene Harpole, Los Angeles, for contestant and respondent, United States.

Edmund G. Brown, Atty. Gen. and Edward Sumner, Deputy Atty. Gen., for contestant and respondent, State.

DORAN, Justice.

The facts relating to the within appeal are as follows. Decedent died August 26, 1945. The will was admitted to probate September 28, 1945 and letters testamentary issued to decedent's widow Alma Werfel on October 3, 1945.

Appellant Werfel's brief recites that "On October 17, 1945, the trial court made an order authorizing a family allowance of \$1,000 per month to be paid to the widow of the decedent for a period not to exceed six months from the date of his death. No appeal was ever taken from said order. It became final by the lapse of time. Complying with said order of October 17, 1945, the executrix paid the widow the six monthly payments of \$1,000 each, which payments were approved in the Order Settling First Account Current and Report of Executrix.

"On October 28, 1946, the court below made an order authorizing the executrix to pay to the widow \$1,500.00 per month beginning from the date of the last payment made under the order

of October 17, 1945, and ending upon further order of the court. This order was never appealed from and became final by lapse of time. Thereafter on September 1, 1946, the executrix filed her Second Account Current which reflected the payment of family allowance by the executrix to the widow in the amount of \$21,000.00. These payments were for the period beginning February 25, 1946, and ending April 25, 1947. An order was made on May 28, 1948, approving said Second Account Current and the family allowance payments enumerated therein.

"On March 21, 1949, the Collector of Internal Revenue for the Ninth District served his request for special notice upon the executrix under the provisions of Probate Code, Section 1202. Subsequently, on March 31, 1949, the said Collector filed his claim against the estate in the amount of \$16,735.00 for an income tax deficiency of the decedent for the year 1945. On July 7, 1949, the State of California filed a claim against the estate in the amount of \$1,137.01 for an income tax deficiency of the decedent for the year 1945.

"The executrix filed her Third Account Current on October 28, 1949, which disclosed payment to the decedent's widow in the amount of \$7,500.00 for family allowance for the period beginning April 25, 1947, and ending September 25, 1947.

"Thereafter, after the order settling executrix' Third Account Current, reducing executrix' bond and instructing executrix repayment of tax claims was vacated, a hearing was had on the Third Account Current on May 22, 1951. Among the issues raised, the Assistant Franchise Tax Commissioner argued that the executrix should be surcharged for her payments of family allowance to the widow because the estate was insolvent at the time the payments were made. The argument was that said payments deprived the Franchise Tax Commission of the estate assets from which he might satisfy his

claim against the estate for the decedent's alleged income tax deficiency. The United States also appeared at the hearing and objected to the allowance of the Third Account Current.

"The Trial Court held in its memorandum opinion that the Franchise Tax Commissioner and the United States both having appeared in the Probate Court, were bound by the state of the record in that Court. As a consequence the Court held that they could not seek to surcharge the executrix for those payments, whether for family allowance or otherwise, which were settled and approved in the First and Second Accounts Current. However, the Probate Court surcharged the executrix in the amount of \$7,500.00, being payments of family allowance made to the widow of the decedent for the period beginning April 25, 1947, and ending September 25, 1947. This ruling was made *despite the executrix' having made said payments pursuant to a valid and subsisting order of the very same Court made on October 28, 1946, which order authorized the executrix to make such payments of family allowance until a further order of the court.* (Italics added.) The executrix was never ordered to terminate the family allowance payments. Furthermore, the payments in the amount of \$7,500.00 covered a period in 1945 and the Probate Court expressly found that 'The first notice to the executrix of any claim for unpaid taxes by either the State of California or the United States was upon receipt of a letter mailed April 28, 1948.'

"The executrix sought to have said payments in the amount of \$7,500.00 approved in her Third Account Current. However, as above stated, the Court disapproved the payments and surcharged the executrix in the amount thereof, relying on Probate Code, Section 680 and Estate of Treat, 162 Cal. 250 [121 P. 1003]. It is from this portion of the Court's Order settling, allowing and approving Third Account Current of executrix, disapproving and

surcharging executrix in part and for reduction of bond that this appellant appeals."

The order appealed from was entered December 15, 1951. The appeals of United States and the California Franchise Tax Board are from the same order.

The United States contends that "This case involves the question as to whether the Government is bound by certain orders of the Superior Court sitting as a Probate Court." Its brief recites that the question involved is "Whether the Government is bound by the orders of the Probate Court approving the first two accounts of the executrix of the taxpayer's estate, such orders having been entered before the Government filed its proof of claim for a deficiency of income taxes due from the decedent and before it developed that the estate was insolvent." And, that "It is the position of the United States that it should not be bound by orders of the probate court entered before it became a party to the proceedings."

The Franchise Tax Board of the State of California contends that "The basic question involved in the instant appeal, in the view of the Franchise Tax Board, has not been mentioned in the briefs heretofore filed by the executrix of the above entitled estate and the United States of America. That question is simply: What are the duties of an executor or administrator with respect to ascertaining and paying from assets of any particular estate federal and state tax claims which, under the decision of the California Supreme Court in *People v. Hochwender*, 20 Cal.2d 181, 124 P.2d 823, may be filed at any time prior to the termination of proceedings in the Probate Court?

"It is the position of the Franchise Tax Board of the State of California that it is the duty of an executor or administrator, in view of the *Hochwender* case, *supra*, and in view of the provisions of Section 18204 of the California Revenue & Taxation Code, Personal Income Tax Law, and the provisions of Section 680 of the Probate Code, to ascertain and make pro-

vision for tax claims prior to making any distribution of the assets of a decedent's estate and prior to permitting the payment of family allowance in excess of the maximum permitted by Section 680 of the Probate Code in cases involving insolvent estates."

The court found in fact as follows:

XIV

"On March 31, 1949, the said Collector of Internal Revenue filed his claim against the estate of the above-named decedent for the sum of \$16,735.18; that said claim was for an alleged deficiency of income tax of the decedent for the year 1945.

XV

"That on July 7, 1949, the State of California filed its claim against the estate of the above-named decedent for the sum of \$1,137.01; that said claim was for an alleged deficiency of income tax of the decedent for the year 1945.

XVI

"That the claims mentioned in Findings XIV and XV are good, valid and subsisting claims against the estate of the decedent. That by reason of the filing of the claims aforesaid the amount of the debts of the decedent are in excess of the amount of the remaining assets in his estate.

XVII

"That the payment of the aggregate sum of \$7,500.00 shown in said Third Account Current was paid by the executrix to the said Alma Maria Mahler Werfel *in good faith* and by virtue of said Order of this Court dated October 28, 1946; that at the time of the said payments said Order was in full force and effect." (Italics added.)

And as a conclusion of law found that:

I

"That the estate of the above-named decedent was rendered insolvent by the filing of the claims set forth in the foregoing Findings.

II

"That the Third Account Current of the Executrix should be approved, allowed and settled as rendered and reported, save and except that the item appearing in said account, viz: '9-14-49 Alma Maria Mahler Werfel, family allowance April 25 to September 25, 1947, \$7,500.00' should be disallowed and the Executrix surcharged in said sum of \$7,500.00.

III

"That the claim of the United States of America has priority over the claim of the State of California.

IV

"That the remaining assets of the estate should be reduced to cash by the executrix in the orderly process of administration.

V

"That after the payment of all costs and expenses of administration, the remaining cash on hand should be paid as follows: First, to the United States of America on its claim; secondly, to the State of California on its claim; thirdly, the residue, if any, to the person or persons entitled thereto under the last Will and Testament of the decedent."

[1-3] It should be noted at the outset that neither the United States nor the State is entitled to any special privileges with relation to the administration of the law; each is just another litigant. It is well settled that when a court order or judgment becomes final that ends the litigation as to all litigants. The fact that the United States and the State appeared too late is no fault of either the court or the executrix.

The contention of the United States "that it should not be bound by orders of the probate court entered before it became a party to the proceedings" lacks support in the law. Its "position" in this regard is no different than other litigants or prospective litigant. Whether the State and

the United States have a right of action against the estate or the executrix is beside the issue in the within proceedings. The action of the probate court was final in that proceeding so far as the United States and the State are concerned.

The orders of the probate judge were executed by the widow as executrix, in good faith. And, as pointed out by appellant, "The executrix, in paying the family allowance, was doing only what the Court ordered her to do. The Probate Court cannot order the executrix to pay and then surcharge her for obeying. It cannot entrap the executrix because of her obedience."

No petition to modify the court orders was filed and the action of the State and the United States in the proceedings was in effect nothing but a collateral attack.

[4] So far as the contentions of the State of California is concerned, section 680 of the Probate Code and 18204 of the Revenue and Taxation Code have no application in the circumstances herein. Section 680 limits the time payments may continue in insolvent estates; the estate herein was not insolvent. Section 18204 relates to the personal liability of a "fiduciary". Such issues cannot be raised collaterally in probate proceedings—at least not after the orders of the court have been complied with in good faith. The same situation applies to the United States.

[5] The orders of a probate court such as herein referred to are, in effect, judgments; the law is well settled in this regard and the many cases cited by appellant need not be cited here. The probate court clearly exceeded its authority when it sought to modify previous orders and require the executrix to repay monies theretofore paid under and by virtue of such previous orders. In effect the modification of the previous order was a judgment against the executrix; a judgment imposing a penalty for obeying the order thereafter modified.

For the foregoing reasons the orders of the probate court are affirmed with the

exception of the order recited in paragraph II in the conclusions of law recited above. Said last-mentioned providing that the executrix be "surcharged in said sum of \$7,500.00" is reversed.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 39

DAVIS v. SILVERWOOD.

Civ. 19233.

District Court of Appeal, Second District,
Division 2, California.

Feb. 11, 1953.

Action by truck driver, employed by third party to deliver merchandise to and from defendant's store, to recover for personal injuries sustained when an elevator which he was assisting defendant's employee in fixing dropped to basement with plaintiff aboard. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., rendered judgment in favor of defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that plaintiff, who had completed his employer's business on defendant's premises and deviated from his course to assist defendant's employee in fixing the elevator, was a mere licensee and, as such, not entitled to recover in absence of active negligence on part of defendant.

Affirmed.

1. Appeal and Error ☞927(7)

On appeal from judgment predicated upon a directed verdict for defendant, evidence must be viewed in light most favorable to plaintiff.

2. Negligence ☞121(1)

A licensee must establish active negligence on part of defendant in order to recover for his injury.

3. Negligence ☞32(2), 45

Truck driver employed by third party to deliver merchandise to and from defendant's store was, when after completing his

employer's business, he voluntarily attempted to assist defendant's employee in fixing defendant's elevator, a mere "licensee", and, as such, was not entitled to recover for injuries received when elevator fell, with truck driver aboard, to basement of defendant's store, in absence of active negligence on part of defendant.

Rinehart, Merriam, Parker & Berg, Pasadena, for appellant.

Jennings & Belcher, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant, predicated upon a directed verdict in an action to recover damages for personal injuries resulting from alleged negligence, plaintiff appeals.

[1] The evidence, viewed in the light most favorable to plaintiff, as it must be on an appeal from a judgment predicated upon a directed verdict, discloses that on January 27, 1948, plaintiff was employed as a truck driver by United Parcel Service and had been thus employed for approximately nine years. During this period he delivered merchandise to and from defendant's Sixth and Broadway store in Los Angeles. The shipping department of defendant's store was located in the basement. It was accessible either by a stairway or by a sidewalk freight elevator which opened onto Sixth Street. Plaintiff had used such elevator for conveying merchandise from the basement many times daily for nine years.

On January 27, 1948, plaintiff called at defendant's store to pick up merchandise. He parked his truck on Sixth Street with the rear end near the sidewalk elevator. He then went downstairs to the shipping department and, with the aid of a Silverwood employee, loaded the elevator. He operated the elevator in raising it to the sidewalk. Henry Walkins, a Silverwood employee, there passed the merchandise from the elevator to plaintiff in the truck. This process was repeated until three of four loads had been brought from the basement. Plaintiff operated the elevator for each load and it was operating satisfactori-

ly, as it had been on all prior occasions when plaintiff had used it.

When the last merchandise for that trip had been loaded on the truck plaintiff closed and locked the truck doors. He had completed his use of the elevator. Having no further use for the elevator, plaintiff left it at the sidewalk level, visited the wash-room in the basement, thereafter called at the receiving desk and telephoned the display department. On learning nothing else was to go plaintiff walked upstairs and out the side door of defendant's store. He had completed the purpose of his call at defendant's store and was headed for his truck on which he intended to proceed on his route.

Just prior to this time the side rods which held the elevator doors open had been removed by Henry Walkins, defendant's employee. This plaintiff knew was the normal procedure and indicated that the elevator was prepared to go down. Henry Walkins had pulled the chain to lower the elevator but it did not descend. A rock had caused the elevator to be wedged tight at sidewalk level.

On the way to his truck plaintiff passed near the elevator. Mr. Walkins informed plaintiff a stone prevented the elevator from going down. Plaintiff had at no time previously been asked by defendant to repair any of its elevators—in fact he did not have the mechanical skill for such undertaking. However, he immediately walked onto the elevator to ascertain the trouble. As he stooped over to take a closer look the elevator dropped to the basement causing him serious personal injuries.

At the conclusion of plaintiff's evidence defendant rested and the trial judge granted a motion for a directed verdict in favor of defendant. The present appeal has ensued. This is the sole question necessary for us to determine:

Did the trial court err in granting defendant's motion for a directed verdict upon the ground that plaintiff at the time of the accident was on defendant's premises as a mere licensee?

[2, 3] *No.* Where a plaintiff makes delivery in the course of his employment to the consignee's premises and has completed

his delivery, starts on his return journey to his employer's premises but deviates from his course to assist an employee of the consignee in connection with a matter on the consignee's premises the plaintiff is a mere licensee. (Tharp v. San Joaquin Cotton Oil Co., 27 Cal.App.2d 554, 560 [2] ff., 81 P.2d 443, 82 P.2d 21, petition for hearing denied by Supreme Court.) It is likewise settled that a licensee must establish active negligence on the part of a defendant in order to recover for his injury. (Demmon v. Smith, 58 Cal.App.2d 425, 432, 136 P.2d 660. Petition for hearing denied by Supreme Court.)

Applying the foregoing rules to the facts of the instant case it is clear that at the time of the accident plaintiff had completed the purpose for which he had been on defendant's premises as an invitee and had started to return to his employer's premises when he voluntarily returned to defendant's premises to see what was the matter with the elevator. At this time he was a mere licensee and since the record is devoid of any evidence which would support a finding that plaintiff's injury resulted from the active negligence of defendant, the trial court properly granted the motion for a directed verdict.

This case is on all fours with Tharp v. San Joaquin Cotton Oil Co., supra, in which plaintiff delivered a load of cottonseed to defendant's warehouse. Having unloaded, he started to drive away when he noticed that the warehouse conveyor belt which he used in unloading had stopped. He returned to the warehouse and attempted to put the conveyor belt back on the pulley from which it had slipped. Two of defendant's employees were also attempting to get the belt back in operation. One of defendant's employees gave the conveyor belt a jerk and the plaintiff was injured. The trial court granted a motion for nonsuit which was sustained on appeal. Defendant in its brief very clearly illustrates the similarity of the cited case with the facts in the instant case by quoting from the opinion in the case as follows:

"[1] In the case at bar the evidence shows that the plaintiff was not acting for

the mutual benefit of his employer and the defendants, [2] and was engaged upon a mission of his own, without the knowledge of either Creager or Britton as to what he was about to do. [3] At the time in question the plaintiff's employer had nothing whatever to do with the restarting of the machinery contained in the defendants' plant. [4] In other words, whatever he did was purely personal to himself, and was not in furtherance of the interests of his employer. [5] Roy Tharp was the employer of the plaintiff, and so far as the truck load of cottonseed belonging to Roy Tharp was concerned, it had all been delivered at the place, and under the circumstances and conditions provided by the defendants for such delivery. [6] There was no business of the plaintiff or of his employer about to be transacted in which the plaintiff or his employer was interested. [7] The matter of replacing the belt was purely an affair for Creager and Britton, and did not concern either the unloading or the delivery of any cottonseed brought to the premises by the plaintiff. [8] The plaintiff had finished unloading his cotton; [9] he had gone from the premises provided for that work; [10] had turned and started toward home; [11] and then, without any business connected with the premises belonging to the defendants, he went back and entered the powerhouse and attempted to perform a service not expected to be performed by truck drivers, and performed at an instant of time when neither Creager nor Britton were aware of the fact that he was about to perform such service. The testimony shows that Creager, who was directing Britton, never saw Tharp in the powerhouse. * * *

"[12] We do not need to enter into a discussion of either of the alleged negligence of Britton or of the alleged negligence of the defendants in not having the belt properly guarded. * * * [13] The fact remains that the circumstances show that the plaintiff in this case was a mere licensee, and the principles enunciated and the cases cited in the Buckingham Case [Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807], supra,

showing when one is an invitee and when one is a licensee, we think conclusive of this case and support the order of the trial court in granting a motion for nonsuit on the ground that the plaintiff was a mere licensee * * *." (27 Cal.App.2d at page 560 et seq., 81 P.2d at page 445.)

Thereafter defendant in its brief substitutes the facts of the present case for those in the Tharp case by paraphrasing it as follows, the substitutions and changes being in italics:

"[1] In the case at bar the evidence shows that the plaintiff, *in returning to the elevator to see what was holding it up*, was not acting for the mutual benefit of his employer and the defendant, [2] but was engaged upon a mission of his own without the knowledge of *defendant's employees* as to what he was about to do. [3] At the time in question the plaintiff's employer had nothing whatever to do with the *lowering* of the *elevator* contained in the defendant's *store*. [4] In other words, whatever he did was purely personal to himself, and was not in furtherance of the interests of his employer. [5] *United Parcel* was the employer of the plaintiff, and so far as the truck load of *merchandise* belonging to *defendant* was concerned, it had all been *loaded* at the place, and under the circumstances and conditions provided by the defendant for such *loading*. [6] There was no business of the plaintiff or of his employer about to be transacted in which the plaintiff or his employer was interested. [7] The matter of *lowering the elevator* was purely an affair for *defendant's employees*, and did not concern either the *loading* or *hauling* of any *merchandise* from the premises of the defendant. [8] The plaintiff had finished *loading the merchandise*; [9] he had gone from the premises provided for that work; [10] had turned and started *for his truck*; [11] and then, without any business connected with the premises belonging to the defendant, he *stopped and stepped onto the elevator* and attempted to perform a service not expected to be performed by truck drivers, and performed at an instant of time when *none of defendant's employees* were aware of the fact that he was about

to perform such service. The testimony shows that *the shipping department foreman*, who was *in charge of the elevator*, never saw *plaintiff on the elevator*.

"[12] We do not need to enter into a discussion of either of the alleged negligence of *Henry Walkins* or of the alleged negligence of the defendant in not having the *elevator* properly guarded. * * *

[13] The fact remains that the circumstances show that the plaintiff in this case was a mere licensee, and the principles enunciated and the cases cited in the *Buckingham* case, *supra*, showing when one is an invitee and when one is a licensee we think conclusive of this case and support the order of the trial court in granting a motion for a *directed verdict* on the ground that the plaintiff was a mere licensee."

In view of the fact that the foregoing rules and authorities dispose of the present cause no useful purpose would be served by discussing other points raised by counsel.

Affirmed.

MOORE, P. J., and FOX, J., concur.



116 Cal.App.2d 44

EARLL et al. v. McCOY et al.
Civ. 4492.

District Court of Appeal,
Fourth District, California.
Feb. 11, 1953.

Rehearing Denied March 5, 1953.

Hearing Denied April 9, 1953.

Action, under Labor Code provision for indemnification of employee by employers for value of hand tools owned by them but left in employers' garage on night it burned. The Superior Court of Orange County, Robert E. Gardner, J., rendered judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where mechanics were required to furnish own hand tools, and for practical reasons and by custom and usage, left them in garage overnight but were free to take them

away at any time, the loss was not suffered in direct consequence of a discharge of their duties, but was only incident to their employment.

Judgment affirmed.

1. Master and Servant ☞72½

Labor Code provision for indemnification of employee by employer for expenditures or losses in discharge of duties or obedience to directions is intended to provide for losses suffered from property damage, but such losses must be in direct consequence of discharge of the employee's duties or in obedience to the employer's directions. Labor Code, § 2802.

2. Master and Servant ☞72½

Automobile mechanics who furnished own hand tools, which, for practical reasons and by custom and usage, were left in employer's automobile garage overnight, but which could have been taken away at any time, were not entitled to recover for tools destroyed by fire at night when garage was closed. Labor Code, §§ 2802, 2857.

McCabe & Schumacher, Fullerton, for appellants.

Head, Jacobs & Corfman, Santa Ana, for respondents.

MUSSELL, Justice.

This action was brought under the provisions of Section 2802 of the Labor Code to recover the value of personal property destroyed by fire.

Plaintiffs, a group of automobile mechanics, were employed by defendants in the operation of a general garage and Ford agency in Fullerton. Each of the plaintiffs received a weekly guaranteed salary, plus fifty per cent of money collected for his labor and each furnished his hand tools, which, for practical reasons and by custom and usage, were left in the garage overnight. There were no express instructions from the employer to leave the hand tools (which in some cases weighed several hundred pounds) at the place of business, but there was testimony to the effect that the job foreman discouraged the plaintiffs from taking their tools home.

Each mechanic used his own tools, replaced them when they were worn out or lost, and, when not in use, they were left in the garage. On the night of June 23, 1950, a fire destroyed defendants' place of business, together with the hand tools and equipment belonging to the plaintiffs.

It is not contended that the defendants were negligent in connection with the fire or that plaintiffs' claims as to the amount of losses are excessive.

Plaintiffs joined in this action claiming indemnity for their losses under the provisions of Section 2802 of the Labor Code. That section provides as follows:

"Indemnification of employee for expenditures or losses in discharge of duties or obedience to directions. An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful."

It is the contention of the plaintiffs that the losses suffered by them were in direct consequence (1) Of the discharge of their duties as employees; and (2) In obedience to the directions of their employers in view of the provisions of Section 2857 of the Labor Code providing that an employee shall perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable or manifestly injurious to his employer to do so. In this connection it is argued that when one performs services in conformity to the usage of the place of employment, he is obeying a direction of the employer.

The trial court held that plaintiffs were not entitled to the benefits of said Section 2802 and rendered judgment in favor of defendants. We conclude that the losses to the plaintiffs were not incurred in direct consequence of the discharge of their duties but were losses suffered incidental to their employment. If plaintiffs had been working or at the place of employment, it

is quite possible that the fire would not have occurred and that plaintiffs' tools would not have been destroyed. There is no direct, unbroken connection between the losses and the discharge of the duties of the plaintiffs. The losses were directly caused by fire at a time when the tools were not being used in the discharge of the duties of the employees or in obedience to the employer's instructions, and where, as here, the court found that the plaintiffs were not required to leave their tools at the place of employment, Section 2802 of the Labor Code is not applicable. This section of the code was enacted in 1937 and was based on former Civil Code section 1969, which, as originally enacted, is identical with Section 2802 of the Labor Code except that the phrase "except as prescribed in the next section" was deleted. The next section, 1970, before its repeal, sets forth the conditions under which an employer is not bound to indemnify his employee, such as for "losses suffered by the latter (employee) in consequence of the ordinary risks of the business in which he is employed" and "in consequence of the negligence of another person employed by the same employer".

[1,2] It is the contention of plaintiffs that by the reenactment of Section 1969 in 1937 and the noted deletion, the legislature intended to cover losses suffered by the employee other than for personal injuries. The section, by its terms, covers "Indemnification of employee for expenditures or losses in discharge of duties or obedience to directions" and indicates a legislative intent to provide for losses suffered from property damage. However, such losses must be in direct consequence of the discharge of the employee's duties or in obedience to the employer's directions. There is no evidence in the record indicating that the fire which directly caused the losses occurred in direct consequence of the discharge of duties of employment. The evidence shows that plaintiffs furnished their own hand tools and when broken or worn out these tools were replaced by plaintiffs, at their own expense. There was no requirement in the terms of employment that plaintiffs fur-

nish a specified number or kind of hand tools and the employer exercised no control over them. Plaintiffs were not required to keep their tools in the garage at night and were free to take them away at any time. Under such circumstances, we cannot hold that the defendants were insurers of the private property of plaintiffs and responsible for the losses incurred.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



116 Cal.App.2d 31

HOLLAND v. KERR et al.

Civ. 15394.

District Court of Appeal, First District,
Division 1, California.

Feb. 11, 1953.

Hearing Denied April 8, 1953.

Action by automobile guest against host and motorist for injuries sustained in head-on collision. The Superior Court, Contra Costa County, Wakefield Taylor, Jr., J., entered judgment as of nonsuit for the host, and entered judgment on verdict for the motorist, and the guest appealed. The District Court of Appeal, Bray, J., held that judgment as of nonsuit was proper, and held that the evidence supported the verdict for the motorist.

Affirmed.

1. Automobiles ⇨244(20), 245(24)

In action by automobile guest against host and motorist for injuries sustained in head-on collision at U-curve on mountain road, evidence was insufficient to show willful misconduct of the host, and granting of nonsuit as to host was proper.

2. Automobiles ⇨244(10)

In action by automobile guest against host and motorist for injuries sustained in head-on collision at U-curve on mountain

road, evidence supported verdict for motorist.

3. Evidence ⇨380

Where witness testifies that photograph truly represents what it purports to represent, it is not necessary to its introduction in evidence that the one who took it be produced.

4. Evidence ⇨383(10)

Trial ⇨234(8)

The nonproduction of photographer did not weaken evidence of photographs identified as true by eyewitnesses to automobile accident, and did not require instruction to effect that if it is within power of party to produce stronger or more satisfactory evidence than was offered on a material point, the jury should view the weaker evidence with distrust. Code Civ.Proc. § 2061, subsd. 6, 7.

5. Trial ⇨252(22)

Where record fails to show that defendant produced inferior evidence when it was within his power to produce evidence of a higher degree, the giving of an instruction authorizing the jury to view the weaker evidence with distrust is error. Code Civ.Proc. § 2061, subsd. 6, 7.

6. Trial ⇨234(8)

Failure to produce photographer who took pictures which were admitted in evidence was not such "suppression of evidence" as would warrant instruction authorizing jury to presume that suppressed evidence would be adverse to party willfully suppressing it. Code Civ.Proc. § 1963, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Suppression of Evidence".

7. New Trial ⇨98

In action by automobile guest against host and motorist wherein judgment as of nonsuit was entered for the host, even if motorist's testimony introduced after nonsuit, which plaintiff claimed was contrary to motorist's testimony prior to nonsuit, might have supported finding of willful misconduct by the host, such fact would not cause an abuse of discretion in denying

new trial where preponderance of evidence was against finding of host's willful misconduct and in favor of finding that motorist was not guilty of negligence.

8. Automobiles ↵245(24)

New Trial ↵6

In action by automobile guest against host, on motion for nonsuit, it is the duty of the court, if there is any evidence which would support a finding by the jury of willful misconduct, to deny a motion for nonsuit, but, on motion for new trial, the question is whether the court abused its discretion in denying a new trial, not whether there is evidence to support a particular finding.

Abe Hart and Joseph L. Bortin, San Francisco, for appellant.

Dana, Bledsoe & Smith, San Francisco (Joseph W. Rogers, Jr., San Francisco, of counsel), for respondent Bisek.

Belcher & Koller and Clark & Heafey, Oakland (Gerald P. Martin, San Francisco, of counsel), for respondent Kerr.

BRAY, Justice.

As a result of a collision between an automobile driven by defendant Bisek and in which plaintiff was riding, and one driven by defendant Kerr, plaintiff sued both defendants. From a judgment of nonsuit in favor of Bisek and a judgment on a jury verdict in favor of Kerr, plaintiff appeals.

Questions Presented.

1. Was there any evidence of willful misconduct, and hence the judgment of nonsuit was improper? 2. Did the court err in refusing instructions based on section 2061, subdivisions 6 and 7, and section 1963, subdivision 5, Code of Civil Procedure, where photographs were admitted in evidence without objection, in the absence of the photographer who took them? 3. Assuming that after judgment of nonsuit granted, evidence tending to show willful misconduct was introduced, did the court abuse its discretion in denying a motion for new trial?

Evidence Prior To Nonsuit.

On Mothers' Day, 1950, plaintiff, his wife, Bisek (plaintiff's brother-in-law), his wife and son, Knight (plaintiff's son-in-law), and his wife (plaintiff's daughter), were picnicking atop Mt. Diablo. About 5:30 they started to return home. Knight left first, having the women with him in his car. Bisek followed with his son and plaintiff in this car. They had gone down about two miles of winding road, the Knight car being in sight most of the time. There was traffic coming up the hill. While going about 20 to 30 miles an hour they came to a very short "U" turn. Plaintiff testified that as they came around this bend, another car was approaching and "instantly we met." There was no time for anyone to take action. Plaintiff was knocked unconscious and otherwise injured. Plaintiff identified and introduced photographs of what he claimed was the scene of the accident, a blind turn. He testified that coming down the hill, the speeds of the Bisek car, and the Knight car, which kept about 300 to 500 feet ahead, were about the same, and that there was nothing about Bisek's speed, manner of or conduct in driving, to give plaintiff concern. Bisek was driving as plaintiff would have driven had he been at the wheel. The speed could have been as low as 15 to 20 miles an hour. Neither plaintiff nor Bisek had had anything to drink. The roadway was approximately 20 feet wide. In plaintiff's judgment both cars were straddling the imaginary center line, Bisek's car being two or three feet over that line. On cross-examination plaintiff was shown certain photographs which will be discussed hereafter. Plaintiff was positive that the scene depicted in these photographs was not the scene of the accident. Plaintiff testified that traffic coming up the hill was light and that they passed cars occasionally.

Knight testified that the car he was driving was about 200 feet ahead of Bisek's car, going about 15 to 20 miles an hour. Plaintiff had been following him at about that speed. Traffic was "probably normal." Fifteen cars coming upgrade accumulated between the time of the accident and the

time when he transferred the unconscious plaintiff into his car and left for the hospital. He saw the accident through his mirror. He stopped his car and ran back. Defendant Kerr's car was partially on the shoulder. Bisek's car was entirely on the right side of the highway. He identified plaintiff's pictures as showing the place of the accident, and denied that it was at the scene of Kerr's pictures. When Kerr's car passed him going towards the scene of the accident Knight had to go to his extreme right to keep from hitting him, as defendant Kerr's car was straddling the center. Kerr, called under section 2055, Code of Civil Procedure, testified that plaintiff's pictures did not show the scene of the accident; that just before the point of collision he was forced off the road by a car (apparently the Knight car). Kerr did not sound his horn. The accident happened some distance from a curve. Both plaintiff and Knight claimed it happened just as plaintiff got around a curve. Kerr stated that the accident happened as he was in the act of getting back on the road. He was going into second gear, going about 4 to 5 miles an hour. At the time of the collision, however, he was completely stopped.

No Willful Misconduct.

[1] On the foregoing testimony, the court granted a nonsuit in favor of defendant Bisek. Obviously there was not an iota of evidence of willful misconduct. Plaintiff contends that taking the testimony strongest in favor of his contention, as is the rule in considering a motion for nonsuit, the evidence showed that Bisek was driving on the wrong side of the road, and that, as Bisek knew there was traffic coming up the hill and was driving at a controllable speed, 15 to 20 miles an hour, he should have had knowledge of possible danger, and his failure to avoid an accident was either the result of volition or reckless disregard for the safety of others in the face of probable danger. Completely ignoring plaintiff's own testimony to the effect that Bisek was driving the car the way that plaintiff would have driven it, that Kerr's car came suddenly around the curve two or three feet over the wrong

side of the center, and that "there was no time to take any action by anyone," the most the evidence showed at the time of the motion for nonsuit was that Bisek could be guilty of ordinary negligence only. Neither the evidence nor any reasonable inferences therefrom would have justified a finding of willful misconduct. See discussion in *Weber v. Pinyan*, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407, as to difference between gross negligence and willful misconduct; and in *Porter v. Hofman*, 12 Cal. 2d 445, 85 P.2d 447, as to difference between ordinary negligence and willful misconduct. The court did not err in granting the motion.

Evidence Subsequent To Nonsuit.

One Prestwich testified that as he was driving down the mountain, Bisek's car and another automobile (apparently Knight's) passed him going in the same direction "at a rate of speed" and it was directly ahead of him at the time of the accident. It occurred 100 to 150 feet after Bisek's car had gone around the curve. It was going 15 to 20 miles an hour. As it went around the curve it swung wide into its left side of the highway. When it hit Kerr's car, the latter was on its right shoulder as far as it could get without hitting the bank. Kerr's car appeared as though it was starting to come back on the highway and at the time of impact appeared to be stopped. Prestwich identified all but one of Kerr's photographs as showing the scene of the accident. (In the one he did not identify a curve obscures the point of impact as claimed by Kerr.) He then identified five photographs (defendant's exhibits 6 to 10) showing the cars resting at the scene of the accident immediately after the accident. They show that Kerr's car was to the right of the highway on the shoulder and show Bisek's skidmarks starting from the middle of the highway sliding over to the left point of impact. They completely corroborate Kerr's version of the accident. Bassett, the chief ranger at Mt. Diablo State Park, who came to the scene of the accident while the cars were still there, identified Kerr's photographs as depicting the scene and testified that plaintiff's photographs were of

a place about a mile away. Bassett talked to the photographer who was there taking Kerr's pictures.

Kerr, also a state ranger, testified that as he was going uphill about 15 miles an hour and about 200 feet from the accident, Knight's car came downhill and made an attempt to pass another car going downhill, compelling Kerr to pull over to his right onto the shoulder. Kerr came to a stop, then started up and started to pull back onto the pavement when he saw Bisek's car about 200 feet away coming towards him at a speed of 30 to 35 miles an hour. Kerr stopped. Bisek's car struck his car. Kerr identified his own pictures as being the true scene. Kerr smelled alcohol on Bisek's breath there. Bisek's insurance company paid Kerr \$500 for damages to his car and bruises to himself. Mrs. Kerr corroborated Kerr's version of the accident. California Highway Patrolman Galbraith identified Kerr's pictures showing the cars after the accident. He is shown in one of the pictures. The skidmarks of Bisek's car were approximately 33 feet long. He detected the odor of alcohol on Bisek's breath. He charged Bisek only with driving on the wrong side of the road. Brown, Assistant Park Ranger, also identified Kerr's pictures and smelled liquor on Bisek's breath.

Instructions.

[2-6] Obviously, there was ample evidence to support the jury's verdict for Kerr. Plaintiff offered an instruction based on section 2061, subdivisions 6 and 7, Code of Civil Procedure, to the effect that if it is within the power of a party to produce stronger or more satisfactory evidence than which was offered on a material point, the jury should view the weaker evidence with distrust. He also offered one based on section 1963, subdivision 5, Code of Civil Procedure, to the effect that if the jury should find that any evidence was willfully suppressed, the jury might presume, in the absence of evidence to the contrary, that such evidence, if produced, would be adverse to the party willfully suppressing the evidence. The court properly refused to give these instructions. Plaintiff very in-

geniously claims that as the photographer who took defendant's photographs was not identified, produced, or his absence explained, these instructions should have been given upon the theory that possibly the photographer might have taken other photographs which might have been contradictory to those taken. Had he been produced as a witness such fact might have been discovered on cross-examination. The court properly refused to give the instructions. The photographs were identified by five witnesses, three of whom were apparently disinterested, who testified that they truly represented the scene of the accident. (Two or three of them are shown in the pictures.) No objection was made to their introduction nor to the failure to identify or produce the photographer. Where a witness testifies that a photograph truly represents what it purports to represent it is not necessary to its introduction in evidence that the one who took it be produced. *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 201, 215 P. 675. Had plaintiff desired the photographer identified he could have so stated and his name could have been thus obtained; and had he desired him to testify he could have subpoenaed him. Ranger Brown pointed out that in one of the photographs he is shown making out a report on the hood of one of the cars involved in the accident, and then stated that he wrote into his report the name of the person taking the pictures. Moreover, section 2061, subdivisions 6 and 7, does not apply. The nonproduction of the photographer does not weaken the evidence of photographs identified as true by eyewitnesses. Where the record fails to show that defendant produced inferior evidence when it was in his power to produce evidence of a higher degree, the giving of the requested instruction would be error. *Thomas v. Gates*, 126 Cal. 1, 6, 58 P. 315. Nor does section 1963, subdivision 5, apply. There was no suppression of evidence here. It would have been serious error to give the proffered instruction on suppression. *Estate of Moore*, 180 Cal. 570, 585, 182 P. 285. It is very seldom in the trial of cases that when photographs can be identified properly otherwise, the photographer is produced.

New Trial.

[7, 8] Plaintiff's contention that the trial court abused its discretion in denying the new trial again is ingenious. He contends that Kerr testified favorably to Bisek to help him get a nonsuit, and then changed his testimony after it was granted, to protect himself, and that therefore the court should have granted a new trial of the whole case. The alleged change of testimony is this: When called under section 2055 and before nonsuit, Kerr was asked how sharp a curve was it, that is, the one where the collision took place. He replied, "Its rather a sharp curve, its a very sharp curve." After nonsuit, he testified that from the point where the cars collided to the center of the curve it was approximately 200 feet and he saw the Bisek car approaching at that distance. While a comparison of these two statements makes it appear that the second is contradictory of the first, a reading of Kerr's testimony prior to the question above set forth shows that in speaking of the curve as the one where the collision took place Kerr was not referring to the point of impact but to the general location. He had been testifying that the scene in plaintiff's photographs was not the scene of the accident,¹ that in contrast with the wider curve and low bank shown in plaintiff's photographs, the accident took place where there was a sharp curve and a high bank. Moreover, he then stated that he was approaching the curve when the accident happened but "I was still some distance from the curve." Actually there was no change in testimony. In testifying after the nonsuit he was asked in greater detail than during his examination in plaintiff's case in chief. Plaintiff charges collusion between Kerr and Bisek because Kerr testified on cross-examination

before nonsuit (he was not asked concerning the subject thereafter) that he did not blow his horn, thereby, says plaintiff, admitting negligence. Assuming, but not deciding, that failure to blow the horn under the circumstances constituted negligence, we fail to understand how such an admission of negligence showed collusion between Kerr and Bisek. There is no basis for a conclusion that the court erred in refusing to grant a new trial. Moreover, assuming, but not deciding, that the evidence introduced after the nonsuit might have supported a finding of willful misconduct, still such fact would not cause an abuse of discretion in denying a new trial. The situation on motion for new trial is entirely different than on motion for nonsuit. On the latter it is the duty of the court, if there is any evidence which would support a finding by the jury of willful misconduct, to deny a motion for nonsuit. But on a motion for new trial, it is not a question of whether there is evidence to support a particular finding, but whether the court abused its discretion in denying a new trial. See *Rather v. City and County of San Francisco*, 81 Cal.App.2d 625, 638, 184 P.2d 727; *Clark v. Bradley*, 106 Cal.App.2d 537, 547, 235 P.2d 439; *Estate of Baird*, 198 Cal. 490, 503, 246 P. 324 (motion for new trial after judgment of nonsuit). Here the preponderance of, if not the entire, evidence certainly is against a finding of willful misconduct by Bisek, just as it is in favor of the jury's finding that Kerr was not guilty of negligence. Therefore there was no abuse of discretion in denying a new trial as against both defendants.

The judgments are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

1. Plaintiff, in his brief, concedes that his photographs are of the wrong place.

116 Cal.App.2d 102

HIRSCHY v. COODLEY.

Civ. 19254.

District Court of Appeal, Second District,
Division 3, California.

Feb. 16, 1953.

Action against defendant for alleged seduction of plaintiff's wife. The Superior Court of Los Angeles, Roy L. Herndon, J., sustained demurrer to complaint, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that complaint was insufficient to state cause of action for seduction, but stated only action for criminal conversation, which did not lie.

Affirmed.

1. Husband and Wife ☞341

"Criminal conversation" is sexual intercourse of an outsider with a husband or wife, and an action therefor by the innocent spouse against the outsider does not lie. Civ.Code, § 43.5(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Criminal Conversation".

2. Seduction ☞1

"Seduction" signifies a leading astray, and has been described as persuading or inducing woman of previously chaste character to yield to sexual intercourse by use of any of a species of artifices calculated to have that effect. Civ.Code, § 43.5(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Seduction".

3. Seduction ☞16

Complaint which charged that defendant, unlawfully and with intent to injure plaintiff, and deprive of companionship and affection of his wife, seduced wife and had illicit intercourse with her at various places to plaintiff's damage, was insufficient to state cause of action for seduction but merely stated cause for criminal conversation. Civ.Code, § 43.5(b).

Title & Tannenbaum and Julius M. Title,
Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered on an order sustaining a demurrer to the second amended complaint, referred to as the complaint, without leave to amend.

The facts alleged are these: Plaintiff and Charlotte Hirschy are, and at all times pertinent were, husband and wife. Between March 1 and July 21, 1950, while plaintiff and his wife were living together, defendant unlawfully and with intent to injure plaintiff and deprive him of the companionship and affection of his wife, seduced Charlotte and had illicit intercourse with her at various places in Los Angeles to plaintiff's damage. At the times mentioned Charlotte was twenty years of age.

[1] The action is for criminal conversation and does not lie. Civil Code, § 43.5 (b) reads: "No cause of action arises for: * * *. (b) Criminal conversation." Criminal conversation is sexual intercourse of an outsider with a husband or wife. *Young v. Young*, 236 Ala. 627, 184 So. 187, 190-191; 42 C.J.S., Husband and Wife, § 697, page 352; 27 Am.Jur 135, § 535. *Bedan v. Turney*, 99 Cal. 649, 34 P. 442, and *Barlow v. Barnes*, 172 Cal. 98, 155 P. 457, denominate an action by a husband against another for damages because of the latter's alleged sexual intercourse with the plaintiff's wife as an action for criminal conversation. See 13 Cal.Jur. 908, § 91. In *Rash v. Pratt*, 1 W.W.Harr., Del., 18, 111 A. 225, 228, the court said: "[C]riminal conversation in legal contemplation means adultery which is sexual intercourse by a man and a woman, one of whom is lawfully married to another person." And in *Turner v. Heavrin*, 182 Ky. 65, 206 S.W. 23, 4 A.L.R. 562: "In its general and comprehensive sense, the term 'criminal conversation' is synonymous with 'adultery'; but in its more limited and technical signification, in which it is here to be considered, it may be defined as adultery in the aspect of a tort."

[2] The cause of action pleaded is not seduction as plaintiff argues. Seduction

J. F. Rosen and Harry Wolpin, Los Angeles, for appellants.

signifies a leading astray. It has been described as the act of persuading or inducing a woman of previously chaste character to yield to sexual intercourse by the use of any species of arts, persuasion, deceit, false promises, or other artifices which are calculated to have and do have that effect. 79 C.J.S., Seduction, § 4(b), page 958; 47 Am.Jur. 631, § 2. Tersely it has been described as the offense of a man who induces a woman to surrender her chastity by flattery, promises, or artifice. *Morehead v. Commonwealth*, 194 Ky. 592, 240 S.W. 93, 95; *Franklin v. McCorkle*, 84 Tenn. 609, 1 S.W. 250, 252, 57 Am.Rep. 244; *Opitz v. Hayden*, 17 Wash.2d 347, 135 P.2d 819, 826. *Marshall v. Taylor*, 98 Cal. 55, says at page 60, 32 P. 867, at page 869: "The word 'seduction,' when applied to the conduct of a man towards a female, means the use of some influence, promise, art, or means on his part, by which he induces the woman to surrender her chastity and her virtues to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity based on professions of attachment, or the like, for the woman; and that, relying solely on said promises or professions of flattery or artifice or importunity, she surrendered her person and chastity to her alleged seducer; and that, relying and being influenced solely by such promises, flattery, artifice, and urgent importunity, she then being chaste, surrendered her person and chastity to her alleged seducer." See also *People v. Votaw*, 38 Cal.App. 714, 717, 177 P. 485; *Carter v. Murphy*, 10 Cal. 2d 547, 562-563, 75 P.2d 1072.

If a wife engages in an unlawful act of sexual intercourse freely and voluntarily and without the employment on the part of the outsider of any art, promise, deception, persuasion, or the exercise of any undue influence over the alleged seducee which was calculated to overcome her reluctance and scruples, the act thus voluntarily entered into does not amount to seduction.

Carter v. Murphy, supra, 10 Cal.2d at page 559, 75 P.2d 1078.

[3] The complaint does not allege the necessary elements of a cause of action for seduction. See *Swett v. Gray*, 141 Cal. 83, 74 P. 551; *Davis v. Stroud*, 52 Cal.App.2d 308, 316, 126 P.2d 409; 23 Cal.Jur. 194, § 4. The complaint must allege that the female is chaste. *Davis v. Stroud*, supra, 52 Cal. App.2d at page 316, 126 P.2d at page 413. There is no allegation to that effect in the present complaint. In *Young v. Young*, 236 Ala. 627, 184 So. 187, 190, it is said: "Seduction * * * is a wrong directed specially against the female, as such; causing the female, chaste at the time, to surrender her virtue, through the seductive arts and inducements recognized by law. * * * Criminal conversation is not only limited to the marriage relation, while seduction is despoiling the chaste female, but the culpability of criminal conversation has little relation to the age of the woman. She may wantonly engage in criminal conversation, even be the aggressor inviting such breach of fidelity to her husband. In such case the young wife would be no less culpable than the old." In *Davis v. Stroud*, supra, it is said that, 52 Cal.App.2d at page 316, 126 P.2d at page 413: "Only an unmarried female can be seduced." The mere allegation that defendant "seduced" plaintiff's wife is insufficient.

The complaint does not state facts sufficient to constitute a cause of action.

Affirmed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. When only an unmarried female, Code Civ.Proc., sec 374, or in some cases her parents, Code Civ.Proc., sec. 375, may sue for her seduction when she was under the age of consent, namely 18 years, Civ.Code, sec. 56; Pen.Code, sec. 261, we have here a suit by a husband for the alleged seduction of his wife when she was 20 years of age. The action has no semblance of merit and the appeal is frivolous.

BROWN v. HARPER.

Civ. 4496.

District Court of Appeal, Fourth District,
California.

Feb. 11, 1953.

Rehearing Denied March 5, 1953.

Hearing Denied April 8, 1953.

Action against plaintiff's former husband for an accounting, for restitution and damages alleged to have resulted from alleged false and fraudulent representations allegedly made by defendant with respect to nature and extent of defendant's property, wherein defendant filed a cross-complaint. The Superior Court of Riverside County, Russell S. Waite, J., rendered a judgment for defendant on complaint and cross-complaint and plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence justified conclusion that plaintiff and defendant had no community property at time of divorce other than as set forth in property settlement agreement.

Judgment on complaint affirmed and judgment on cross-complaint reversed.

1. Husband and Wife ⇨264

In action against plaintiff's former husband for accounting, restitution and damages alleged to have resulted from alleged false and fraudulent representations made by defendant with respect to nature and extent of property of defendant who entered into property settlement agreement with plaintiff in which defendant represented he had no interest in partnership or in theater operated by partnership, evidence justified conclusion that plaintiff and defendant had no community property at time of divorce other than as set forth in property settlement agreement.

2. Husband and Wife ⇨257, 259

Where husband is operating a business which is his separate property, income from such business is allocated to community or separate property in accordance with extent to which it is allocable to husband's efforts or his capital investment.

3. Husband and Wife ⇨248½, 257, 259

Capital which husband brings to marriage partnership is his own separate property, but it is question for court to decide what portion of profits thereafter arises

from use of such capital and what part arises from activity and personal ability of husband, and that portion of income due to personal character, energy, ability and capacity of husband is community property.

4. Fraud ⇨58(2)

In action against plaintiff's former husband for accounting, restitution and damages alleged to have resulted from alleged false and fraudulent representations made by defendant with respect to nature and extent of property of defendant who entered into property settlement agreement with plaintiff in which defendant represented he had no interest in partnership or in theater operated by such partnership, evidence sustained conclusion that such representation although untrue was unknowingly untrue and was innocently made.

5. Fraud ⇨50

When cause arises out of alleged false representation, plaintiff, in order to prevail, must ordinarily show that representation was false to knowledge of party making it and was as to a material fact, or was recklessly made, or without reasonable grounds for believing its truth, that it was made with intent to induce other party to do or refrain from doing some act and was relied upon by other party.

6. Internal Revenue ⇨1933

Where partnership in which defendant was a partner paid estimated income tax for year in name of defendant and defendant's wife, which funds were charged against partnership interest of defendant and were made from partnership business account, and plaintiff subsequently obtained divorce from defendant after which final returns for fiscal year were filed and additional payment was made on separate return of defendant, and request was made and granted for refund on separate return of plaintiff, such tax refund was either payable to plaintiff or to partnership and not to defendant individually.

Launer, Chaffee & Launer, Fullerton, for appellant.

Clayson & Stark, Corona, for respondent.

MUSSELL, Justice.

This is an action brought by plaintiff against her former husband for an accounting, for restitution and damages alleged to have resulted from false and fraudulent representations made by defendant with respect to the nature and extent of his property. A cross-complaint was filed by defendant in which he claimed that the plaintiff was indebted to him in the sum of \$522.11 for money had and received. The trial court rendered judgment in favor of the defendant both on the complaint and on his cross-complaint. Plaintiff's appeal is based upon the contention that the evidence does not support the findings and judgment.

Plaintiff and defendant were married on June 17, 1946 and lived together until May, 1947. On May 15, 1947, plaintiff commenced an action for divorce in which she sought an award to her of the community property and made no claim for alimony. Two days later the parties executed a property settlement agreement providing for a transfer to defendant of the house and furniture owned by the parties and the payment to plaintiff of the sum of \$500. Plaintiff waived all right to support and maintenance. The agreement contained the following provisions:

"Whereas, said husband represents that he has no title to, or interest in, Glenn Harper & Sons or in the Corona Theatre or in any theatre conducted by Glenn Harper and has not disposed of any such interest prior to making this settlement. * * *

"Now, therefore, relying upon said representations and in consideration of the respective covenants and promises hereinafter made, said parties covenant, promise and agree as follows:

"In consideration of the foregoing covenants and agreements and relying upon them, each party hereto forever quit claims, surrenders and releases unto the other, any and all rights, claims, interest or estate, whether of community, inheritance, marital support or any other nature whatsoever, present or future, in and to any and all property and earnings of the other,
* * *"

Plaintiff contends that the quoted representations were false; that she was induced thereby to proceed with the trial of the divorce action without requesting an adjudication with respect to the community property of the parties or for her support and maintenance.

Glenn Harper, who had been in the motion picture business since 1911, owned a theatre in Corona and leased two in Fontana. At the time of his marriage to plaintiff, defendant James Harper was a partner with his father, Glenn Harper, and with his two brothers, Leslie and Ernest, in the operation of the Corona theatre and one in Fontana. The partnership related solely to the operation of said theatres and the partnerships did not own any real property or rights therein or any other substantial physical assets. In this connection defendant testified that he had no actual knowledge of his partnership interest. Glenn Harper testified that there was no written or express partnership agreement with his sons; that the partnerships did not in any way extend to the ownership of the theatres or other physical property; that the partnerships were as to the profits only; that there was no agreement with defendant as to a division of partnership earnings; that James had no ownership in the profits of the partnership; that James had no interest in partnership funds or income unless he, Glenn Harper, saw fit to give it to him.

The record shows that during the time the plaintiff and defendant were married they were employed in the Corona theatre. Defendant was doing routine work not involving any managerial direction, the theatre being managed by his brother, Leslie, under the supervision of his father. Plaintiff and defendant received between \$40 and \$45 per week for their joint services and they expended all of the sums received by them from the theatres. It appears also that Glenn Harper paid from the business numerous traffic violation fines for James, plus payments on the home and furniture and \$500 paid by defendant to plaintiff at the time of the property settlement agreement.

Income tax returns for the partnerships, prepared by an accountant under the direc-

tion of Glenn Harper, indicated that the operating partnerships made substantial profits and that the shares of the net income allocated to defendant exceeded the sums actually paid to him. However, Glenn Harper retained control and ownership of these funds. He testified that eventually his sons would get one-fourth of the profits of the business but that his son, James, had only a drawing account.

[1] The trial court found that the weekly payments to defendant constituted all of the partnership income attributable to the personal character, energy, ability and capacity of the defendant and that defendant's one-fourth interest in the partnership was acquired prior to his marriage to plaintiff and was his separate property. There is substantial evidence to support these findings and the court's conclusion that plaintiff and defendant had no community property at the time of their divorce except as set forth in the property settlement agreement.

Appellant argues that the presumption is that all property acquired after marriage (except that acquired by a married woman or by an instrument in writing) is community property and that the presumption can be overcome only by strong evidence to the contrary. Citing *Estate of Bryant*, 3 Cal.2d 58, 43 P.2d 529, and *Estate of Jolly*, 196 Cal. 547, 238 P. 353. However, these cases hold that the presumption is disputable and may be controverted by other evidence, direct or indirect, and even by an inference tending to prove a contrary contention. We cannot say as a matter of law that the evidence here was insufficient to controvert it.

[2,3] Appellant contends that the trial court failed to consider the element of defendant's separate investment in the theatre business in determining what part of the partnership income should be allocated as community property. The rule is stated in *Huber v. Huber*, 27 Cal.2d 784, 792, 167 P.2d 708, 713, as follows:

"In regard to earnings, the rule is that where the husband is operating a business which is his separate prop-

erty, income from such business is allocated to community or separate property in accordance with the extent to which it is allocable to the husband's efforts or his capital investment."

As was said in *Witaschek v. Witaschek*, 56 Cal.App.2d 277, 281, 132 P.2d 600, 603:

"The capital which the husband brings to the marriage partnership is his own separate property, but it is a question for the court to determine what portion of the profits thereafter arises from the use of this capital and what part arises from the activity and personal ability of the husband. That portion of the income due to the 'personal character, energy, ability and capacity of the husband' is community property."

In the instant case defendant's present interest in the partnership was limited to a drawing account of \$40 to \$45 per week and there was substantial evidence upon which to base the court's findings that certain weekly payments constitute all of the partnership income attributable to the character, energy, ability and capacity of defendant. In view of this finding it was unnecessary to find as to the income, if any, from defendant's separate investment.

[4] Plaintiff contends that the trial court erred in holding that plaintiff was not entitled to damages or restitution for the alleged false representations of defendant. This contention is without merit. The court concluded that the defendant had an interest in the operating partnership which was his separate property; that the representation in the property settlement agreement that defendant had no title to or interest in the Glenn Harper & Sons or in the Corona theatre was false, although unknowingly and innocently made; that plaintiff did not rely upon this representation to her damage and that there was no basis for restitution. Defendant's testimony that he had no actual knowledge of this partnership interest, the fact that there was no partnership agreement, the further fact that a division of interest was never discussed between father and son and the testimony as

to the nature of the interest of defendant in the business furnish sufficient evidence to support the trial court's conclusion that the representation was unknowingly and innocently made.

[5] As was said in *Cox v. Westling*, 96 Cal.App.2d 225, 229, 215 P.2d 52, 54:

"The elements of actionable fraud frequently have been summarized as follows: 'When a cause arises out of an alleged false representation, the plaintiff, in order to prevail, must ordinarily show that the representation was as to a material fact; that such fact was false and known to be false by the party making it, or else recklessly made, or without reasonable grounds for believing its truth; that the representation was made with intent to induce the other party to do or refrain from doing some act; that it was relied upon by the other party—in other words, that such other party was actually misled and deceived and induced by it to act or refrain from acting; that in so acting or refraining from acting he was ignorant of the falsity of the representation and reasonably believed it to be true; and that he thereby suffered damage or injury. The absence of any one of the elements is generally fatal to a recovery.' 12 Cal.Jur. 724-725. *Wheat v. McNeill*, 111 Cal.App. 72, 78, 295 P. 102; *Andrew v. Bankers & Shippers Ins. Co.*, 101 Cal.App. 566, 575, 281 P. 1091; see, also, 37 C.J.S., Fraud, § 3, p. 215."

In the instant case the elements of intent and knowledge are lacking and such absence is fatal to recovery for fraud. There is also testimony in the record indicating that plaintiff did not rely upon this representation. The divorce complaint was filed two days before the property settlement agreement was executed and did not contain a request for alimony or support money. Plaintiff testified that she did not talk to defendant about it and stated in her deposition that she "wanted a divorce and didn't care about alimony or anything else provided

she could get the divorce and get it right away".

[6] Finally, it is argued that neither the findings nor the evidence support the judgment for defendant on the cross-complaint. The evidence shows that the partnerships paid an estimated income tax for the year 1947 in the name of plaintiff and defendant. These funds were charged against the partnership interest of defendant and were made from the partnership business account. When the final returns for the 1947 fiscal year were filed, an additional payment was made on the separate return of defendant, and a request was made for a refund on the separate return of plaintiff. This request was granted and the government sent a check for \$522.11, payable to plaintiff, representing this overpayment. She received this check on May 6, 1949, and cashed it. She refused to return these funds to defendant and he seeks recovery thereof in his cross-complaint on the theory that plaintiff is indebted to him in the sum of \$522.11 for money had and received for his use. Glenn Harper testified that the annual tax payments for defendant were made from the partnership business and were charged to his account and the accountant (Mr. Cowen) testified that the source of the monies to pay the particular estimate of tax involved in the cross-complaint was the partnership business account. Under this evidence (which is uncontradicted) it appears that the tax refund involved would be payable to the partnership or to the plaintiff and not to the defendant individually. The cross-complaint was not filed by defendant in a representative capacity but by him individually. Under such circumstances, the evidence was insufficient to support a judgment in favor of defendant on the cross-complaint.

Judgment on the complaint affirmed. Judgment on the cross-complaint reversed. Each party to bear their own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

116 Cal.App.2d 103

ERICSON et al. v. PETERSEN.

Civ. 4606.

District Court of Appeal, Fourth District,
California.

Feb. 16, 1953.

Hearing Denied April 15, 1953.

Action for injuries sustained by patient in rest home in fall from bed. The Superior Court, Fresno County, Philip Conley, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the evidence showed that the proximate cause of the injury was due to the action of the patient.

Affirmed.

1. Negligence ⇨121(2)

To authorize application of doctrine of "res ipsa loquitur", accident must be of kind which ordinarily does not occur in absence of someone's negligence, must be caused by agency or instrumentality within exclusive control of defendant, and must not have been due to any voluntary action or contribution on part of plaintiff.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

2. Negligence ⇨121(2)

Doctrine of res ipsa loquitur, which throws upon party charged duty of producing evidence, may be invoked when chief evidence of true cause of injury, whether culpable or innocent, is practically accessible to defendant but inaccessible to injured person.

3. Appeal and Error ⇨931(1)

On plaintiff's appeal, evidence would be viewed in light most favorable to defendant.

4. Asylums ⇨8

In action for injuries sustained by patient in rest home in fall from bed, evidence showed that proximate cause of injury was due to patient's action.

5. Asylums ⇨8

Where chief evidence of true cause of fall by patient from rest home bed was accessible to the patient, doctrine of res ipsa loquitur would not apply.

6. Asylums ⇨8

In action for injuries sustained by patient in rest home in fall from bed, wherein plaintiffs sought to avoid effect of rule making doctrine of res ipsa loquitur inapplicable where evidence concerning accident is accessible to injured person on ground that patient because of mental condition was unable to explain happening of accident, evidence presented question for trier of fact as to patient's mental capacity.

7. Asylums ⇨8

In action for injuries received by patient in rest home in fall from bed, evidence supported determination that neither operator of rest home nor her agents were negligent at time of injury.

8. Evidence ⇨87

Where there was substantial evidence to support judgment for defendant, effect of any failure on part of defendant to call witness was matter to be considered by trial court. Code Civ.Proc. § 1963, subd. 5.

Wild, Carlson & Reeve, Robert M. Barnard, Fresno, for appellants.

Lawrence W. Young, James M. Thuesen, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiffs and appellants, husband and wife, brought this action for damages, alleging that Mrs. Ericson suffered injury while a patient in a sanitarium operated by defendant and respondent. Defendant denied negligence and alleged contributory negligence on the part of the plaintiffs. The court made detailed findings, and found in favor of defendant on all issues. Plaintiffs appealed and claim mainly that the evidence is insufficient to justify the finding that defendant was not negligent and that plaintiff Mrs. Ericson was guilty of contributory negligence which was the proximate cause of her injury.

The evidence shows that she was about 74 years of age and had suffered a stroke in 1949, leaving her left side affected. In March, 1950, she fell while in her home and broke her leg. She has been practically

bedridden ever since. She was in the Community Hospital and later in the Collins Rest Home, until March 27, 1950. Mr. Ericson investigated defendant's licensed rest home, which contained 44 beds. Sixteen of the patients were bed patients. In the daytime eight nurses and an orderly were on duty. On the night shift there were as high as six nurses part time. Mrs. Ericson was brought to the home on May 27, 1950. The rate for her ordinary care was \$150 per month, which was paid in advance. She was confined to a regular hospital bed. Later, side-rails, about 19 inches in height such as are ordinarily used in hospitals, were securely attached to the bed. The outside, or highest rail, was attached by wire covered with a stocking. The inside or lower rail near the wall, was attached by a clamp at the head and foot of the bed, and was tied to the bed by means of a shoe lace in a bow knot, with two hook clamps so that it could be let down when the nurse was making the bed or bathing the patient. The patient was "confused" and, even in the other home and hospital, continually expressed a desire to return to her home. Mr. Ericson visited with his wife on several occasions and expressed his entire satisfaction with the care given her, although defendant indicated to him that the patient showed considerable nervousness during the night and she suggested special nurse's care. Apparently Mr. Ericson was satisfied with the general care given to the patient and knew that a nurse would not be with his wife at all times. Plaintiff's attending physician never indicated that any restraint, other than the side-rails, should be considered to keep the patient from climbing out of bed. Two other patients were in the same room, which room was nearest the nurse's call desk. Each patient had access to a call bell.

About 4:45 p. m. on June 1st, a nurse prepared the patient for dinner. Both rails were up and the bed was against the wall. The nurse rolled the mattress up in a reclining position and placed the tray on the bed preparatory to feeding her. Several other nurses testified that just previous

to this time the rails were up and were securely clamped and tied. About 5 p. m., after checking the rails and general conditions, the nurse momentarily left the room to look over a chart at the desk. Soon thereafter, she heard a commotion and immediately returned to the bedroom and saw Mrs. Ericson sitting on the floor pushing the bed away with her foot. At that time the inside rail was down and the leather shoe lace was untied and on the floor. The bed was about three feet from the wall. The doctor and the patient's husband were called and it was discovered that the patient had a fractured hip bone.

The husband and his daughter testified to a little different version of the position of the one rail and the bed clothing when they arrived several hours later. The case was heard by the court without a jury.

It is plaintiffs' contention that under the evidence they were entitled to the application of the doctrine of *res ipsa loquitur*, and if applied, the court was duty bound to find in favor of plaintiffs since an inference of negligence arose by reason of its application, and since any explanation given by defendant as to the cause of the injury was physically impossible, and since Mrs. Ericson was paralyzed, the side rail could not have been removed or let down by her, and therefore it must have been left in that position by the attending nurse when she left the room. It is then argued that it is the duty of a hospital to use reasonable care and diligence in safeguarding a patient committed to its charge, and such diligence is to be measured by the capacity of the patient to take care of herself, citing such cases as *Thomas v. Seaside Memorial Hospital*, 80 Cal.App.2d 841, 183 P.2d 288; *Valentin v. La Societe Francaise*, 76 Cal.App.2d 1, 172 P.2d 359; *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 P. 436; *Timbrell v. Suburban Hospital, Inc.*, 4 Cal.2d 68, 47 P.2d 737; and *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 689, 162 A.L.R. 1258. The cases relied upon by plaintiffs are factually dissimilar to those in the instant case.

[1,2] The applicability of the doctrine of *res ipsa loquitur* is fully discussed in

Ybarra v. Spangard, supra, and it is there said:

"The doctrine of *res ipsa loquitur* has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" It further recites that: "'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.'" (Citing cases.)

[3-5] From the evidence, viewed in a light most favorable to the defendant, as we must, it appears that the proximate cause of the injury was due to the action of Mrs. Ericson. The chief evidence of the true cause was accessible to the injured person. Therefore, the doctrine would not apply. *Black v. Partridge*, 115 Cal.App.2d 639, 252 P.2d 760.

Plaintiffs endeavor to avoid the effect of this evidence by concluding that Mrs. Ericson, by reason of her mental condition, was unable to explain the happening of the accident. The court made a specific finding that at the time plaintiff got out of the bed she was mentally normal and knew the significance of her own acts. The evidence on this question is various.

Plaintiff's attending physician for some years, testified that in March, 1950, she had a determined increase of mental confusion and that in June, 1950, she was still "mentally confused"; that on the day of trial, December 3, 1951, she was greatly improved as to her mental condition, but could not come to court to testify because of her mental incompetency; that what he meant by "incompetent" was that she was not able

to take care of her affairs in a rational manner.

The defendant and the nurse testified generally that when Mrs. Ericson was in the home her mental condition was good; that she carried on a good conversation but that her chief subject of complaint was that she was tired of hospitals and wanted to get out of bed and go home.

Plaintiffs' daughter testified that on May 10th and 31st she went to the rest home and carried on a conversation with her mother; that she talked about the past most of the time but could answer intelligently questions asked of her in a conversation. The husband testified his wife was not confused all the time; that she intelligently answered some of his questions and others she did not; that his wife was "not insane", just "mentally confused" part of the time.

[6] Plaintiffs argue that the testimony of the attending physician should be accepted as true and the other testimony as to her sanity disregarded. They lay considerable stress upon a notation made by defendant written on a refund check bearing the word "mental". Defendant accounts for this by saying that she meant "confused" and the notation was placed thereon because the bookkeeper always wanted to know the reason for the refund. It appears from the evidence that the question of plaintiff's mental capacity was a question of fact for the trial court to determine. *Rose v. Melody Lane*, 39 Cal.2d 481, 247 P.2d 335.

Defendant produced in evidence certain rules and requirements of the State Department of Health pertaining to rest homes, and in particular Article 9, sec. 246(a) thereof, which provides:

"Restraints. (1) General. Restraints may be applied only when they are necessary to prevent injury to the patient or others, shall be used only when alternative measures are not sufficient to accomplish these purposes, and on written order of the physician."

[7] There is sufficient evidence supporting the finding that neither defendant nor her agents were negligent at the

time of the claimed injury, even if it could be said that the doctrine of *res ipsa loquitur* was applicable to the facts presented. Only a conflict in the evidence would arise for the determination of the trial judge. The finding is supported by substantial evidence and this court is not authorized to reweigh evidence. *Lockard v. Matlaw*, 140 Cal.App. 640, 35 P.2d 591; *Burton v. Los Angeles Ry. Corp.*, 79 Cal. App.2d 605.

In *Gray v. Carter*, 100 Cal.App.2d 642, 224 P.2d 28, this court reversed a judgment for plaintiff and held the evidence was insufficient to support a verdict awarding a sanitarium patient damages as a result of a fall in her room where it appeared that plaintiff, who was suffering from arthritis received the general care of a sick patient and there was no evidence that any nursing care was expected or contracted for, no indication as to how or why she fell, and no evidence which would support an inference that defendants had any knowledge of any change in plaintiff's mental condition which would have caused them, as reasonable persons, to anticipate that she was likely to fall. Many cases are cited therein supporting the judgment here rendered.

[8] A final claim is made that another patient was in the room at the time and should have been called by defendant as a witness to show what was the cause of plaintiff's fall; that by reason of defendant's failure to call her, it must be inferred that her testimony would have been adverse to defendant, citing sec. 1963, subdivision 5 of the Code of Civil Procedure. The evidence is that one of the patients in the room with Mrs. Ericson subsequently died and the other was a bed patient at the time. There is no showing that that patient was awake or observed the plaintiff or that she knew anything pertaining to the cause of plaintiff's injury. She was available to plaintiff as a witness, as well as to defendant. There is no showing that defendant willfully suppressed any evidence. Where there was substantial evidence to support the judgment, the effect of any failure on the part of defendant to call a

witness was a matter to be considered by the trial court. *Moore v. Spremo*, 72 Cal. App.2d 324, 164 P.2d 540.

Judgment affirmed.

MUSSELL, J., concurs.

BARNARD, P. J., being disqualified, did not participate herein.



115 Cal.App.2d 844

KETTMAN v. LEVINE.

No. 15261.

District Court of Appeal, First District,
Division 1, California.

Feb. 10, 1953.

Hearing Denied April 8, 1953.

Action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, which was in the wrong lane, and when trucker was thereafter struck by second automobile while talking to defendant. The Superior Court, in and for the County of Santa Clara, Milo Popovich, J., entered judgment on verdict for defendant, and trucker appealed. The District Court of Appeal, Bray, J., held that, where jury, upon requesting court to re-read some instructions, was primarily interested in question of proximate cause, any error in the contributory negligence instructions could not have been prejudicial.

Judgment affirmed.

I. Automobiles ☞246(8, 22)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, giving of instruction that trucker could not recover unless he proved both existence of defendant's negligence and fact that such negligence directly or proximately contributed to the injuries was proper.

2. Trial ⇨296(3)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, failure to include in instruction on proximate cause a statement that such cause may operate directly or through intermediate agencies or through conditions created by such agencies was not prejudicial error in view of other instructions given.

3. Trial ⇨296(3)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, giving of instruction on proximate cause which stated, in part, that proximate cause consists only of the factor or combination of factors that compels the injurious result was not error in view of other instructions given.

4. Automobiles ⇨246(22)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, giving of instructions that proximate cause existed if defendant foresaw, or by exercise of ordinary care would have foreseen, probability of second motorist's and defendant's conduct resulting in the injury and that defendant would not be liable in absence of such foreseen or foreseeable probable result was proper.

5. Negligence ⇨59

The question of proximate cause is a question of foreseeability.

6. Negligence ⇨141(8)

In a personal injury action, it is improper to state that a degree of negligence, however slight, prevents a recovery by plaintiff instead of instructing that it is negligence contributing proximately, no matter how slight, to the injury that prevents a recovery.

7. Automobiles ⇨246(25)**Trial** ⇨296(3)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, giving of instruction that degree of negligence, however slight, would prevent recovery by plaintiff was error but was not prejudicial in view of other instructions given.

8. Automobiles ⇨246(25)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, instructing jury that trucker had duty to avoid placing himself in danger was not error.

9. Automobiles ⇨246(8)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, giving of instruction that defendant was not required to anticipate that there would be an accident or take precautions against any accident which a person of ordinary prudence would not anticipate was not error.

10. Automobiles ⇨242(8)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, trucker, who was unable to remember anything after the first accident, was entitled to a presumption of due care.

11. Appeal and Error ⇨1068(1)

In action by trucker for injuries received when truck, which was in proper lane, collided with defendant's oncoming automobile, and when trucker was thereafter struck by second automobile while talking to defendant, where jury's interest, upon having court reread the instruc-

tions, was in the question of proximate cause, any error in the contributory negligence instructions could not have been prejudicial.

James F. Boccardo and David S. Lull, San Jose (Edward J. Niland, Santa Clara, of counsel), for appellant.

Crist, Stafford & Peters and John M. Brenner, Palo Alto, for respondent.

BRAY, Justice.

In a personal injury action, plaintiff appeals from a judgment on a jury verdict in favor of defendant.

Questions presented.

Instructions:

(a) Proximate Cause

(b) Contributory Negligence.

Facts.

Originally the action was against defendant and one Garcia. Upon payment to plaintiff of \$4500 the action was dismissed as to Garcia. Later, a jury rendered a verdict in favor of defendant. As no contention is made of the insufficiency of evidence to justify the verdict, only such of the evidence will be given as is necessary for the proper consideration of plaintiff's contentions concerning the instructions. At about 6:50 a. m. one dark and foggy morning a collision occurred on the Bayshore Highway between an automobile operated by defendant and a tractor and semi-trailer (hereafter referred to as a truck) operated by plaintiff. At that time the two lanes normally used by northbound traffic were under repair for about a quarter of a mile. They were blocked off at each end of the repair area by wooden horses, lanterns and detour signs directing northbound vehicles to use the inner southbound lane and southbound traffic to use the outer southbound lane. Plaintiff, traveling north, was correctly using the inner southbound lane. Defendant, traveling south, was incorrectly using the same lane. The two vehicles collided. The circumstances left little, if any, doubt that defendant's negligence caused the accident. Later, defendant pleaded guilty to driving on the

wrong side of the road and paid a \$50 fine. Although plaintiff testified that he was rendered unconscious in the collision, remembering nothing until he awoke later in the hospital, other evidence supports the conclusion that he was not seriously injured at this time. Shortly, two state highway patrolmen arrived. They parked their car apparently in the northbound lane of the two regular southbound lanes, put flares out, and while one directed traffic the other talked to plaintiff and defendant, and to a tow-truck driver who had arrived. Plaintiff's truck extended several feet into the outer southbound lane. Traffic was moving slowly by with plenty of room to get around the accident. The fog had lifted a little, and it became somewhat lighter. About 7:04 a. m. Garcia, coming from the north and driving between 25 and 35 miles per hour, drove suddenly onto the scene. The patrolman, tow-truck driver and defendant were able to get out of his way, but he struck plaintiff, hurling him into the air, and then caroming off plaintiff's truck. Plaintiff sustained serious injury.

The jury retired at 3:37 p. m. At 5 o'clock they returned and requested further instruction. The court re-read instructions on negligence, ordinary care and proximate cause. Counsel stipulated that no further instructions need be read. At 6 o'clock the jury returned with a verdict of 11 to 1 in favor of defendant.

(a) Proximate cause.

Both parties agree that under the circumstances of this case, the question of the proximate cause of plaintiff's injuries was one for the jury, and that the evidence would have supported a finding, had the jury so found, that defendant's negligence in driving on the wrong side of the road and causing the first accident was a proximate cause of the second. See *Bunch v. Eason*, 95 Cal.App.2d 845, 214 P.2d 28.

[1] Instruction No. 15, after stating that the burden is on plaintiff to prove negligence on defendant's part and that such negligence contributed directly or proximately to plaintiff's injuries, states: "Un-

less the plaintiff proves both the negligence of said defendant and that such negligence *directly or proximately* contributed to the injuries and damages sustained, there can be no recovery herein * * *.”¹

Plaintiff’s first criticism seems to be that notwithstanding the use of “or” in two places in this instruction the jury is told either that defendant’s negligence must be *both* a direct *and* proximate cause, or that “direct” means “proximate” and vice versa. Obviously, the instruction does not do so. It correctly states the law. Interestingly enough, in *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393, and *Ward v. Read*, 219 Cal. 65, 25 P.2d 821, a somewhat similar instruction but using the conjunctive “and” instead of the disjunctive “or” was held proper. In *Hill v. County of Fresno*, 140 Cal.App. 272, 35 P.2d 593, the conjunctive instruction was held erroneous but not prejudicial. In *Ramos v. Service Bros.*, 118 Cal.App. 432, 5 P.2d 623, an instruction using the word “directly” instead of “proximately” was held proper.

[2] Plaintiff contends, secondly, that in its instruction No. 33, B.A.J.I. Instructions No. 104 and 104-A, “The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause,” the court should have added, “It may operate directly or through intermediate agencies or through conditions created by

such agencies.” Plaintiff argues that the omission of this sentence gives an emphasis to the word “directly” in instruction No. 15 and wherever it is used in other instructions. While it would have been better to have included the sentence, we cannot say that its omission gave the emphasis contended nor that it was prejudicial in view of the second portion of the instruction, the other instructions, and particularly instructions No. 37 and No. 38, based on B.A.J.I. 104-C and 104-D.

[3] Instruction No. 34, 1950 B.A.J.I. Supp., p. 85 (104 alternate (new)) states: “Liability in law attaches only to the proximate cause of injury, and to that cause only when it issues from negligence. Although many circumstances leading up to and surrounding an accident may be linked to it in a chain of causation, so that we may say that the accident would not have happened without them, the proximate cause consists only of the factor or combination of factors that *compels* the injurious result. The word ‘proximate’ means ‘near’; and any particular conduct, to be a proximate cause of injury, must be effective as a cause at the time the injury is inflicted, and in one of three ways: It must immediately precede and lead into the injury, or, if the conduct began or was done at a prior time, either it or a condition created by it must continue to the time of injury.” Plaintiff contends first that the word “near” is misleading in that the jury might understand it to mean not “closest in responsible causation” (cf. *Black’s Law Dictionary*, 3rd ed., 1933, p. 1457) but near in a physical sense. “Proximity in point of time or space is no part of the definition” of proximate cause. *Osborn v. City of Whittier*, 103 Cal.App.2d 609, 230 P.2d 132. But reading the instruction as a whole and in conjunction with the other instructions in the case this criticism is captious.² Plaintiff also contends that the word “compels” makes the instruction faulty in that, in effect, it tells the jury that defendant’s negligence in bringing about the first

1. Unless otherwise noted, all italics added.

2. Twenty-seven instructions mentioning proximate cause were given. Eight explained it.

collision, in order for such negligence to be a proximate cause of plaintiff's injury, must have compelled Garcia to run plaintiff down. Concerning the choice of the word "compel" in this instruction, its authors state (1950 Supp. B.A.J.I. p. 84): "The greatest difficulty in defining proximate cause lies in distinguishing it and setting it apart from all the circumstantial causes. The word 'compel' makes the distinction. * * * The accidental injury is compelled into reality—probably by a combination of conditions and force, and we suggest that to answer the question, what compelled the accident? is to identify the proximate cause."

We doubt the advisability of using the word "compel" in this type of instruction. A jury may not understand it in the same sense the B.A.J.I. authors intended. The word "causes" is more familiar to the layman. However, a common sense interpretation of this instruction in connection with the other instructions, particularly those referring to specific acts of the defendant which could be considered in determining the proximate cause of the second accident, would not warrant the conclusion drawn from it by plaintiff.

[4, 5] Plaintiff also complains of Instructions No. 37 and No. 38, contending that they, or at least No. 38, is similar to the instruction which the court in *Werkman v. Howard Zink Corp.*, 97 Cal.App.2d 418, 218 P.2d 43, found objectionable because it stated in effect that negligence of a person could not be a proximate cause of an accident unless the person foresaw, or by the exercise of ordinary care would have foreseen the *identical* consequences that happened. However, the instructions criticized here did not so state. They stated that in determining whether defendant's conduct was a proximate cause, the test was whether defendant foresaw, or by the exercise of ordinary care would have foreseen, the probability of Garcia's conduct and the probability that defendant's conduct plus that of Garcia would result in injury to plaintiff. If the probable result was not thus foreseen or foreseeable by defendant he would not be liable. In-

struction No. 37 is B.A.J.I. Instruction 104-C. Instruction No. 38 is a repetition of most of 104-C, using the names of the parties instead of the general designation of "actors" as in instruction No. 37. As said by Mr. Presiding Justice Peters in *Jones v. City of South San Francisco*, 96 Cal.App.2d 427, at page 435, 216 P.2d 25, at page 29, the question of proximate cause is "a question of foreseeability." These instructions were proper. Moreover, instruction No. 37 was given at plaintiff's request.

(b) Contributory Negligence.

[6, 7] Instruction No. 54: "You have no right to compare the fault of one driver in this case with the fault of either other driver. In other words, if you find from the evidence that plaintiff was guilty of *any degree of negligence, no matter how slight*, which proximately contributed to the happening of the accident, then your verdict must be for the defendant." Instruction No. 56: "Any negligence, *however slight*, on the part of plaintiff which directly and proximately contributed to the happening of the accident involved in this case bars a recovery by him."

In instruction No. 57 the language used was that if plaintiff was guilty of any negligence which proximately contributed, "even in the slightest degree," to the happening of the accident, plaintiff could not recover. In *Clark v. State of California*, 99 Cal.App.2d 616, at page 623, 222 P.2d 300, 304, the court said concerning instructions which, like those above mentioned, stated that recovery would be barred if plaintiff were guilty of contributory negligence, "no matter how slight", which proximately contributed to the accident, "The rule is, not that any degree of negligence, however slight, which directly concurs in producing the injury will prevent a recovery; but, if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover." Ordinarily we would not be disposed to attach great importance to this defect in the instructions * * *." However, in that case the jury had returned for

a re-reading of instructions on plaintiff's negligence, and in the colloquy between court and the foreman of the jury great emphasis was laid upon slight negligence of plaintiff rather than negligence slightly contributing to the accident. The court stated: "What the foreman said to the court at that time amounted in substance to a statement that the jury were discussing the question of decedent's negligence exactly in the light of the court's erroneous statement"; and that from the circumstance of the jury's desire to have the contributory negligence instructions re-read and particularly because of the jury foreman's statement to the effect that the jury were under the impression that plaintiff could not recover if he were negligent "in even the tiniest little bit", 99 Cal. App.2d at page 624, 222 P.2d at page 305, it was clear that the jury considered the "question of decedent's negligence exactly in the light of the court's erroneous statement." 99 Cal.App.2d at page 623, 222 P.2d at page 304. In our case, however, there was no request for re-reading of instructions on contributory negligence. It was proximate cause in which the jury was primarily interested. Technically speaking, it is improper to state that the *degree of negligence, however slight*, prevents a recovery by plaintiff, instead of stating that it is the *negligence contributing proximately, no matter how slight*, to the injury. However, it would be very difficult except in a case like the Clark case, *supra*, where the matter was discussed with the court, for a jury to understand the difference between the two instructions. In our case instruction No. 57 states the matter correctly. Instructions No. 54 and No. 56 state it incorrectly. It is very doubtful if the jury knew the difference in these instructions. In *Conner v. Southern Pacific Co.*, 38 Cal.2d 633, at page 641, 241 P.2d 535, at page 540, a "negligence, no matter how slight" instruction was given. The majority opinion, without discussing this or any other instruction in detail, held that all the instructions were correct.

[8] Instruction No. 50: "I instruct you that it was the duty of Jack L. Kettman to be alert and to avoid placing himself in danger." This instruction should be considered in connection with all the other instructions in the case, and when so read it did not require, as plaintiff contends, plaintiff to avoid danger at his peril, but only required him to use reasonable care to avoid danger.

[9-11] Instruction No. 51: "The court instructs you that Mr. Levine is to be judged in the light of what would be reasonable and proper under the circumstances. Any person can determine how the accident might have been avoided after it has happened. The law does not require Mr. Levine to anticipate that there was going to be an accident or take precautions against any accident which a person of ordinary prudence would not anticipate." When read with the other instructions this one stated in effect that defendant was only required to anticipate accidents which a person of ordinary prudence would anticipate. This is a correct statement of the law. At the time Garcia struck him plaintiff was in the inner southbound lane being used by northbound traffic, with defendant and the two patrolmen. Garcia should have been in the outer or southbound lane. They were discussing the removal of the vehicles from the highway. Plaintiff, because of his inability to remember subsequent to the first accident, was entitled to the presumption of due care. These circumstances, plus the jury's interest in proximate cause, show clearly that the jury did not find contributory negligence, and that any error in the contributory negligence instructions could not have been prejudicial.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

115 Cal.App.2d 828

PEOPLE v. WHITE,

Cr. 4890.

District Court of Appeal, Second District,
Division 2, California.

Feb. 9, 1953.

Hearing Denied March 9, 1953.

An accused was convicted in the Superior Court of Los Angeles County, William B. Neeley, J., of burglary of the first degree, attempted robbery, and assault with a deadly weapon, and he appealed. The District Court of Appeal, McComb, J., held that accused was properly sentenced for three separate crimes, as against contention that acts committed by accused constituted but one offense.

Affirmed.

1. Criminal Law Ⓒ641(1)

An accused has constitutional right to appear and defend himself in person and may waive assistance of counsel. Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

2. Constitutional Law Ⓒ268**Criminal Law** Ⓒ641(1)

Where an accused charged with burglary of the first degree, attempted robbery and assault with a deadly weapon, voluntarily chose to represent himself, he could not on appeal from conviction successfully contend that he was deprived of his constitutional right to be represented by counsel. Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

3. Assault and Battery Ⓒ92**Burglary** Ⓒ41(1)**Robbery** Ⓒ24(1)

Evidence justified conviction for burglary of the first degree, attempted robbery, and assault with a deadly weapon.

4. Criminal Law Ⓒ1159(3, 4)

Conflicts in evidence in criminal prosecution and inconsistencies in testimony of an individual witness are questions to be determined by trial jury whose finding, supported by substantial evidence, is binding upon an appellate court.

5. Criminal Law Ⓒ338(1)

In prosecution for burglary of the first degree, attempted robbery, and assault with a deadly weapon, subject matter of

questions asked complaining witness on cross-examination as to whether complaining witness was congratulated for bravery because of his conduct and as to whether complaining witness received considerable publicity after incident, was irrelevant and immaterial, and trial court properly refused to permit complaining witness to answer such questions.

6. Criminal Law Ⓒ1035(3)

Where an accused charged with burglary of first degree, attempted robbery, and assault with a deadly weapon, did not object at time of trial to alleged misconduct of trial judge in comments judge made during course of trial, nor did accused request trial judge to admonish jury to disregard such alleged prejudicial remarks, accused could not complain of such alleged error on appeal from conviction.

7. Assault and Battery Ⓒ56

An accused could properly be convicted of assault with a "deadly weapon" even though pistol used by accused in assault was a type pistol for which ammunition was never obtained and was not obtainable, since an unloaded pistol may be used as a bludgeon.

See publication Words and Phrases, for other judicial constructions and definitions of "Deadly Weapon".

8. Assault and Battery Ⓒ56

If a person is armed with pistol when he perpetrates crime, such evidence is sufficient to sustain finding that such person was armed with a "dangerous weapon" or "deadly weapon", even though pistol was not loaded.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous Weapon".

9. Assault and Battery Ⓒ56**Burglary** Ⓒ2**Criminal Law** Ⓒ29**Robbery** Ⓒ1

An accused was guilty of burglary when he entered retail store with intent to commit larceny, was guilty of robbery when he demanded at gun point that store owner give accused money, and was guilty of assault with a deadly weapon when he

bludgeoned store owner over head with pistol when store owner denied possessing any money, and accused was properly sentenced for three separate crimes, as against contention that acts committed by accused constituted but one crime. Pen.Code, §§ 211, 240, 245, 459.

10. Criminal Law — 1109(2)

Where accused made no objection to reporter's transcript nor suggested any corrections thereof until after trial judge, on thirteenth day after accused acknowledged receipt of transcript, signed and certified to original reporter's transcript that no objection was made within time allowed by law, accused waived alleged error in transcript under rules on appeal. Rules on Appeal, rule 35(c).

Edmund G. Brown, Atty. Gen. and Michael J. Clemens, Deputy Atty. Gen., for respondent.

Harold Raymond White, in pro. per.

McCOMB, Justice.

From a judgment of guilty after trial before a jury of (1) burglary of the first degree, (2) attempted robbery, and (3) assault with a deadly weapon, defendant appeals.

Facts: On February 23, 1952, defendant entered a ladies ready-to-wear apparel store owned by Mr. Cohen at about 8:35 a. m., and confronted Mr. Cohen, pointing a gun at him and saying, "Give me your money." When Mr. Cohen stated that he had no money and he had just come into the store to clean it, defendant reiterated his demand and upon the second denial by Mr. Cohen that he had any funds, defendant hit him over the head with the butt of a gun. Four more blows were rendered in the same manner and after a struggle Mr. Cohen succeeded in getting out of the door and calling for help whereupon defendant left the store. At about 11:00 a. m. the same day defendant was arrested.

At the time of trial defendant represented himself without the aid of counsel.

Questions: First: *Was defendant deprived of his constitutional right to have*

the assistance of counsel for his defense as provided by the 14th amendment to the Constitution of the United States and Article I, section 13 of the Constitution of the State of California?

No. At the time of trial after an extended colloquy between the trial judge and defendant as to whether the public defender should represent defendant, acting purely in an advisory capacity, or defendant should represent himself, defendant said, "Your Honor, I appreciate your admonition. I still, however, would like to represent myself."

[1, 2] A defendant has a constitutional right to appear and defend himself in person. He is entitled to waive the assistance of counsel and where he does so, as in the instant case, of his own volition and with full knowledge of what he is doing, he cannot complain that he has not had a proper defense at the time of his trial. (People v. Ansite, 110 Cal.App.2d 38, 39 [1], ff, 241 P.2d 1036.) In the present case defendant voluntarily chose to represent himself; therefore there is no merit in his contention that he was deprived of his constitutional right to be represented by counsel.

Second: *Was there substantial evidence to sustain the trial jury's finding as to defendant's guilt?*

[3, 4] *Yes.* Witnesses gave direct testimony in support of each and every fact set forth above which, having been believed by the jury, is binding upon this court. Conflicts in the evidence and inconsistencies in the testimony of an individual witness are questions to be determined by the trial jury whose finding, supported by substantial evidence, as in the instant case, is binding upon an appellate court. (People v. Moulton, 71 Cal.App.2d 195, 197 [3], 162 P.2d 317.)

[5] Third: *Did the trial court commit prejudicial error in refusing to permit the complaining witness on cross-examination by defendant to answer the following questions?*

(1) "Q. By Mr. White: As a consequence of your action, Mr. Cohen, you were congratulated for your bravery in this case?"

(2) "Q. By Mr. White: Mr. Cohen, as a consequence of this incident did you receive considerable publicity after the incident?"

No. The subject matter of the questions was entirely irrelevant and immaterial to any issue before the trial jury, hence the trial court's ruling was correct.

Fourth: *Did the trial judge commit prejudicial error in his comments during the course of the trial?*

[6] No. Defendant selects isolated words and phrases in statements made by the trial judge during the course of the trial, all of which were perfectly proper. However, from a legal point of view defendant is not in a position to complain of the alleged error of the trial judge for the reason that before a defendant may complain on appeal of misconduct of the trial judge he must (1) object to such alleged misconduct, and (2) request the trial judge to admonish the jury to disregard the alleged improper conduct. *People v. Guasti*, 110 Cal.App.2d 456, 465 [10], 243 P.2d 59. See also cases cited in 7 McKinney's New Calif. Digest (1945) Crim.Law, sec. 1090, p. 616, and West's Cal. Digest, Criminal Law ¶1035(2).

In the present case defendant neither objected at the time of trial to the alleged misconduct nor did he request the trial court to admonish the jury to disregard the alleged prejudicial remarks.

Fifth: *Did the trial court commit prejudicial error in denying defendant's motion for dismissal of the third count of the information charging him with an assault with a deadly weapon because the pistol which he used was "an old type Belgium pistol for which ammunition" had never been obtained nor was obtainable?*

[7,8] No. In order to constitute a "deadly weapon" it is not necessary that a pistol be loaded since, as in the instant case, it may be used as a bludgeon. If a person is armed with a pistol at the time he perpetrates a crime, this evidence is sufficient to sustain a finding by the trier of fact that he was armed with a dangerous or deadly weapon, even though it was not

loaded. (*People v. Egan*, 77 Cal.App. 279, 284 [5], 246 P. 337.)

Sixth: *Did the trial court err in sentencing defendant for three separate crimes?*

[9] No. Defendant contends that the acts which he committed constituted one offense, and that the trial court erroneously carved three crimes out of one set of facts.

This contention is devoid of merit. In the present case the evidence shows that there were a series of separate and distinct acts on the part of defendant which constituted three separate and distinct offenses:

(1) The crime of burglary was committed when defendant entered the store with the intent to commit larceny; (Penal Code, sec. 459.)

(2) He was guilty of robbery when he demanded of Mr. Cohen at the point of a gun that Mr. Cohen give him money; (Penal Code, sec. 211.)

(3) He was guilty of the crime of assault with a deadly weapon when he bludgeoned Mr. Cohen over the head with a pistol. (Penal Code, sections 240 and 245.)

People v. Knowles, 35 Cal.2d 175, 217 P. 2d 1, relied on by defendant, is clearly distinguishable on its facts from the present case and is therefore not controlling here. In the *Knowles* case there was one criminal act which resulted in the commission of the two offenses, robbery and kidnapping, while in the present case as shown above, the evidence disclosed three separate offenses on the part of defendant in the course of his criminal conduct, and that each crime was supported by separate, independent, distinct acts, although they arose out of the same criminal course of conduct.

Seventh: *Did the trial court commit prejudicial error in not including in the Reporter's Transcript the oral arguments made to the trial judge during the hearing on his motion for a new trial?*

[10] No. The record discloses that defendant acknowledged receipt of the Reporter's Transcript on July 31, 1952. Defendant did not make any objection to the

transcript nor suggest any corrections thereof until after the trial judge on August 12, 1952, had signed and certified to the original Reporter's Transcript that no objection had been made thereto within the time allowed by law. As a result, any alleged errors in the Reporter's Transcript were waived by defendant for the reason that Rule 35, subsection c of the Rules on Appeal, 36 Cal.2d 29, provides in part thus: "Unless a proposed correction is served and filed within 5 days after delivery of the original transcripts to the judge, the judge shall certify on the original that no objection was made thereto within the time allowed by law * * *."

An examination of the record discloses that defendant had a full, fair, impartial and constitutional trial, and that even though he chose to represent himself, the trial judge protected his rights at each stage in the proceeding.

Affirmed.

MOORE, P. J., and FOX, J., concur.



116 Cal.App.2d 147

**ELECTRICAL PRODUCTS CORP. et al. v.
COUNTY OF TULARE.**

Civ. 4389.

District Court of Appeal, Fourth District,
California.

Feb. 17, 1953.

Owner of truck and driver brought action against county to recover for injuries sustained by driver and for damage to truck as result of accident caused by defective condition of highway. The Superior Court, Tulare County, Frank Lamberson, J., entered judgment for owner of truck and driver, and county appealed. The District Court of Appeal, Barnard, P. J., held that county was not liable under the circumstances.

Judgment reversed.

1. Highways ⇨187(1)

A public agency, such as a county, is not an insurer of safety of travelers on its highways under the Public Liability Act. Government Code, § 53051.

2. Highways ⇨189

A public agency, such as a county, is not bound by the Public Liability Act to keep its public ways so as to preclude the possibility of injury or accident. Government Code, § 53051.

3. Counties ⇨223

In an action under the Public Liability Act against a county to recover for injuries, plaintiff must prove all facts necessary to establish the liability of the public agency. Government Code, § 53051.

4. Highways ⇨213(2)

Ordinarily, sufficiency of warning of dangerous condition of highway or whether action taken by county is such as reasonably necessary to protect the public under the circumstances, is one of fact in action against county under the Public Liability Act. Government Code, § 53051.

5. Automobiles ⇨204

The driver of a motor vehicle has a duty to see that which is clearly visible and which would be seen by any one exercising ordinary care.

6. Automobiles ⇨256

Where county received notice of defective condition of highway only a few hours before truck driver was injured and truck was damaged because of defective condition of highway, and extensive repairs were required to remedy the defective condition, but men were not available to make repairs that day, because they were working elsewhere, and employee of county was sent as soon as possible to put up warning signs and flare pots, and signs and pots were placed at least an hour before accident, county was not liable under the Public Liability Act for injuries sustained by driver and damage to truck. Government Code, § 53051.

R. N. Nickerson, Ralph B. Jordan, Boris S. Stanley, Visalia, for appellant.

Dannenbrink & Graves, Oakland, Bradley & Bradley, Visalia, for respondents.

BARNARD, Presiding Justice.

This is an action for damages caused by the overturning of a truck owned by the plaintiff corporation and driven by the plaintiff Blomquist. This truck weighed seven or eight tons, having a steel boom about 25 feet long extending from the rear end up over the cab and being loaded with tools, ladders and other equipment and supplies.

At 4:30 P. M. on April 6, 1950, Blomquist was driving this truck south on a paved county road running between Dinuba and Visalia. There was a cattle-pass under this road some ten miles north of Visalia. While this pass was similar to a bridge or culvert, as far as the road was concerned, it was built for the passage of cattle and not for the flow of water. On this day an adjoining landowner had allowed irrigation water to escape and this underpass was nearly full of water. This water loosened the dirt underneath causing the pavement along the north edge of the underpass to bend downward, making a depression which was variously described by different witnesses. A highway patrol officer, who arrived shortly after the accident, described it as a saucer-like depression about 18" wide and 5" deep at the deepest part, the deepest part extending about two feet before it tapered off. Other witnesses estimated the depth all the way from 4" to 12". Photographs taken a half hour after the accident show a varying drop of the road at the north edge of the underpass, and support the officer's testimony as to its nature and extent.

As Blomquist approached this underpass he was traveling from 40 to 45 miles an hour. The road was straight and dry, the weather was clear, and there were no cars on the road in front of him. He saw the depression in the road when he was 50 or 60 feet from it. He said he applied his brakes immediately, but his skid marks began south of the underpass and extended for 153 feet. As the truck struck the rut its steering mechanism broke and the car over-

turned at the south end of the skid marks, causing the damage complained of.

The complaint in this action alleged that the defendants permitted this road, at this point, to exist and continue in a dangerous and defective condition which was known to them; that this accident occurred by reason of this dangerous and defective condition; and that certain damage to the truck and injury to Blomquist were directly and proximately caused thereby. The answer denied these allegations and alleged contributory negligence. The court, sitting without a jury, found that the defendant county permitted this road "to exist and continue in a dangerous and defective condition" at this spot; that this dangerous condition, consisting of a deep cave-in in the surface of the road was known to the county; that the county "did not take action reasonably necessary to protect the public against the condition"; that this accident occurred "as a direct result of the negligence of said defendant in failing to take reasonable precautions and actions reasonably necessary to protect the plaintiffs from said dangerous and defective condition in said road"; and that none of the injuries or damages suffered by the plaintiffs were proximately caused and contributed to by the negligence and carelessness of the driver of the truck. Judgment was entered against the county, awarding \$3165 to the plaintiff corporation and \$2531.16 to Blomquist.

The county has appealed from the judgment contending that the findings, to the effect that it did not take action reasonably necessary to protect the public against the existing condition in this road, are not supported by the evidence. It is also contended that the respondents were guilty of contributory negligence as a matter of law; that the court erred in failing to find on the issue as to whether a reasonable time had elapsed after notice in which to take other steps, if they were necessary, to remedy this defective condition; and that the trial court's interpretation of the Public Liability Statute would impose upon counties extreme burdens not within the scope of that statute. The respondents contend that the findings are supported by the evidence;

that the existence of the dangerous and defective condition of this road was clearly established; that the signs which were posted were not adequate and not properly posted; that what legally should have been done and what was actually done were questions of fact which are controlled by the findings; that the question of contributory negligence was one of fact and there is no evidence of such negligence; that there was no error in failing to directly find whether or not a reasonable time had elapsed after notice since such a finding may be implied from the other findings, and since any finding on that issue would necessarily be adverse to the appellant; and that the standard of care and reasonableness of the steps taken to protect the public, as required by the Public Liability Act, must necessarily be weighed by the trier of fact.

The respondents' liability rests upon the provisions of the Public Liability Act, Government Code, Sec. 53051, in effect at the time of the accident. So far as material here, this section provided for such liability where the governing board had knowledge or notice of the defective condition and "For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition." It appears, without dispute, that a defective condition here existed and that the appellant had received notice thereof. While there is some question with respect to the "reasonable time" element, the main question is as to whether the action taken by the county was sufficient to constitute "action reasonably necessary to protect the public", as required by the statute.

A Mrs. Swearington testified that she drove over this road the Saturday night preceding the accident; that she felt quite a jolt which she later decided was at this underpass; that her sleeping husband was not awakened by the bump; and that she did not report the matter to anyone connected with the county or its road maintenance. Mr. Switzer, who was in charge of all county roads, testified that he drove over this road on the first or second day of April and

noticed no defect. Mr. Price, who was in charge of road maintenance in that road district, testified that he inspected the roads regularly, that he went over this road three or four days before the accident, and that there was no defect there or any water in the underpass at that time. He further testified that he received a report of the defect about noon on April 6, and that he sent an employee to put out lights and signs because it was impossible to get anybody out there to take care of it at that time. Mr. Lovero testified that on the afternoon of April 6, he was the only employee working in the maintenance yard when the yard clerk came out and reported that a complaint had been received about this defective condition. He loaded some signs and flares in a pickup truck and went to the cattle pass. He placed one sign about 300 feet south of the pass and another 12 feet south of the pass, on the east side of the road; and placed another about 12 feet north of the pass, and one about 300 feet north of the pass on the west side of the road. He also left a flare pot by each sign. While posting signs he saw the depression, which he estimated to be about 4" deep, and saw cars pass over the depression without any trouble. As he left he drove over the depression, going about 15 miles an hour.

Blomquist testified that he did not see any warning sign prior to the accident; that after the accident he and a Mr. Turney, who was riding with him, walked back to the underpass and "checked up on the signs"; that he could see no signs except one about 10 feet from the "bridge" which was laying face down beside the road; that this sign was about "2 x 2½ feet square"; and that it had legs on which to stand. Turney testified that at that time he saw a sign laying down six or eight feet from the north side of the bridge and along the west side of the road; that there was a flare pot beside it; that he also saw another sign with a flare pot beside it about 100 yards south of the culvert and on the left side of the road as you went toward Visalia; and that these flare pots were the kind you usually see on the road to indicate danger. The highway patrol officer, who arrived a few minutes

after the accident, testified that he made his usual investigation of the accident but that he did not observe any signs. He testified fourteen months after the accident, and the evidence indicates that his memory was not perfect. Some photographs were taken by a professional photographer about half an hour after the accident. One of these, looking south from the underpass, shows this officer pacing the distance from the underpass to the overturned truck, and shows the sign and flare pot on the east side of the highway nearly opposite the overturned truck. Another photograph, looking south, shows that sign and flare pot and also shows another flare pot on the same side of the road a few feet south of the underpass. Another photograph, looking north, shows the depression, a flare pot near the west edge of the pavement a few feet north of the underpass, and a sign standing some distance to the north on the west side of the highway.

Mrs. Simas, a witness called by the respondents, testified that just prior to the accident she was driving south on this road about 20 feet behind the truck in question; that as they approached the underpass from the north she saw posted on the west edge of the road a sign reading "Dangerous but Passable"; that the sign in the photograph last above referred to was the sign they had passed just before the accident; that she remained at the scene of the accident for some 30 minutes; that "I saw the pictures made, so they (the signs) weren't put there after"; that the sign was white with red letters; that she was 20 feet behind the truck as she passed the sign, and she clearly saw the sign there; and that "he went on his side of the white line so he undoubtedly passed by". She also testified that she saw the sign on the south side of the underpass which appears in the photographs, that this sign also read "Dangerous but Passable", and that she could not say whether or not there was another sign laying down immediately north of the underpass. She also testified that she had traveled north on this road about 10 o'clock that morning and had seen these same signs in these positions at that time. There was evidence that these signs were the usual type of warning signs

customarily used, that the two signs some 100 yards from the underpass on the east and west sides of the road, respectively, were signs standing up on legs, and that they read "Dangerous but Passable" in red letters. While the evidence, with respect to the two signs placed near the underpass on each side of the road, is not so complete there is some evidence that these signs read "Slow". There is no evidence as to how or when the sign near the bridge on the west side of the road was knocked down and no evidence of anything which could charge the appellant with notice of that fact. *Stockton Automobile Co. v. Confer*, 154 Cal. 402, 97 P. 881.

[1-3] A public agency is not an insurer of safety to travelers on its streets, *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723, and a public agency is not bound to keep its public ways so as to preclude the possibility of injury or accident. *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725. A plaintiff must prove all facts necessary to establish the liability of the public agency, *Meyer v. City of San Rafael*, 22 Cal.App.2d 46, 70 P.2d 533. It appears, without conflict, that a defective condition here existed; that the county's agents received notice of this only a few hours before this accident happened; that extensive repairs were required and men were not available to make the repairs that day; and that an employee was sent as soon as possible to put up warning signs. While there is some conflict as to the exact hour when these signs and flare pots were placed in position, it appears without conflict that they were so placed at least an hour before this accident happened. While the respondent *Blomquist* stated that he did not see the signs it conclusively appears that at least one sign on each side of the road, about 100 yards from the underpass, was actually in position as the truck approached the underpass and that the four flare pots were then in position, all of these being alongside the pavement with nothing to prevent their being seen by anyone traveling along this road.

[4,5] Ordinarily, the sufficiency of the warning of the dangerous condition or

whether the action taken is such as is reasonably necessary to protect the public under the circumstances is one of fact. *Rose v. Orange County*, 94 Cal.App.2d 688, 211 P.2d 45; *Sandstoe v. Atchison, T. & S. F. Ry. Co.*, 28 Cal.App.2d 215, 82 P.2d 216. Under some circumstances, it has been held that the physical conditions or jogs or offsets in a street may be equivalent to warning signs "and as readily visible to the alert driver as a sign informing him of the condition; there being nothing to conceal the real condition or to deceive the operator of an approaching automobile while driving at a lawful rate of speed and with due caution". *Waldorf v. City of Alhambra*, 6 Cal. App.2d 522, 45 P.2d 207, 209. A duty rests on a driver to see that which is clearly visible and which would be seen by anyone exercising ordinary care. *Huetter v. Andrews*, 91 Cal.App.2d 142, 204 P.2d 655. It would seem that this would be especially true with respect to commonly used warning signs placed in a proper position. If the placing of such signs, where the repairs cannot be immediately made, does not constitute the action reasonably necessary to protect the public, required by the statute here involved, the only reasonable alternative would be for the public bodies to place barricades and prevent all use of the streets or roads until repairs could be made. This would be an unreasonable hardship on the traveling public and in many cases is entirely unnecessary. There was evidence that many cars passed safely over this depression shortly after the accident; that one of these was a paint truck; and that two ladders on this truck "jarred very hard" but did not fall off. It would be unreasonable to stop all use of such a road, to the great inconvenience of careful drivers, because a few drivers might disregard such warning signs. A further consideration here is that the truck involved was not only one of great weight but usually top-heavy.

The appellant took some action to protect the public against this defective condition by placing the usual warning signs in the

customary manner, and doing this promptly after receiving the first knowledge or notice. The only question is whether the action thus taken was sufficient to constitute the "action reasonably necessary" required by the statute. Where there is no dispute with respect to the facts in this regard this question comes close to being one of law. Assuming, however, that it is one of fact the question remains whether there was sufficient substantial evidence to support the finding that action which was reasonably necessary under the circumstances was not taken.

[6] The evidence shows, without conflict, that only a few hours elapsed after notice of the condition was received; that the road crews were busy elsewhere and men were not available to make repairs that day; that the usual and ordinary warning signs were placed in position promptly; and that at least one of those signs and two flare pots, affecting south-bound traffic, were there and plainly visible at the time. Whether the sign near the underpass was knocked down before the truck passed, or at that time, is immaterial on this issue. There was no evidence that repairs could have been made before the accident happened, and no evidence tending to indicate that any better warning should have been given in view of the existing condition as disclosed by the evidence. The undisputed evidence strongly indicates that the action taken by the appellant was such as was "reasonably necessary" under the circumstances, within the meaning of this statute. There is no substantial evidence which is sufficient to support the finding to the contrary. The evidence that the respondent driver failed to see the warnings which were plainly visible is not sufficient for that purpose.

Under the views above expressed, it is unnecessary to consider the other points raised. The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

**OVERHOLTZER et al. v. NORTHERN
COUNTIES TITLE INS. CO.**

Civ. 15247.

District Court of Appeal, First District,
Division 1, California.

Feb. 17, 1953.

Rehearing Denied March 19, 1953.

Hearing Denied April 15, 1953.

Action on title policy failing to disclose easement. The Superior Court, City and County of San Francisco, I. L. Harris, J., rendered judgment favorable to plaintiffs, and defendant appealed. The District Court of Appeal, Peters, P. J., held that the trial court had applied the wrong measure of damages.

Affirmed in part, reversed in part, and remanded with directions.

1. Insurance ⇨146(3)

Title insurance policy should be construed liberally in favor of insured and against insurer, and when very contingency happens that was insured against, only clear and compelling reasons should permit court to deny to insured full reimbursement for all losses up to face amount of policy.

2. Insurance ⇨507½

Where title policy imposing duty upon insurer to defend upon receiving notice of pending litigation contained apparently conflicting clause requiring insurer to pay litigation costs only if litigation were carried on with its written authorization, insurer could not be permitted to escape liability because it had not given written authorization after being notified of litigation.

3. Insurance ⇨665(8)

In suit on title policy for, inter alia, litigation cost, evidence showed a waiver by insurer of policy provision making it liable for litigation costs only if litigation were carried on by insured with written authorization of insurer.

4. Insurance ⇨645(2)

In suit on title policy, allegation and proof of existence of easement not disclosed by policy and of diminution in market value as result thereof was all that was required.

5. Pleading ⇨406(9)

If allegation of reliance on title policy was necessary in cause of action based on guarantee of title, such requirement was waived when insured directly testified that he relied upon policy in cutting pipe line which constituted easement undisclosed by policy.

6. Insurance ⇨539(5)

Even though title policy excepted "any facts" which inspection of land would reveal, insured's knowledge of existence of pipe line across land was not knowledge of existence of easement therefor, and self-help employed by insured, in reliance on title policy which failed to disclose easement for pipe line, was reasonable and did not violate policy provision making notice of adverse interest a condition to insurer's liability if insurer were prejudiced by lack thereof.

7. Insurance ⇨665(4)

In action, on title policy, for litigation costs, wherein insurer contended that litigation had not involved validity of easement, which title policy failed to disclose, record established that location of easement had been challenged in such litigation and that its validity had therefore been an issue.

8. Insurance ⇨507½, 646(8), 665(4)

Title policy insureds established prima facie case when they offered evidence of their expenses in connection with litigation, and it was up to title insurer to prove, if it could, that all such expenses were not incurred in connection with easement, which title policy failed to show; and if major expense was so incurred, and it was impossible to apportion, title insurer was liable for total expense.

9. Insurance ⇨507½

Title policy insureds could recover sum expended for survey, by which they sought to defeat, on ground of mislocation, third party's claim of easement, not shown in policy, since such survey could well have resulted in direct benefit to title insurer.

10. Damages ⇨68

Where amount in question is calculable under, or calculated by, contract, interest is allowable as an item of damages. Civ. Code, § 3287.

11. Interest ⇨39(3)

In suit on title policy for expenses incurred by insured in connection with litigation involving easement not shown in policy, there was no error in allowing insured interest on litigation expenses from date of entry of judgment in action involving easement. Civ. Code § 3287.

12. Interest ⇨39(3)

Damage to market value of land caused by easement not disclosed by title policy is "unliquidated", and therefore interest on award for such damage, in suit on title policy, should run from date of judgment rather than from date of policy. Civ. Code, § 3287.

13. Limitation of Actions ⇨127(13)

In action on title policy failing to show easement, cause of action upon claimed common-law liability of title company as abstracter for negligence in making search of title was entirely new one, and, therefore, it was not error to reject proposed amendment setting forth such cause of action, when such cause had been barred by statute of limitation prior to offering of amendment. Code Civ. Proc. § 339, subd. 1.

14. Insurance ⇨507½

In action on title policy failing to disclose easement, insurer's liability should have been measured by diminution in value of property, caused by defect in title, as of date of discovery of defect, measured by the use to which the property was then being devoted, rather than diminution in market value of property, caused by the defect, measured at time of purchase according to use to which property was then devoted.

PETERS, Presiding Justice.

The Northern Counties Title Insurance Company issued a policy in the amount of \$3,000 to A. E. and Orpha Overholtzer. The company failed to discover a certain recorded easement constituting a cloud on the title. The Overholtzers later discovered the easement, engaged in litigation with the holder of the easement, and then brought this action against the insurance company for damages caused by the existence of the easement. The prayer is for \$3,000, the full amount of the policy, and for \$488.49, on the covenant to defend contained in the policy, that being the amount expended by the Overholtzers in the defense of the easement litigation, the insurance company not having participated therein. The trial court found in favor of the Overholtzers for the full amount of the litigation expenses, and found the general damages to be \$1,000. From the judgment for \$1,488.49 both sides appeal.

The title policy is dated October 6, 1947, and insures the Overholtzers against "all loss or damage not exceeding the sum of Three Thousand & no/100ths * * * dollars which any Insured shall sustain by reason of * * * any defect in, or lien or encumbrance on said title" except those listed. The property involved consists of 2.88 acres in Sonoma County purchased by the Overholtzers from one Osmon. At about the same time the Overholtzers purchased an adjoining parcel of 2.31 acres adjacent to the state highway from one Merrifield, it being contemplated by the Overholtzers that they would develop the two parcels as a unit for an industrial use. At the time of purchase the Osmon property was agricultural land. The title company had no knowledge of the proposed industrial use.

The title company failed to list in its policy an easement properly recorded January 19, 1946, whereby Osmon had granted to one Musso the right to construct and maintain a water pipe across the northerly boundary of the Osmon property for a distance of about 450 feet. This pipe line was constructed before the Overholtzers purchased the property, and, although it was supposed to be underground, it was, in fact, exposed in several places. Mr. Over-

DeMeo & DeMeo and J. N. DeMeo, Santa Rosa, for appellant.

Howard B. Crittenden, Jr., San Francisco, for respondents.

holtzer could not recall seeing the pipe before the purchase, but admitted that Osmon had told him there was a pipe line across the property leading to the Mussos' property. Overholtzer did not then know, however, that this pipe line existed by reason of the grant of an easement.

The two parcels are so located that there is a sharp rise from the Osmon to the Merrifield property up to the highway, forming an embankment. Immediately after the purchases, the Overholtzers started preparations for the construction of a lumber mill. They first levelled the two lots and a fill was made at the base of the embankment. It is here that the 2-inch Musso pipe is located so that such pipe instead of being 6 to 18 inches deep, is now 6 to 8 feet deep in this area. A 60-foot wide improved road was constructed from the highway over the fill and hence over the water pipe. Thus, access was secured to the Osmon parcel, and to the lumber mill. There is another alternative ungraded road that branches off from the main road and crosses, in part, adjoining property. Overholtzer testified that this road was occasionally flooded in winter, was too narrow to permit proper use, and, if used as the sole means of access, would deprive the two parcels of the benefits of direct highway access.

A fully equipped lumber mill was constructed on the Osmon parcel, and a house on the Merrifield parcel. The mill went into operation in late January of 1948. The total cost of the venture was about \$53,000, but this included \$2,200 as the purchase price of the Merrifield parcel, \$4,000 for the construction of the house on that parcel, and \$2,000 for levelling and filling, which benefited both parcels. The two parcels were used as a unit in the operation, the Merrifield parcel for drying the lumber and the Osmon parcel for the mill operation.

At a time when the mill was almost completed, Overholtzer got into a dispute with the Mussos over the use of one of the Mussos' power poles. Mrs. Musso told Overholtzer that she did not like the mill located below her, and for that reason would not grant the requested permission

to use the pole. Thereupon Overholtzer threatened to compel the removal of the pipe line. Mrs. Musso claimed a right of way, but Overholtzer denied the existence of such right. He read and reread the policy, noted its omission to mention any such right of way, and then, without legal advice or notification to the title company, cut the Mussos' pipe. As a result, on January 9, 1948, the Mussos brought suit against the Overholtzers, claiming an easement for their pipe line and requesting damages and an injunction to prevent interference with the pipe line. The Overholtzers consulted their then lawyer and under date of January 20, 1948, he notified the title company of the Musso litigation, of the issuance by it of the title policy, that he, the attorney, believed "that no such easement existed" and concluded as follows: "I am taking steps necessary to protect Mr. and Mrs. Overholtzer in this action, but I am giving you notice as there may be necessary a later settlement between you and Mr. and Mrs. Overholtzer." Shortly after this letter was written the attorney called upon Daw, the president of the title company. According to Daw, he told the attorney that he had checked the records, found that the easement did exist, and that "there was no defense to this action, so far as the easement was concerned, it was a matter of record." Daw also testified that he told the attorney that the title company was not ready to make a settlement "but in the event it was found that a loss accrued to Mr. Overholtzer, why, of course, we would have to pay up to the extent of our policy, that that was the procedure we would follow."

Without further communication with the title company the Overholtzers defended the Mussos' action. They filed an answer and affidavit. The title company on this appeal, in an attempt to deny to the Overholtzers the litigation costs of the Musso litigation, claims that by these pleadings the Overholtzers admitted the existence of the easement, and that the Overholtzers' defense in that action was not relevant to any dispute over the title of the easement. Thus, so the title company claims, there was nothing that it was required to defend in

that litigation. The contention that the Overholtzers' answer admitted the validity and existence of the easement is clearly without merit. While the Overholtzers there admitted that there had been an agreement between Osmon and the Mussos, they denied all of the rest of the allegations in the relevant paragraph of the complaint, and thus denied that such agreement was for the challenged easement. The affidavit filed by the Overholtzers in the Musso litigation is more equivocal. In one paragraph it avers that the Osmon parcel when purchased by them was subject to a right of way, and then avers that in locating and constructing the easement the Mussos did not follow the agreement but constructed the pipe line on property not included within the easement. Thus, whether or not the existence of the easement was placed into issue in the Musso litigation, clearly its validity, at least as to location, was there challenged.

It should be mentioned that the Musso litigation also involved the Cavallos, neighbors adjoining the Merrifield parcel, who were brought into the action by the Overholtzers because of a boundary dispute.

In the Musso action, after trial, the judge's order for findings contains a two-page discussion as to the existence of the easement, and then holds that the location of the easement was acquiesced in by Osmon. The final judgment was entered in the Musso action on August 25, 1949. It denied damages against the Overholtzers, decreed the Mussos' ownership of the easement with the right to enter to repair, and permanently enjoined the Overholtzers from interfering with the rights thus fixed.

In the present action Overholtzer testified that in the Musso action he was required to pay a surveyor \$87.50 for checking the location of the pipe line. Plaintiff also testified that on June 2, 1949, he received a bill from his attorney for legal services rendered in the Mussos' action of \$350, and for \$50.99 expended for costs. All of these items, totalling \$488.49, together with interest from September 13, 1949, were allowed against the title company.

In the present action the Overholtzers tried to show the general damages incurred by reason of the easement in several ways. They first testified that in March, 1949, they had leased the mill and properties to a tenant and given him an option to purchase for \$45,000. Thus, argue the Overholtzers, presuming a total investment of \$52,000 or \$53,000, the difference of \$7,000 or \$8,000 was caused by the easement. The title company correctly calls attention to the fact that the total investment includes \$2,200 for the Merrifield property and \$4,000 for the house constructed thereon, and contends that the damages must be limited to the Osmon property. The Overholtzers contend that the two parcels were purchased together, are operated as a unit, and should be considered together for purposes of damages.

The title company also contended at the trial that if the value of the improvements were to be considered, which it denied, then the depreciation in the value of the machinery must be deducted from the investment, that machinery having been in use for over two years at the time of trial. After considerable discussion the parties stipulated to a set of rates of depreciation for different items.

The Overholtzers also sought to show loss in value caused by the easement in that the pipe line under the road might be dug up at any time for repairs and that this loss of security of access adversely affected the market value of the premises for a lumber mill. Overholtzer also testified that the Mussos had threatened to thus interfere with the operations of the mill. The Overholtzers produced a mill man who admitted that he was not an expert on real estate and that he was not qualified to appraise mill properties, but who, over objection, was permitted to testify that the existence of the easement with the constant possibility of interference with the access to the mill, depreciated the property as a mill between \$15,000 and \$20,000. The title company does not challenge the qualifications of this witness on this appeal. At the trial, it produced two qualified realtors who testified that the existence of the pipe

line did not affect the market value of the premises.

The complaint states but one cause of action and is based upon the policy. It prays for damages of \$3,000, the policy limit, and \$488.49 for breach of the covenant to defend contained in the policy. The answer alleged that an inspection of the premises would have disclosed the easement, and averred, in defense of its admitted failure to defend the Musso action, that there had been no request that it defend and that it had not granted any "written authorization," as required by the policy to the Overholtzers to conduct the litigation.

The trial court, after finding the issuance of the policy, its terms, and that the policy failed to disclose the existence of Mussos' easement, found that, "in reliance upon said title policy" and because of his belief engendered thereby that there was no such easement, Overholtzer cut the pipe and was sued by the Mussos. The court found that the Musso litigation was brought to establish the Mussos' right to the easement; that the Overholtzers "notified" the company of the litigation "as provided in said contract of insurance," but the title company "refused and neglected to defend, appear for, or instruct or employ counsel"; that it became necessary for the Overholtzers to do so and to employ a surveyor. After finding the results of that litigation the court found the reasonable attorney fees and costs and surveyor fees thus incurred totalled \$488.49.

The court then found that the Overholtzers acquired the Osmon and Merrifield parcels for industrial purposes and with the intent to develop them as a unit, but that when acquired the Osmon parcel was used for agricultural purposes; that the land was acquired in reliance upon the representation contained in the contract of insurance that there were no easements, and in such reliance made the extensive improvements already described. The court fixes the value of the improvements at \$50,000, and the value of the land at the date of trial for industrial purposes at \$3,000 an acre, but for agricultural purposes at \$600 per acre. The court then finds that the easement adversely affects the value of

the Overholtzers' property by reducing the value of the land and improvements \$15,000. Then the court finds that on the date the Overholtzers purchased the Osmon tract it was only worth \$2,000 for agricultural purposes instead of the \$3,000 the Overholtzers paid for it, and that the difference of \$1,000 was caused by the easement.

The conclusions and judgment allowed awards against the title company as follows: \$488.49 for breach of the covenant to defend with interest thereon from September 13, 1949, and upon the insurance policy \$1,000 for depreciation in the value of the land as agricultural land fixed as of the date of purchase, with interest from the date of purchase, namely, October 6, 1947. The court expressly disallowed any recovery for diminution in value of the improvements caused by the easement, or for any diminution so caused to the value of the land as industrial land. From this judgment both sides appeal.

The Title Company's Appeal.

[1] The title company raises several technical objections to the entire judgment. Before discussing these in detail certain general observations should be made. This is a suit on a title insurance policy. The Overholtzers secured such policy to protect them against defects in their title, and paid a premium, fixed by the company, for such protection. The insurance company failed to discover the existence of a recorded easement that constitutes a cloud on the title. As found by the trial court, which finding is supported, the Overholtzers bought the Osmon property, and an adjoining parcel, in the belief, induced by the policy, that they had clear title, and constructed over \$50,000 of improvements. They had such faith in the insurance company's representations that they cut the pipe and were thus forced into litigation. Under such circumstances the title company should not be permitted to avoid liability on technicalities or upon a literal interpretation of an isolated clause of the policy that is qualified by other clauses. Title insurance policies should be interpreted in the same fashion as are other insurance policies, that is, liberally in favor

of the insured, and against the insurer. Title insurance is practically an unregulated business. No state control is exercised over the terms of the policies or over rates. The companies frame the policies. When the very contingency happens that was insured against, only clear and compelling reasons should permit a court to deny to the insured full reimbursement for all losses, up to the face amount of the policy, sustained because of the happening of such contingency. See 9 Appleman, Insurance Law and Practice, § 5201, at p. 3; p. 12, § 5209; *Coast Mutual B.-L. Ass'n v. Security T. I. & G. Co.*, 14 Cal.App.2d 225, 57 P.2d 1392; *National Holding Co. v. Title I. & T. Co.*, 45 Cal.App.2d 215, 113 P.2d 905; *Blackburn v. Home Life Ins. Co.*, 19 Cal.2d 226, 120 P.2d 31.

With these general principles in mind we turn to the title company's arguments.

[2] It is first urged that there is no liability for the litigation expense on the covenant to defend because the Overholtzers failed to plead or to prove that the litigation was carried on with the "written authorization" of the title company as required by the policy. The clause relied upon is condition number 7 which reads in part as follows: "The Company will pay, in addition to any loss insured against by this Policy, all costs imposed upon the Insured in litigation carried on by the Company for the Insured, and in litigation carried on by the Insured with the written authorization of the Company but not otherwise. * * *" But this is not the only clause relating to the obligations of the title company. Condition number 2 provides in part: "The Company at its own cost shall defend the Insured in all actions or proceedings commenced against the Insured founded upon a defect, lien or encumbrance insured against by this Policy and may pursue such litigation to final determination in the court of last resort. * * * In all cases where this Policy permits or requires the Company to prosecute or defend any action or proceeding, the Insured shall secure to it the right to so prosecute or defend such action or proceeding, and all appeals therein, and permit it to use, at its option, the name of the Insured for such purpose. * * *"

Thus by this last clause, strictly interpreted against the company, a duty to defend upon notification of the pending litigation arises. There can be no doubt that the title company was notified of the Musso litigation by telephone and by letter. When so notified the company was under a duty to defend its insured. When it failed to defend, the Overholtzers had to defend themselves. The company, in view of such apparently conflicting provisions, should not be permitted to escape liability because they did not authorize in writing such defense.

[3] Even if condition 7 be read alone, so as to require written authorization, the facts show a waiver of that provision. According to the testimony of the president of the title company, when the attorney for the Overholtzers had notified him of the pending litigation, he did not either offer to defend that action or instruct the lawyer not to defend. What he did was to tell the lawyer that the title company was not ready to settle yet "but in the event it was found that a loss accrued to Mr. Overholtzer, why, of course, we would have to pay up to the extent of our policy, that that was the procedure we would follow." While the president did tell the attorney that "there was no defense to this action, so far as the easement was concerned," he did not instruct the attorney not to defend. It must be remembered that the Musso action involved not only an application for an injunction, but also a prayer for damages. What were the Overholtzers to do? Allow a default judgment for damages to be taken against them? The evidence shows that the pipe was cut in reliance on the terms of the policy. Any damages resulting therefrom were directly caused by the failure of the title company to discover the easement. Under such circumstances it would result in a miscarriage of justice to permit the company to raise the "written authorization" provision based upon their failure, after notice, to defend the Musso action. By their actions the company has waived strict compliance with the condition. See, generally, *Purcell v. Land Title Guarantee Co.*, 94 Mo.App. 5, 67 S.W. 726; *Fidelity Union Casualty Co. v. Wilkinson*, Tex.Civ.App., 94 S.W.2d 763, affirmed in 131 Tex. 302,

114 S.W.2d 530; 9 Appleman, Insurance Law and Practice, p. 21, § 5213.

[4] The next contention of the title company also lacks merit. It is contended that the Overholtzers did not plead or prove any legal damage but only pleaded and proved a hypothetical damage—that is, possible damage to the road if the pipe had to be repaired. The point lacks merit. The damage results from the cloud on the title. If that cloud impairs the market value of the land, the Overholtzers are entitled to whatever damages resulted from that cloud. As to just when such damages should be computed, that point will be later discussed. So far as pleading and proof are concerned, an allegation and proof of the existence of the easement and of diminution in the market value are all that is required. Certainly, the Overholtzers did not have to wait until the pipe broke. See 128 A.L.R. 373; *Glyn v. Title Guarantee & Trust Co.*, 132 App.Div. 859, 117 N.Y.S. 424.

[5] The title company next urges that the complaint is defective in failing to allege reliance upon the policy. If an allegation of reliance is necessary on a cause of action based on a guarantee of title (as distinguished from the liability of an abstractor—see *Title Ins. & Trust Co. v. Los Angeles*, 61 Cal.App. 232, 214 P. 667, for the distinction between the two), such requirement was here waived, because Mr. Overholzer directly testified that he relied upon the policy in cutting the pipe. See *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 240 P. 2d 580.

After these unsound attacks on the pleading, the title company turns its attention to the findings. It contends that the trial court failed to make a finding as to whether the Overholtzers complied with the following condition of the policy: “* * * In case any such action or proceeding shall be begun, or in case knowledge shall come to any Insured of any claim of title or interest adverse to the title as insured, or which might cause loss or damage for which the Company shall or may be liable by virtue of this Policy, such Insured shall at once notify the Company thereof in writing. If such notice shall not be given to the Company at least five days before the appear-

ance day in any such action or proceeding, or if such Insured shall not, in writing, promptly notify the Company of any defect, lien or encumbrance insured against or any such adverse claim which shall come to the knowledge of such Insured, in respect to which loss or damage is apprehended, then all liability of the Company as to each Insured having such notice in regard to the subject of such action, proceeding or claim shall cease and terminate, provided, however, that failure to so notify shall in no case prejudice the claim of any Insured unless the Company shall be actually prejudiced by such failures.”

[6] The contention is made that had a finding been made on this issue, the court would have had to find that the Overholtzers did not comply therewith because the evidence shows that they cut the pipe before consulting with the insurance company. It is contended that had such consultation been had, the entire litigation could have been avoided. What this contention amounts to is this: That although the Overholtzers had such faith in the insurance company that they honestly and reasonably believed that such insurance company would not overlook a recorded easement, they should not have cut the pipe but should have run to the insurance company and asked it if it had made a mistake. Failure to do so prevents recovery, even though, in so acting, the Overholtzers reasonably relied upon the provisions of the policy. Of course, the Overholtzers knew of the pipe and knew of the claim of the Mussos to a right of way, but when they read the policy they reasonably believed that since the policy did not mention it, it was a mere license, and that the pipe could be cut. To give the quoted clause the meaning and legal effect ascribed to it by the title company would be to entrap the insured. The question is, did the Overholtzers act reasonably in cutting the pipe without notifying the title company? Under the findings and evidence, to which reference has already been made, there could be only one answer to that question, namely, that the self-help employed by the Overholtzers in reliance on the policy was reasonable and did not violate the above clause.

The title company next points to one of the exceptions contained in the policy to the effect that the company does not insure against "Any facts which a correct survey and inspection of said land would show," and contends that it was entitled to a finding as to what an inspection would show. The evidence is conflicting as to what an inspection would have shown. This contention is simply another way of stating the reliance argument. Knowledge of the existence of the pipe was not knowledge of the existence of the easement. If, after the Mussos directly informed the Overholtzers of the existence of the pipe line, the Overholtzers acted reasonably in relying on the policy and reasonably believed, based on the terms of the policy, that there was no easement, then, obviously, inspection would not have disclosed the existence of the easement. The court has found reliance, and, this being so, failing to find on what an inspection would have disclosed was not error.

[7, 8] The title company also urges that litigation expenses should not have been allowed at all because, so it is claimed, the Musso litigation did not involve the validity of the easement. The facts in reference to this contention have already been set forth in detail. As there pointed out, the Overholtzers did not, as the title company claims, admit in their answer the existence of the easement. The order for findings and the findings demonstrate that the trial court in that action did rule on the existence of the easement. While the affidavit of the Overholtzers did seem to admit the existence of the easement, it did not ascribe any legal effect thereto. In addition, the location of the easement was challenged, and therefore its validity was in issue. Damages were successfully opposed. While the case did involve some issue as to the Cavallos, and no apportionment of expenses was made, the Overholtzers established a prima facie case when they offered evidence of their expenses, and it was up to the title company to prove, if it could, that all such expenses were not incurred in connection with the easement. If, as appears, the major expense was so incurred, and if it is impossi-

ble to apportion, then the title company is liable for the total expense.

[9] The title company also objects to the \$87.50 allowed for the survey. It seems obvious that if the Overholtzers had been able to defeat the claimed easement on the ground of mislocation, it may well have resulted in direct benefit to the insurance company. The point is without merit.

The title company also objects to the allowance of \$1,000 damages for diminution in value of the insured property, contending that the evidence of damage is speculative and hence improper. It seems to be the theory of this appellant that there could be no damage until actual physical interference with the use of the land occurred. That is not the law. The mere existence of the easement created a cloud on the title. If that cloud resulted in diminution of the market value of the property then recoverable damage resulted. However, for reasons to be discussed on the appeal of the Overholtzers, we are of the opinion that there must be a new trial on the issue of damage, and for that reason no further discussion of the issue is necessary.

[10, 11] The title company correctly, in part, challenges the awards of interest. The trial court allowed interest on the \$1,000 from the date of the policy and on the \$488.49 from September 13, 1949, which the trial court erroneously found to be the date of the entry of the judgment in the Musso action—the correct date was August 25, 1949. Interest on the two items of damage must be separately considered. First, as to the allowance of interest on the litigation expenses. Section 3287 of the Civil Code provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." This section has been a prolific source of litigation. However, it can be said that where the amount in question is calculable under or calculated by the

contract, interest is allowable. *Jacobs v. Farmers' Mut. Fire Ins. Co.*, 5 Cal.App.2d 1, 41 P.2d 960; *Koyer v. Detroit F. & M. Ins. Co.*, 9 Cal.2d 336, 70 P.2d 927; *Pellas v. Ocean Accident & Guar. Corp.*, 24 Cal. App.2d 528, 75 P.2d 635. The policy does not here fix the date that such litigation expenses are payable. Obviously the amount thereof became fixed, for interest purposes, when liability therefor was incurred by the Overholtzers. We do not have to decide whether that date was when the services were contracted for or when the Overholtzers were billed for such services, because either date was long prior to September 13, 1949. The Overholtzers do not complain that the interest should have been allowed from a prior date, and obviously the title company is not injured by having the date fixed at a time much later than the Overholtzers legally could have had it fixed. For these reasons, the allowance of litigation expenses and the interest thereon should be affirmed.

But when we come to the interest on the damage to the market value of the land caused by the easement, another problem is presented. Although this item of damage must be reversed for reasons hereafter stated, and so, of course, the award of interest likewise must be reversed, because of the impending new trial on the issue of damages we should, for the guidance of the trial court on such re-trial, pass on this issue.

[12] The measure of damages here is the depreciation in market value caused by the existence of the easement (as of what time will hereafter be discussed). While diminution in market value can sometimes be fixed or is reasonably ascertainable and therefore interest is allowable under the above section, such can be allowed only when the diminution is fixed or reasonably ascertainable. *Lineman v. Schmid*, 32 Cal. 2d 204, 195 P.2d 408, 4 A.L.R.2d 1380; *Indemnity Ins. Co. v. Watson*, 128 Cal.App. 10, 16 P.2d 760; *Minton v. Mitchell*, 89 Cal. App. 361, 265 P. 271. Here the policy does not fix the date when liability accrues, nor does the policy provide how damages are to be computed. Obviously, diminution of market value caused by the easement is not

a fixed nor computable sum. The evidence in the instant case demonstrates how difficult the ascertainment of that item may be. For the reasons stated the demand is unliquidated within the meaning of the section and interest on the award, if any is made, should run from the date of judgment. *Swafford v. Goodman*, 115 Cal.App. 2d 105, 251 P.2d 680; *Axell v. Axell*, 114 Cal.App.2d 248, 250 P.2d 182.

The Cross-Appeal of the Overholtzers.

One of the major contentions of the Overholtzers on their appeal is that they should have been permitted to amend to conform to proof so as to allege a cause of action upon a claimed common law liability of the title company as abstractor—a liability claimed to exist that sounds in negligence for defective search of the title in the abstracting process. The question as to whether a title insurance company is liable not only as an insurer up to the face amount of the policy, but, where negligence can be shown, as an abstractor and in excess of the face amount of the policy, is an interesting one. In the briefs and supplemental briefs many cases and theories are discussed dealing with this problem. The cases are in conflict. Strong arguments can be made on each side of the controversy. We do not find it necessary to decide whether such liability exists in this state because it is our opinion that the point is not properly before us.

[13] As already pointed out, the complaint alleges but one cause of action which is admittedly predicated entirely on the policy. The complaint does not suggest or even hint at a possible liability for negligence as an abstractor. But the Overholtzers contend that they made a motion to conform by proof raising this issue. The only place in the record that suggests that some undisclosed motion was made to conform to proof is a portion of the last sentence of the conclusions of law. That portion of the sentence reads as follows: "and because neither nor both of said plaintiffs are entitled to recover by reason of their reliance upon said policy and the statements therein contained, their request to amend their complaint to conform to the

proof is denied." What the first portion of this quoted phrase means we do not know. What amendment to conform to proof the court is talking about, when it was made, and to what it related is not disclosed by the record. Obviously, such motion could not have been made until after the completion of the trial because the reporter's transcript discloses no such motion. If the proposed amendment did attempt, as claimed by the Overholtzers, to state a cause of action for negligence as abstracter, that would have been an entirely new cause of action from the one stated in the complaint. When the motion was made, such new cause of action would have been barred by section 339, subd. 1, of the Code of Civil Procedure. Thus, in view of the record, it is quite obvious that the trial court acted well within its discretion in denying the motion to amend, whatever that motion may have been.

The Overholtzers also object to the method used in computing damages in the present case. As already pointed out, the trial court fixed damages as of the date the policy was issued and limited the damages to the diminution in the value of the property caused by the easement measured by the use to which the property was then devoted. The court found that at the date of purchase the property was used for agricultural purposes and that for such purpose the property without the easement was worth \$3,000, but with the easement was worth but \$2,000, hence allowed \$1,000 as damages. The court also found that the Overholtzers purchased the property and an adjoining parcel for an industrial use, and devoted the two parcels to such use. It also found that the easement depreciated the value of the property as actually used by the Overholtzers at least \$15,000. This finding, repudiated as a measure of damages by the trial court by its findings and judgment, is based on the highly questionable testimony of one witness, a mill operator, not versed in real estate operations.

The findings present the question as to the proper time for the valuation of the property for purposes of damages in such cases—is it the diminution in the market value of the property caused by the de-

fect and measured at the time of purchase, market value being measured by the use to which the property is then devoted, or is it the diminution in value as of the time of the discovery of the defect measured by the use to which the property is then being used? In either event, maximum liability is measured by the face amount of the policy.

[14] It seems quite apparent to us that liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted. When a purchaser buys property and buys title insurance, he is buying protection against defects in title to the property. He is trying to protect himself then and for the future against loss if the title is defective. The policy necessarily looks to the future. It speaks of the future. The present policy is against loss the insured "shall sustain" by reason of a defect in title. The insured, when he purchases the policy, does not then know that the title is defective. But later, after he has improved the property, he discovers the defect. Obviously, up to the face amount of the policy, he should be reimbursed for the loss he suffered in reliance on the policy, and that includes the diminution in value of the property as it then exists, in this case with improvements. Any other rule would not give the insured the protection for which he bargained and for which he paid.

There may be some conflict in the authorities on this subject but the weight of authority and the better reasoned cases support the views above expressed. See 9 Appleman, Insurance Law and Practice, p. 24, § 5217; 7 Couch, Cyclopaedia of Insurance Law, p. 6286, § 1887; 6 Cooley's Briefs on Insurance (2d Ed.), p. 5726; see, also, Pennsylvania Laundry Co. v. Land T. & Tr. Co., 74 Pa.Super. 329 (a 7-man intermediate appellate court); Buquo v. Title Guaranty & Trust Co., 20 Tenn.App. 479, 100 S.W.2d 997; Kentucky Title Co. v. Hail, 219 Ky. 256, 292 S. W. 817; Narberth Building & Loan Ass'n v. Bryn Mawr Trust Co., 126 Pa.Super. 74, 190 A. 149. There may be a few cases

contrary, but most of them involved distinguishable factual situations. See *Murphy v. United States Title Guaranty Co.*, 104 Misc. 607, 172 N.Y.S. 243; *Glyn v. Title Guarantee & Trust Co.*, 132 App.Div. 859, 117 N.Y.S. 424; *Beaullieu v. Atlanta Title & Trust Co.*, 60 Ga.App. 400, 4 S.E.2d 78.

We believe the majority rule is sound and should have been followed in the present case.

For the above reasons the judgment is affirmed insofar as it imposes liability on the title company for damages based on the terms of the policy and for violation of the covenant to defend; the award of \$488.49 with interest for damages for violation of the covenant to defend is affirmed; the award of \$1,000 damages is reversed and the cause remanded to the trial court for the sole purpose of retrying that issue of damages in accordance with the views herein expressed. In the interests of justice the Overholtzers shall recover costs on both appeals. It is so ordered.

BRAY and FRED B. WOOD, JJ., concur.



116 Cal.App.2d 132

RICHARDS et al. v. PLUMBE et al.
Civ. 15151.

District Court of Appeal, First District,
Division 2, California.

Feb. 17, 1953.

Rehearing Denied March 19, 1953.

Hearing Denied April 15, 1953.

Action for a declaration of plaintiffs' rights in an oil and gas lease and royalties, an accounting for moneys collected under the lease, and an injunction against payment of any moneys so collected to one of defendants. From a judgment of the Superior Court in and for the City and County of San Francisco, Franklin A. Griffin, J., declaring that plaintiffs have no interest in the lease or rentals thereunder, plaintiffs appealed. The District Court of Appeal, Jones, J. pro tem., held that the evidence was sufficient to

support the trial court's finding that plaintiffs' agreement with such defendant to engage in the business of dealing in oil and gas leases or properties was annulled and abandoned by mutual consent before defendants secured the lease involved.

Judgment affirmed.

1. Appeal and Error ⇨931(1)

On appeal from judgment, every intentment tending to support judgment must be indulged in and every reasonable inference from facts, which tends to support finding on which judgment was based, must be accepted.

2. Appeal and Error ⇨931(1)

On appeal from judgment, construction of evidence must be in support of finding on which judgment is based, with all conflicts resolved in respondent's favor.

3. Appeal and Error ⇨1010(1)

Appellant's contention that evidence is insufficient to sustain trial court's determination requires appellant to demonstrate that there is no substantial evidence to support trial court's challenged findings.

4. Appeal and Error ⇨1010(1)

The burden is on appellant, contending that evidence is insufficient to sustain trial court's determination, to show such lack of substantial facts in record that reviewing court may say, as matter of law, that there is no ground on which trial court could have based any reasonable inference in support of its finding, and unless such burden is met, judgment appealed from should not be reversed.

5. Appeal and Error ⇨996

When two or more inferences can be reasonably deduced from facts in evidence, appellate court is without power to substitute its deductions therefrom for those of trial court.

6. Joint Adventures ⇨1.14

Partnership ⇨267

A partnership or joint adventure may be abandoned or dissolved by conduct inconsistent with its continuance.

7. Mines and Minerals ⇨101

In action for declaration of plaintiffs' rights in oil and gas lease and royalties, ac-

counting for moneys collected under lease, and injunction against payment of any moneys so collected to one of defendants, evidence was sufficient to support trial court's finding that agreement between plaintiffs and such defendant to engage in business of dealing in oil and gas leases or properties was annulled and abandoned by mutual consent before defendants secured lease involved.

James Martin MacInnis, San Francisco, William F. Cleary, San Francisco, of counsel, for appellants.

Wm. M. Maxfield, San Francisco, and Ralph Coffey, Oakland, for respondents.

JONES, Justice pro tem.

This appeal is taken from a judgment decreeing that appellants have no interest in an oil and gas lease on lands in Sacramento County, nor in the rentals which they yield. In addition to a declaration of their rights in the lease and the royalties appellants have also sued for an accounting for past collections and to restrain the payment of any monies collected under the lease to the respondent Plumbe. The action is founded upon an agreement of mutual undertaking made by appellants with Plumbe. The trial court found that this agreement had been annulled and abandoned by mutual consent before the lease came into existence.

Appellants challenge the sufficiency of the evidence to sustain this finding and in addition make the contentions that the evidence is not sufficient to sustain other findings, that certain documentary evidence relating to the boundaries of the Rio Vista Gas Field was improperly admitted, and that a motion to strike a portion of the testimony of Plumbe should have been granted. If there is evidence not involved in the three latter contentions sufficient to support the finding that the agreement was annulled and abandoned, these contentions become immaterial and present no problem of prejudicial error.

[1-5] It is an elementary principle of law that when an appeal is taken every intendment is to be indulged in which tends

to support the judgment, and every reasonable inference that may be drawn from the facts which tends to support a finding must be accepted. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. The construction of the evidence is to be in support of the finding, Patten & Davies Lbr. Co. v. McConville, 219 Cal. 161, 164, 25 P.2d 429, with all conflicts resolved in favor of the respondent. It may also be said that when the charge is made that the evidence is not sufficient to sustain the determination of the trial court, "Such contention requires" the appellant "to demonstrate that there is no substantial evidence to support the challenged findings." Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. Furthermore the burden is on the appellant to show such a lack of substantial facts in the record that the reviewing court may say as a matter of law that there is no ground upon which the trial court could have based any reasonable inference in support of its finding, and unless this burden is met, a reversal should not be ordered. Nor is the reviewing court permitted to substitute an inference different from that drawn by the trial court. In Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, it is stated that "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Passing to the contract upon which appellants rely, it is found to be couched in this language:

"Agreement

"Whereas, R. E. Plumbe, of Alameda, California; Gilbert Richards of San Francisco, California; and John R. Daley, of San Francisco, California, have associated themselves together as one in the business undertaking of seeking, locating or otherwise acquiring, leasing, operating, buying, selling, or

otherwise dealing in oil and gas leases or properties, oil and gas, cracking processes and all other things relative to petroleum and its derivatives, for the purpose of profitable gain and a division of all such cognate benefits on a share and share alike basis of the net gain thereof.

"Now Therefore, the three above named parties whose signatures of assent and agreement to the foregoing preamble hereto appear below, for and in consideration of one dollar each to the other paid in hand and receipt of which is hereby acknowledged, agree and do hereby agree to execute and perform each to the full extent of their ability and effort in furthering the progress of the above mentioned business, pertaining to the Rio Vista Oil and Gas Field of California. Done this 15th day of March, A.D.1947.

"Lu Netta Joy Plumbe	R. E. Plumbe
Witness	R. E. Plumbe
	Gilbert Richards
Witness	Gilbert Richards
	John R. Daley
Witness	John R. Daley"

The trial court's finding with respect to the abandonment of this agreement is as follows:

"It is untrue, however, that said agreement (Plaintiff's Exhibit '1' in evidence) constituted evidence of or the terms of an agreement between the parties signatory thereon which was in effect during the times hereinafter referred to and concerned in this action, and it is true that any agreement between the parties as evidenced by said document was, prior to the times hereinafter referred to and concerned in this action, cancelled and annulled by the mutual consent of the parties thereto and by the abandonment by the parties thereto of the enterprise as therein contemplated, to the effect that the same did not exist as an agreement or evidence of an agreement between the parties effective or concerning the times hereinafter referred to and herein involved."

The record discloses that pursuant to their agreement, appellants and Plumbe secured a lease on 2½ acres of land owned by one Slawek definitely located within the boundaries of the Rio Vista Gas Field, together with leases on other properties the location of which was uncertain with respect to the then recognized boundaries of the field. Through failure to secure a license from the state to drill a well on the leased lands, and for other reasons, all of the leases expired and in the latter part of May, 1947, appellant Richards went about other business and appellant Daley removed to Wyoming.

Plumbe, however, continued his activity in the Rio Vista area, and was approached by a Mr. Gardiner who suggested that he undertake to develop the Gardiner acreage situate near the Georgiana slough as a wildcat proposition. The Gardiner lands were well without the recognized boundaries of the Rio Vista Field. Plumbe interested the respondents Smith, Lucas, Riddle and Slater in the offer of Gardiner. Individual leases on other lands in the immediate vicinity were secured by them. They then undertook to develop a well on the Gardiner property.

The unchallenged testimony of the defendant Smith, in regard to this association and the activities of his associates was given as follows:

"Q. You had known Mr. Lucas before? A. Many years.

"Q. He was in the welding business and had used your products, I suppose? A. Yes. I had been together with him on other oil deals before, back to 1928.

"Q. Do you recall when you went to Los Angeles to see Mr. Lucas? A. In the latter part of June, 1947.

"Q. And what was the outcome of that conference? A. Well, he criticized the individual leases, and suggested that we go back and get him a community lease, and add to it as much acreage as we could.

"Q. Was that with the idea of drilling the Slawek land, or with the idea of putting on a wildcat in an entirely new field? A. It was the idea of putting

down a wildcat well in an entirely new field.

"Q. And most of the acreage, other than the Slawek piece, at that time was not considered part of the Rio Vista Field, was it? A. No, it was not.

"Q. And for that reason, it could not be used as total acreage for pro rate within the Rio Vista Field, is that correct? A. Well, the Gardiner property and the Lewallen property had been under lease to the Standard Oil Company of California, and they had given it up because their geologists had condemned the land as being unproductive of gas.

"Q. There were no wells on it at that time? A. There were no wells on it.

"Q. So, after your conversation with Mr. Lucas, you went into the area to obtain a community lease? A. That is correct.

"Q. As large an acreage as possible? A. That's right.

"Q. Who assisted in that endeavor, or who were the parties with you in that activity? A. Mr. Plumbe and myself did most of the work.

"Q. Were there any others? A. Well, Mr. Slater was along on some leg work. He did not obtain any of the signatures. Riddle also came along at various times.

"Q. When did you start on that work? A. As soon as we got back from—oh, I guess we started about the first or second week of July, 1947. The lease shows it was July 10th, I believe.

"Q. Would you say that you had started on that work in March or April or May? A. *Oh, no, I knew nothing about it. You see, I did not know Plumbe until June.*

"Q. Was any work done by anyone on this community lease prior to July of 1947? A. No.

"Q. Now, after the lease of July, 1947, was obtained, then what happened? A. Well, then they started pressing Lucas.

"Q. In other words, they wanted to get someone in there to drill? A. To get in there and drill, but he did not have the correct facilities to go in there and drill it.

"Q. Were there any shortages in the business at that time which controlled your activities? A. Yes, in well casing and tubular casing.

"Q. So ability to obtain well casing and tubing was essential in order to put down a wildcat well? A. That is correct.

"Q. And, by a wildcat, you mean by some independent person, other than the bigger companies? A. *No, a wildcat is any well that is drilled in an unproven area.*

"Q. But you knew that the big companies would not be interested, because Standard had turned it down, is that correct? A. Their geologists had turned it down. Associated and Shell also turned it down.

"Q. So you went back to Mr. Lucas to try to put over a deal with him? A. That is right.

"Q. And you had six months within which to do it, from and after July 10, 1947? A. That is correct.

"Q. Were you successful in doing it within that period of time? A. No, we were not.

"Q. For what reason, if you know? A. Well, they could not get pipe, and Lucas apparently was stalling.

"Q. In other words, the leases expired then, did they? A. *They expired on January 9, 1948.*

"Q. For the reason that you could not get anyone, up to that time, interested in drilling? A. That's right.

"Q. What next caused you to be active in connection with this transaction? A. Well, the next we learned was that Lucas had gone to Gardiner direct, and asked him for a lease to be made in his name and that of his wife which, if it had come about, why, Plumbe and Slater and Riddle and myself would have been out.

"Q. In other words, you got wind of the fact that after the *leases had expired* Lucas had bypassed you and gone direct to one of the larger landowners? A. That is correct. There is a telegram to that effect on file here.

"Q. And it was knowledge of the contents of the telegram of February 2nd, which was Plaintiffs' Exhibit B for Identification, and now is Plaintiffs' 17 in evidence, that you refer to? A. Yes.

"Q. As I understand it, the lease had expired on January 9? A. That's right." (Emphasis added.)

After the expiration date of the first community lease, Plumbe and Smith, together with their associates, secured a second community lease on the Gardiner and other properties. This is the lease in which the appellants now claim an interest by virtue of their agreement of March 15, 1947, with Plumbe.

Smith testified with respect to this second community lease:

"Q. Now, after you made your peace with Lucas, you went to work on the second community lease, is that correct? A. That is correct.

"Q. Did Lucas ever at any time explain to you why he was not successful—Do you know why he could not succeed under the first lease, but yet was able to succeed under the second lease? A. The reason he was able to succeed under the second lease was that prior to coming to Isleton in February of 1948 he had had an understanding with the defendant Feldman, that Feldman had the pipe and the tools, and that Feldman would put up the money to drill under the terms of the Georgiana lease, which called for one well every 150 acres.

"Q. Did Feldman, to your knowledge, put up the money for it? A. Yes, he did.

"Q. Or was it assigned to someone else? A. No, Feldman employed the Brown Drilling Company to drill on

the Gardiner property when they had spudded in, in March of 1948.

"Q. Do you know whether or not the lease was assigned to him prior to that time? A. The lease was assigned to Feldman on March 2, 1948, by Lucas.

"Q. What has been the history of the lease since then? A. Well, the landowners, the overriding royalty interests and Lucas' interests, amounted to 20 per cent, and Feldman then acquired, through this assignment of March 2, 1948, approximately an 80 per cent interest. Feldman operated the lease until Gardiner No. 1, 2 and 3, were drilled and put on production. He then sold a 50 per cent of his interest to Brazos Oil and Gas, a subsidiary of Dow Chemical Company, and subsequently has sold his remaining interest to a group called the Vista Rio Corporation."

[6, 7] Nowhere in the record does it appear that either appellant made the slightest contribution toward securing either the first or second community lease. The facts as disclosed by Smith's testimony show no relation whatever between the original undertaking of appellants and Plumbe, and the activities of Plumbe and his associates in securing and exploiting the first and second community leases. The conduct of appellants, and of Plumbe, is wholly inconsistent with the existence of either a partnership or joint venture. As is said in *Beck v. Cagle*, 46 Cal.App.2d 152, 162, 115 P.2d 613, 619, "The abandonment or dissolution of a partnership or joint adventure may take place by conduct inconsistent with its continuance." See also, *Middleton v. Newport*, 6 Cal.2d 57, 62, 56 P.2d 508; and *Fooshe v. Sunshine*, 96 Cal.App.2d 336, 343, 215 P.2d 66, 16 A.L.R.2d 1142. Such was the determination of the trial court here, and this finding is, in our opinion, abundantly supported by substantial evidence.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

116 Cal.App.2d 68

HOLLOWAY et al. v. THIELE.

No. 15385.

District Court of Appeal, First District,
Division 1, California.

Feb. 16, 1953.

Rehearing Denied March 18, 1953.

Action for moneys had and received, brought by vendors against real estate broker who returned to purchaser down payment made pursuant to deposit receipt. The Superior Court in and for the City and County of San Francisco, George W. Schonfeld, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Bray, J., held that, properly construed, the deposit receipt did not make the vendors' right to the down payment conditional upon purchaser's ability to obtain financing; but held that vendors' recovery should have been reduced by amount of defendant's commission, since agreement between the parties entitled him thereto.

Amended and affirmed.

1. Brokers ⇨30

As between vendors and real estate broker who drafted deposit receipt under which down payment on purchase of property was made, instrument would be construed most strongly against broker.

2. Brokers ⇨30

Properly construed, deposit receipt did not make vendors' right to down payment, deposited by purchaser with real estate broker, subject to purchaser's obtaining loan to finance transaction, as broker contended, but vested title to such down payment in vendors when they approved sale; and therefore vendors could recover from real estate broker who, after vendors had approved sale, nevertheless returned deposit to purchaser when she was unable to go through with transaction.

3. Brokers ⇨37

Action for moneys had and received, brought by vendors against real estate broker who had returned deposit to purchaser when purchaser was unable to secure necessary financing, was not, as contended by broker, a penalty-enforcement action, forbidden by Civil Code, nor was it an action for damages for breach of con-

tract, but was merely an action by principals against their agent to recover moneys paid to him for them pursuant to an agency, Civ.Code, § 3369.

4. Brokers ⇨37

In action for moneys had and received, brought by vendors against real estate broker who had returned deposit to purchaser when purchaser was unable to secure necessary financing, purchaser should have been interpleaded so that rights between all of parties could have been adjudicated; and in absence of purchaser, rights between vendors and purchaser could not be litigated.

5. Pleading ⇨139

In action for moneys had and received, by vendors against broker who had returned deposit to purchaser when purchaser was unable to secure necessary financing, where broker denied in answer that he was indebted to vendors in any sum, it was not necessary that he file a counterclaim or cross-complaint in order to be entitled to have set off against any recovery by vendors the commission to which he had become entitled under agreement between parties. Code Civ.Proc. § 956a.

Delany, Fishgold & Minudri, Mathew M. Fishgold and Manuel L. Furtado, San Francisco, for appellant.

Bernard B. Glickfeld, San Francisco, for respondents.

BRAY, Justice.

Defendant, a real estate broker, returned to the buyer a \$3,500 deposit on account of the purchase price of plaintiffs' property. In an action for moneys had and received, plaintiffs recovered judgment for that amount. Defendant appeals.

Question Presented.

Did defendant receive the deposit as plaintiffs' agent?

Facts.

Defendant as a real estate broker was a member of Multiple Listing Service, with whom plaintiffs had listed their property. The listing agreement makes the

listing and the selling broker coagents of the seller and authorizes the latter to accept and hold a deposit from the buyer in accordance with the Uniform Agreement of Sale and Deposit Receipt¹ adopted by the San Francisco Real Estate Association. Thiele found a buyer, a Mrs. Rosa Orton. On April 23, 1951, she signed the deposit receipt. It recited that she had deposited \$200 on account of the purchase price of \$14,250 for plaintiffs' property, that the deposit was to be increased to \$3,500 upon approval by seller. "Property to be refinanced with conventional Insurance Loan at 4½% interest. Balance in Cash to include a 2nd MTGE which is payable to the purchaser in 3 semi Annual payments * * *" (Emphasis added.) Among other provisions of the receipt were, 30 days to be allowed purchaser to examine title, balance of purchase price to be paid before expiration of that time to defendant "for account of the seller," seller to deliver to defendant a proper deed. If purchaser fails to comply with any of the conditions of the receipt within the time limited, "said deposit shall be retained by said seller, as liquidated and agreed damages * * *" or the seller may elect to apply the deposit on account of the purchase price and sue the buyer for specific performance. The same day defendant brought the receipt to plaintiffs' home, stating that he had the \$200 deposit, but saying nothing to the effect that it was paid conditionally. Plaintiffs then signed the approval of the sale attached to the receipt, thereby agreeing to pay the brokers \$712.50 for services rendered and agreeing that "In case of a forfeited deposit, said agent shall receive or retain one-half thereof * * *" but no amount in excess of the commission.

Defendant ordered a title search and opened up an escrow with an escrow company. About April 30 the buyer deposited with defendant the additional \$3,300. May 8 plaintiffs' deed to Mrs. Orton was deposited with the title company. Plaintiffs' title was good, and the same day the escrow company made demand upon defendant for

the \$3,500 deposit. Mrs. Orton's husband was overseas in military service. An insurance company was willing to make a loan on the property for the balance of the purchase price, but the financing could not be completed unless the husband signed the loan papers. Defendant wrote plaintiffs to that effect and stated that the insurance company had recommended that the agreement of purchase be extended until the husband's return, which would be about the middle of June. Plaintiffs agreed to an extension until June 18. The husband's ship landed in Seattle but he was required to make another trip immediately, so he was unavailable to sign the papers. He did not return to San Francisco until August. Early in May defendant stated to plaintiffs that because of Mrs. Orton being unable to obtain a power of attorney from her husband to sign the loan papers and because she was pregnant it would be a gracious thing for plaintiffs to return her deposit and defendant would sell the property to others. Plaintiffs refused either to consent to a return of the deposit or to a sale to others. Defendant testified he could have so sold the property. Defendant made attempts to get a loan for Mrs. Orton from several sources but could not do so because of the unavailability of her husband. Early in June and before the expiration of the extended time, defendant returned the \$3,500 to Mrs. Orton.

Agency.

[1, 4] There is no question that under the listing agreement and the deposit receipt defendant was plaintiffs' agent to receive a deposit on account of the sale to Mrs. Orton. Defendant contends, however, that the deposit made by the letter and the sale to her of the property was conditional upon her being able to obtain an insurance loan and thereby to finance the purchase, and that the deposit receipt so shows. Hence, says defendant, he received the money as Mrs. Orton's agent to be held until she financed her purchase. Whatever defendant's relationship to her might have

1. Hereafter referred to as "deposit receipt."

been, a proper construction of the deposit receipt shows that the clause as to refinancing was not a condition to plaintiffs' approving the sale to her. Immediately after the paragraph concerning refinancing appear the words "Conditions of Sale," followed by numerous specifications, none of which refers to the refinancing. Taking the receipt as a whole, it appears that the buyer paid a deposit of \$200, was to increase the deposit to \$3,500 immediately upon approval of the sale by the sellers, and that the balance of the purchase price was to be cash paid to sellers but secured not by any encumbrance in favor of the seller but by two encumbrances to third parties. The deposit receipt was drawn by defendant and hence as between him and plaintiffs is to be construed most strongly against him. (Restatement, Contracts, § 236(d).)

It must be remembered that this is not an action between the seller and the buyer, nor between the agent and the buyer, but one between the sellers and their agent who at no time disclosed to the sellers the fact, if it were such, that he received either the \$200 or the \$3,300 from the buyer conditionally. As soon as the sellers accepted the buyer's contract the latter paid the \$3,300 to defendant. Thereupon the plaintiffs, pursuant to the agreement, deposited their deed to the buyer in escrow. As the plaintiffs' title was good this entitled them to the balance of the purchase price. *Montgomery v. Pacific C. L. Bureau*, 94 Cal. 284, 29 P. 640. The buyer became in default through no fault of plaintiffs, and refused to go through with the sale. This entitled plaintiffs to the deposit. Defendant as their agent had no right to return the deposit to the buyer. She should have been interpleaded and then the rights between the sellers and buyer and between the broker and buyer could have been adjudicated. "In the absence of special circumstances, moneys received by one in the capacity of agent are not his, and the law implies a promise to pay them to the principal on demand." *Savage v. Mayer*, 33 Cal.2d 548, 551, 203 P.2d 9, 10. The deposits were paid to plaintiffs' agent pursuant to the deposit re-

ceipt as the initial payment to the vendors in performance of the contract, and title to them vested in the vendors when they accepted the contract. *Norris v. San Mateo County Title Co.*, 37 Cal.2d 269, 231 P.2d 493. The failure of the buyer's husband to sign the necessary papers to enable her to make loans did not constitute an excuse for her not going through with the agreement which she had signed. See *Fritz v. Frost*, 114 Cal.App. 602, 300 P. 454; *Russell v. Ramm*, 200 Cal. 348, 254 P. 532.

This is neither, as contended by defendant, an action to enforce a penalty, which section 3369, Civil Code, forbids, an action for damages for breach of contract, nor an action to enforce a forfeiture. It is merely an action by principals against their agent to recover moneys paid to him for them pursuant to the agency. Actions between buyer and seller such as *Freedman v. Rector*, 37 Cal.2d 16, 230 P. 2d 629; *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13; and *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal. 2d 751, 128 P.2d 665, do not apply. In *Montgomery v. Pacific C. L. Bureau*, supra, 94 Cal. 284, 29 P. 640, also relied on by defendant, the plaintiff's property was sold at auction by the defendant. One of the terms of sale was that ten days was to be allowed buyer for search of title. The buyer's attorney, on examining the abstract of title, advised that the title was defective. The buyer had paid the defendant \$900 upon the purchase price. The plaintiff tendered the buyer a deed which he refused on the ground that the title was defective. The plaintiff also notified the defendant not to return the deposit to the buyer. The defendant held it and the plaintiff sued the defendant for it. The court held that the title was not defective and that the plaintiff was entitled to the down payment. The court used this language which defendant here stresses: "It may be conceded that as to this deposit the defendant, pending the examination of the title, was a stakeholder for the parties and for its own protection." 94 Cal. at page 290, 29 P. at page 642. The distinction of that case from ours lies in the fact that good

title was a condition precedent, while here the provision relating to financing was not such a condition. Here defendant is in the position that the defendant was in that case when the court stated, " * * * when the title was shown to be perfect the deposit then became, according to the terms of sale, a portion of the cash payment, and the property of the plaintiff * * *. Thereafter the defendant could not return it to the purchaser except at his own risk. Having done so, and having made a mistake, it cannot escape its just liability to the plaintiff." 94 Cal. at page 290, 29 P. at page 642.

In *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 28 P. 796, plaintiff had authorized defendants to sell their property for \$10,000, giving them as commission all they might receive over that amount. They sold the property for \$10,500, receiving a deposit of \$1,050, giving the purchaser an agreement to return the deposit if the title was found imperfect. It was so found. The plaintiffs sued the defendants for the deposit on the theory it became their money as soon as received by the defendant. The court held, however, first, that the relation of the defendants to the plaintiffs was not that of mere agent, that because the defendant was entitled to all proceeds over the stipulated amount, there was rather a relationship of vendor and purchaser, and secondly, that if it were conceded that an agency relationship was created, the agreement between their agent and the buyer made good title a condition precedent to the money paid their agent becoming their money. Obviously it is different than the situation here. Actually, in our case, defendant is attempting to question his principal's title to the money, which became due the principal when defendant obtained their signature to the deposit receipt. This he cannot do. See 3 C.J.S., Agency, § 173(b), p. 63.

In *Bastanchury v. Times-Mirror Co.*, 68 Cal.App.2d 217, 156 P.2d 488, the court held that in an action for money had and received the agent could show that it disbursed the money sued for by the principal in due course of the business between itself and the principal, either upon legal

grounds or upon equitable grounds by way of estoppel or waiver. In our case, however, the agent did not disburse the money in due course of the business between him and plaintiffs but undertook to adjudicate the rights between his principal and the buyer. This he did at his peril.

Evidence.

A reading of the transcript shows that at the beginning of the trial defendant contended that the deposit receipt showed on its face that the financing by the buyer was a condition precedent. (In fact, defendant made a motion for nonsuit based on that ground.) Additionally, after plaintiffs had testified that defendant had not informed them of any such condition at the time they approved the agreement, defense counsel asked defendant what plaintiffs said in regard to the refinancing clause in the agreement. Plaintiffs objected. Considerable argument followed in which defendant stated "It has never been our position Mr. Thiele is not bound by the instrument * * *," that the purpose of the question was to explain any ambiguity in the deposit receipt, "if there is no question of ambiguity about the refinancing or about the second mortgage I will not pursue it further." The court then stated it saw no ambiguity. No attempt was made by defendant to pursue the matter further, nor was defendant asked what, if anything, he stated to plaintiffs. There is no offer of proof nor statement in the briefs that plaintiffs were told at any time prior to the failure of the buyer to accomplish her financing that the purchase and the deposits were conditional. It is true that on a number of occasions defendant attempted to prove the conversations between him and the buyer, apparently to show that both he and the buyer understood the agreement and deposits to be conditional, but until such condition was disclosed to the plaintiffs, such testimony would not be admissible. Again, this is not an action between the buyer and seller, but one between an agent and his principal, whose signature the agent has obtained to a contract without any disclosure of the alleged conditional nature of that contract.

The rights between the buyer and seller cannot be litigated in this action to which the buyer is not a party.

Commissions.

[5] The approval signed by plaintiffs provides that in case of a forfeited deposit the agent shall retain one-half thereof, not exceeding the amount of the commission earned. That commission was 5 per cent of the selling price of \$14,250, or \$712.50. Plaintiffs contend that defendant is not entitled to keep any portion of the \$3,500 because he did not file a counterclaim or cross-complaint. He is not required so to do. Plaintiffs' complaint alleged that defendant is indebted to plaintiffs in the sum of \$3,500 for moneys had and received. Defendant's answer denied that he was indebted to plaintiffs in that or any other sum. Under the contract, one-half of the deposit up to the amount of the commission was to be retained by

defendant. In other words, it is his money. As to the right to retain the commission, the rule above quoted from *Bastanchury v. Times-Mirror Co.*, 68 Cal.App.2d 217, 156 P.2d 488, applies. Plaintiffs' proof, therefore, shows that they are entitled only to that portion of the \$3,500 which does not belong to defendant, namely, the difference between \$3,500 and \$712.50, or \$2,787.50. The trial court should have so found, although in fairness to it, it must be pointed out that it was never asked to so find. Pursuant to the authority invested in us to make findings, Code Civ. Proc. § 956a, the findings are amended accordingly.

The judgment is likewise amended to award plaintiffs judgment for \$2,787.50 only. It is affirmed in that amount. Plaintiffs will recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.



40 Cal.2d 224

**GILL et ux. v. HEARST PUB. CO.,
Inc. et al.
L. A. 22038.**

Supreme Court of California, in Bank.
Feb. 17, 1953.

Action by husband and wife for an invasion of privacy when photograph taken by defendant's employee without consent was published in magazine in conjunction with article. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained demurrer to complaint without leave to amend, and plaintiffs appealed. The Supreme Court, Spence, J., held that when mere publication of photograph was not invasion of privacy, but there was invasion of privacy when published with magazine article, and plaintiffs alleged that defendants consented to publication of photograph by magazine, defect by reason of absence of express allegation of consent to publication of article was subject to being cured by amendment, and sustaining of demurrer without leave to amend was an abuse of discretion.

Judgment reversed.

Carter, J., dissented in part.

Prior opinion, 239 P.2d 636.

1. Torts ⚡19

Where plaintiffs, a husband and wife, sued for invasion of privacy by publication, in conjunction with magazine article, of photograph of plaintiffs taken by defendant's employee without consent of plaintiffs, and memorandum of trial court, when sustaining demurrer, attached no significance to whether plaintiffs charged defendants with consent to publication of photograph only, fact that plaintiffs' argument in opposition to demurrer had stressed publication of photograph alone as constituting the violation was not a waiver by them or estoppel in limitation of their claim for invasion of privacy.

2. Torts ⚡8

Where plaintiffs, a husband and wife, sued for an invasion of their privacy by publication, in conjunction with magazine article, of photograph of plaintiffs in an affectionate pose, taken by defendants' employee without consent of plaintiffs, if defendants consented to publication in magazine of photograph in conjunction

with article having uncomplimentary reflections on plaintiffs, defendants would be liable for an invasion of privacy.

3. Pleading ⚡225(2)

Where plaintiffs, a husband and wife, sued for an invasion of their privacy when photograph taken by defendant's employee without plaintiffs consent was published in conjunction with article in magazine, and plaintiffs alleged that defendants consented to publication of photographs but did not directly allege that there was consent to publication of accompanying article, and the combined publication was an invasion of privacy, defect in complaint with reference to publication of accompanying article was capable of being cured by amendment, and the sustaining of a demurrer to complaint without leave to amend was an abuse of discretion.

4. Pleading ⚡229

Defects by way of uncertainties or ambiguities in a pleading can ordinarily be cured by amendment.

5. Torts ⚡8

The mere publication of an unconsented photograph of husband and wife in an affectionate, but not obscene pose, does not constitute an actionable invasion of privacy, but publication of such photograph, in conjunction with a magazine article tending to unfavorably reflect upon husband and wife may constitute an actionable invasion of privacy.

6. Constitutional Law ⚡90

Torts ⚡8

The right of privacy, in the sense of being protected from undesired publicity is not absolute, but must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press, and the right of privacy may not be extended to prohibit any publication of matter which may be of public or general interest, but the general object of the right is instead, to protect the right of privacy of private life, as determined by norm of the ordinary man. U.S.C.A.Const. Amends. 1, 14; Const. art. 1, § 9.

7. Torts ⇨8

Liability exists for defendant's publicity of plaintiff's private life only if defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities and publication goes beyond the limits of decency. U.S.C.A.Const. Amends. 1, 14; Const. art. 1, § 9.

8. Constitutional Law ⇨90**Torts** ⇨8

The constitutional guarantees of freedom of expression apply with equal force to news publications and entertainment features, and liability on publication of either type accrues only in event of wrongful invasion of privacy.

9. Torts ⇨8

Where picture of husband and wife in an affectionate pose was taken in confectionery operated by them and at time when other persons were present and when husband and wife were open to the public view, photographic incident depicted became a part of the public domain as to which husband and wife could not thereafter assert a right of privacy, unless coupled with something other than mere publication of photograph.

Shacknove & Goldman and Ben F. Goldman, Jr., Los Angeles, for appellants.

Flint & MacKay and Arch R. Tuthill, Los Angeles, for respondents.

Loeb & Loeb, Lawler, Felix & Hall, Los Angeles, Price, MacDonald & Knox, Oakland, John Hamlyn, Sacramento, Cosgrove, Cramer, Diether & Rindge and Binford & Binford, Los Angeles, amici curiae on behalf of respondents.

SPENCE, Justice.

As in the related case of *Gill v. Curtis Publishing Co.*, 38 Cal.2d 273, 239 P.2d 630, plaintiffs, husband and wife, sought damages for an alleged invasion of their right of privacy. Defendants' demurrer to the amended complaint was sustained without leave to amend. From the judgment accordingly entered, plaintiffs appeal. It ap-

pears that plaintiffs properly challenge the correctness of the trial court's ruling insofar as it foreclosed their right to amend.

Plaintiffs' original complaint was predicated solely on the charge that in the October, 1947, issue of *Harper's Bazaar*, a magazine published and distributed by the corporate defendants, there appeared an unauthorized photograph of plaintiffs taken by defendants' employee while plaintiffs were seated in an affectionate pose at their place of business, a confectionery and ice cream concession in the Farmers' Market in Los Angeles. This photograph was used to illustrate an article entitled "And So the World Goes Round," a short commentary reaffirming "the poet's conviction that the world could not revolve without love," despite "vulgarization" of the sentiment by some, and that ballads may still be written about everyday people in love. A demurrer to that original complaint was sustained on the ground that the statute of limitations had run, but leave to amend was granted. Plaintiffs do not question the propriety of that ruling. Code Civ.Proc. § 340, subd. 3.

Plaintiffs thereupon amended their complaint to allege that the same photograph was republished with defendants' consent in the May, 1949, issue of the *Ladies' Home Journal*, a monthly magazine published and distributed by the Curtis Publishing Company. The same publication was involved in *Gill v. Curtis Publishing Co.*, supra, 38 Cal.2d 273, 239 P.2d 630. Specifically, it is here alleged that the "picture" was republished with the "knowledge, permission and consent" of defendants and that "credit" for the publication was given to and required by defendants; that the published photograph depicts plaintiffs in an "uncomplimentary" pose; that plaintiffs' right of privacy was thereby invaded and plaintiffs were subjected to humiliation and annoyance to their damage in the sum of \$25,000. While the picture was used for illustration of an article entitled "Love", see *Gill v. Curtis Publishing Co.*, supra, 38 Cal.2d at page 275, 239 P.2d at page 632, plaintiffs did not allege that defendants also consented to the publication of the article. However, a copy of the picture, with the accompanying article, is attached

as an exhibit to the amended complaint. Defendants maintain that since plaintiffs failed to make the direct allegation that defendants consented to the publication of the article, plaintiffs' alleged cause of action must be deemed to rest solely on the publication of the photograph without reference to the accompanying text or caption under the picture.

[1] It is true that in their argument in opposing defendants' demurrer to their amended complaint, plaintiffs stressed the publication of the photograph alone as constituting a violation of their right of privacy, without regard to its use in connection with the article. However, as appears from its memorandum opinion in sustaining the demurrer without leave to amend, the trial court attached no significance to the matter of whether plaintiffs charged defendants with mere consent to publication of the photograph or included also consent to publication of the accompanying article. In either event the trial court was of the view that there had been no invasion of plaintiffs' right of privacy. Under such circumstances defendants may not successfully urge a waiver by plaintiffs or estoppel in limitation of the premise of their alleged damage claim. Regardless of plaintiffs' theory of liability, the ruling of the trial court would have been the same—that a cause of action had not been stated. Therefore such authorities as *Gordon v. Kifer*, 26 Cal.App.2d 252, 255, 79 P.2d 164; *Alberts v. American Casualty Co.*, 88 Cal.App.2d 891, 896, 200 P.2d 37; and 2 Cal.Jur. 844-852, are not in point.

[2-4] As indicated in *Gill v. Curtis Publishing Co.*, supra, 38 Cal.2d 273, 279, 239 P.2d 630, defendants would be liable in the event of their consent to publication of the photograph in connection with the article in the *Ladies' Home Journal*. Plaintiffs therefore maintain that any defect in the recitals of the amended complaint with reference to defendants' connection with the publication of the article as well as the photograph could be easily corrected by amendment. The incorporation of the article as an exhibit constitutes some basis for an inference that it may have been in-

tended as an inseparable part of the photograph in presenting the extent of plaintiffs' complaint. Moreover, the allegation of consent is broad and it cannot be said that it necessarily negates a consent to publishing the article. The objection to plaintiffs' pleading thus goes to the matter of effecting a clarification of an uncertainty or an ambiguity. Manifestly, such defect is capable of being cured by amendment. *Wennerholm v. Stanford University School of Medicine*, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358; *Washer v. Bank of America Nat. Trust & Savings Ass'n*, 21 Cal.2d 822, 833, 136 P.2d 297, 155 A.L.R. 1338. Under these circumstances, the trial court abused its discretion in sustaining defendants' demurrer without leave to amend. *Wilk v. Vencill*, 30 Cal.2d 104, 109, 180 P.2d 351.

[5-7] The recognition of plaintiffs' right to proceed in the event of proper clarification involves the further observation that mere publication of the photograph standing alone does not constitute an actionable invasion of plaintiffs' right of privacy. The right "to be let alone" and to be protected from undesired publicity is not absolute but must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press. U.S.Const. Amends. I, XIV; Cal.Const. art. I, sec. 9; 41 Am.Jur., Privacy, sec. 9, pp. 931-933; *Nizer*, *The Right of Privacy*, 39 Michigan Law Rev. 526, 528-529; *Gill v. Curtis Publishing Co.*, supra, 38 Cal.2d 273, 277-278, 239 P.2d 630. The right of privacy may not be extended to prohibit any publication of matter which may be of public or general interest, but rather the "general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn." *Brandeis-Warren Essay*, 4 Harvard Law Rev., 193, 215; *Metter v. Los Angeles Examiner*, 35 Cal.App.2d 304, 312, 95 P.2d 491. More-

over, the right of privacy is determined by the norm of the ordinary man; that is to say, the alleged objectionable publication must appear offensive in the light of "ordinary sensibilities." 41 Am.Jur., Privacy, sec. 12, p. 934. As has been said: " * * * liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues. * * * It is only when the defendant should know that the plaintiff would be justified in feeling seriously hurt by the conduct that a cause of action exists." Rest., Torts, Vol. 4, sec. 867, comment d, pp. 400-401; see, also, cases collected: Annos. 138 A.L.R. 22, 46; 168 A.L.R. 446, 452; 14 A.L.R.2d 750, 752. Whether there has been such an offensive invasion of privacy is "to some extent one of law." 41 Am.Jur., Privacy, sec. 12, p. 935; Schuyler v. Curtis, 147 N. Y. 434, 42 N.E. 22, 26, 31 L.R.A. 286; Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133, 139; Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 251, 168 A.L.R. 430.

[8] The picture allegedly was taken at plaintiffs' "place of business," a confectionery and ice cream concession in the Farmers' Market, Los Angeles. It shows plaintiffs, a young man and young woman, seated at a counter near a cash register, the young woman apparently in intent thought, with a notebook and pencil in her hands, which rest on the counter. Plaintiffs are dressed informally and are in a romantic pose, the young man having one arm about the young woman. There are at least five other persons plainly visible in the photograph in positions in close proximity to plaintiffs as the central figures. Apparently the picture has no particular news value but is designed to serve the function of entertainment as a matter of legitimate public interest. Rest., Torts, Vol. 4, sec. 867, comments c and d, pp. 399-401. However, the constitutional guaranties of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature, Lovell v. City of

Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949; Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed. 840; United States v. Paramount Pictures, Inc., 334 U.S. 131, 166, 68 S.Ct. 915, 92 L.Ed. 1260, and defendants' liability accrues only in the event that it can be said that there has been a wrongful invasion of plaintiffs' right of privacy. Cf. Gill v. Curtis Publishing Co., supra, 38 Cal.2d 273, 280, 239 P.2d 630.

[9] In considering the nature of the picture in question, it is significant that it was not surreptitiously snapped on private grounds, but rather was taken of plaintiffs in a pose voluntarily assumed in a public market place. So distinguishable are cases such as Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291, where the picture showed plaintiff in her bed at a hospital, which circumstance was held to constitute an infringement of the right of privacy. Here plaintiffs, photographed at their concession allegedly "well known to persons and travelers throughout the world" as conducted for "many years" in the "worldfamed" Farmers' Market, had voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business. By their own voluntary action plaintiffs waived their right of privacy so far as this particular public pose was assumed, 41 Am.Jur., Privacy sec. 17 p. 937, for "There can be no privacy in that which is already public." Melvin v. Reid, 112 Cal. App. 285, 290, 297 P. 91, 93. The photograph of plaintiffs merely permitted other members of the public, who were not at plaintiffs' place of business at the time it was taken, to see them as they had voluntarily exhibited themselves. Consistent with their own voluntary assumption of this particular pose in a public place, plaintiffs' right to privacy as to this photographed incident ceased and it in effect became a part of the public domain, Brandeis-Warren Essay, 4 Harvard Law Rev. 193, 218; Melvin v. Reid, supra, 112 Cal.App. 285, 290-291, 297 P. 91, as to which they could not later rescind their waiver in an attempt to assert a right of privacy. Cohen

v. Marx, 94 Cal.App.2d 704, 705, 211 P.2d 320. In short, the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence.

Nor does there appear to be anything "uncomplimentary" or discreditable in the photograph itself, so that its publication might be objectionable as going "beyond the limits of decency" and reasonably indicate defendants' conduct to be such that they "should have realized it would be offensive to persons of ordinary sensibilities." Rest. Torts, vol. 4, sec. 867, comment d, pp. 400-401. Here the picture of plaintiffs, sitting romantically close to one another, the man with his arm around the woman, depicts no more than a portrayal of an incident which may be seen almost daily in ordinary life—couples in a sentimental mood on public park benches, in railroad depots or hotel lobbies, at public games, the beaches, the theatres. Such situation is readily distinguishable from cases where the right of privacy has been enforced with regard to the publication of a picture which was shocking, revolting or indecent in its portrayal of the human body. See *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849, 42 L.R.A., N.S., 386; *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194. In fact, here the photograph may very well be said to be complimentary and pleasing in its pictorial representation of plaintiffs.

Plaintiffs have failed to cite, and independent research has failed to reveal, any case where the publication of a mere photograph under the circumstances here prevailing—a picture (1) taken in a pose voluntarily assumed in a public place and (2) portraying nothing to shock the ordinary sense of decency or propriety—has been held an actionable invasion of the right of privacy. To so hold would mean that plaintiffs "under all conceivable circumstances had an absolute legal right to [prevent publication of] any photograph of them taken without their permission. If every person has such a right, no [period-

ical] could lawfully publish a photograph of a parade or a street scene. We are not prepared to sustain the assertion of such a right." *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E.2d 753, 755; see Rest., Torts, Vol. 4, sec. 867, comment c, pp. 399-400. In so concluding, it must be remembered that there is no contention here that the publication of plaintiffs' photograph was for advertising or trade purposes. 41 Am.Jur., Privacy, sec. 22, p. 941; e. g. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101; *Kunz v. Allen*, 102 Kan. 883, 172 P. 532, L.R.A.1918D, 1151 also 26 Southern Cal.Law Rev. 102, 103.

As heretofore indicated, however, we conclude that plaintiffs should have been accorded the right to amend their complaint, and that the trial court abused its discretion in sustaining defendants' demurrer without leave to amend.

The judgment is reversed.

GIBSON, C. J., and SHENK, ED-MONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I concur in that part of the majority decision which reverses the judgment for refusal of the trial court to allow plaintiffs to amend. I dissent, however, from the holding that the publication of the photograph alone did not violate plaintiffs' right of privacy.

It is difficult to ascertain upon what ground the majority opinion rests as will hereafter appear. As outlined in *Gill v. Curtis Publishing Co.*, 38 Cal.2d 273, 239 P.2d 630, and authorities there cited, there are two main questions involved in right of privacy cases: (1) Is the publication of a character which would offend the feelings and sensibilities of the ordinary person; and (2) if it does so offend, is there such a public interest in the subject matter of the publication with reference to its news or educational significance that it may be published with impunity. In the first instance the ques-

tion is whether there has been any tort (violation of the right of privacy) committed, and in the second, having found the tort, is it privileged.

Referring to the second question, first, it should be quite obvious that there is no news or educational value whatsoever in the photograph alone. It depicts two persons (plaintiffs) in an amorous pose. There is nothing to show whether they are or are not married. While some remote news significance might be attached to persons in such a pose on the theory that the public likes and is entitled to see persons in such a pose, there is no reason why the publisher need invade the privacy of John and Jane Doe for his purpose. He can employ models for that purpose and the portion of the public interested will never know the difference but its maudlin curiosity will be appeased.

For the same reasons the discussion in the majority opinion to the effect that plaintiffs consented to the publication because they assumed the pose in a public place is fallacious. But in addition, such a theory is completely at odds with the violation of the right of privacy. By plaintiffs doing what they did in view of a tiny fraction of the public, does not mean that they consented to observation by the millions of readers of the defendant's magazine. In effect, the majority holding means that anything any one does outside of his own home is with consent to the publication thereof, because, under those circumstances he waives his right of privacy even though there is no news value in the event. If such were the case, the blameless exposure of a portion of the naked body of a man or woman in a public place as the result of inefficient buttons, hooks or other clothes-holding devices could be freely photographed and widely published with complete immunity. The majority opinion confuses the situation, as have some of the other cases, with the question of newsworthiness. It has been said that when a person is involved in either a public or private event, voluntarily or involuntarily, of news value, that he has waived his right of privacy. Plainly such

is not the case where the event is involuntary such as the victim of a hold-up. As we said in *Gill v. Curtis Publishing Co.*, supra, 38 Cal.2d 273, 281, 239 P.2d 630, 635: "It should be observed, that referring to the use of a person's likeness for a legitimate public interest as not actionable because it indicates a waiver by the person of his right, is of doubtful validity, for it has been applied whether the publication having news value arose out of an incident of his own making or involuntarily and without his fault thrust upon him." There is no basis for the conclusion that the second a person leaves the portals of his home he consents to have his photograph taken under all circumstances thereafter. There being no legitimate public interest, there is no excuse for the publication.

The first ground, that the picture would not offend the senses of an ordinary person, is equally untenable. It is alleged in plaintiffs' complaint, and admitted by the demurrer that it so offended them. It is then a matter of proof at the trial. Certainly reasonable men could view the picture as showing plaintiffs in a sultry or sensual pose. For this Court to say as a matter of law that such portrayal would not seriously offend the feelings of an ordinary man is to take an extreme view to say the least. The question is one for the trier of fact. *Gill v. Curtis Publishing Co.*, supra, 38 Cal.2d 273, 280, 239 P.2d 630. If it is in part a question of law it is so only to the extent that the right does not extend to "supersensitiveness or agoraphobia." 41 Am.Jur., Privacy, § 12. An examination of the photograph shows that it would offend the feelings of persons other than oversensitive ones.

Finally, adding to the confusion of the precise ground upon which it rests, the majority opinion makes point of the fact that the picture was not used for advertising purposes, and that if it did not hold as it does, there would be liability for a person's picture appearing among others in a parade. Obviously the first has no bearing upon whether an ordinary man would be offended. The offense would ex-

ist or not exist regardless of whether it was used for advertising. The second adds nothing because the parade and those engaging in it are matters of public interest and the persons engaging therein are intentionally placing themselves on public display—parade.

In announcing a rule of law defining the right of a private citizen to be left alone, and not have his photograph published to the four winds, especially when he is depicted in an uncomplimentary pose, courts should consider the effect of such publication upon the sensibility of the ordinary private citizen, and not upon the sensibility of those persons who seek and enjoy publicity and notoriety and seeing their pictures on public display, or those who are in the "public eye" such as public officials, clergymen, lecturers, actors and others whose professional career brings them in constant contact with the public and in whom the public or some segment thereof is interested. Obviously anything the latter group may do or say has news or educational value—such cannot be said of the persons engaged in private business or employment who constitute more than 90% of our population. These private citizens, who desire to be left alone, should have and enjoy a right of privacy so long as they do nothing which can reasonably be said to have news value. Certainly this right is entitled to protection. It seems to me that the law should be so molded as to protect the right of the 90% who do not desire publicity or notoriety and who may be offended by publications such as that here involved. And, when the right of privacy of such a person is violated, and redress is sought in the courts for the indignity suffered, the courts should apply the general rules applicable to the redress of wrongs and submit the issues of fact to a jury when demanded. But the majority of this Court, following its present trend, has again seen fit to deny plaintiffs their constitutional right to a jury trial on the issues of fact here presented by arrogating to itself both the fact finding and law making power. To this holding I most emphatically dissent.

GOODMAN et al. v. HARRIS et al.

S. F. 18688.

Supreme Court of California, in Bank.

Feb. 17, 1953.

Rehearing Denied March 16, 1953.

Action against owner and lessees of premises leased for operation of a motel for death of one guest and permanent injury to another from inhaling carbon monoxide fumes from defective butane gas heater installed by lessees. The Superior Court, San Francisco County, Alvin E. Weinberger, J., entered judgment of nonsuit as to defendant owner, and plaintiffs appealed. The Supreme Court, Edmonds, J., held that the evidence was insufficient to take case to jury on question of whether heater, which was portable, connected to premises only by gas intake pipe, and easily removable, was so affixed to building as to be a part of the realty.

Judgment affirmed.

Carter, J., dissented.

For prior opinion see 245 P.2d 685.

1. Landlord and Tenant ⇨167(8)

Landlord is under a duty to see that property leased for a purpose involving admission of the public is safe for the purposes intended and must exercise reasonable care to inspect and repair the property before possession is transferred so as to prevent any unreasonable risk of harm to the public.

2. Landlord and Tenant ⇨169(11)

In action against owner and lessees of premises leased for operation of a motel for death of one guest and permanent injury to another from inhaling carbon monoxide fumes from unvented and defective butane gas heater installed by lessees, evidence was insufficient to take case to jury on question of whether heater, which was portable, connected to premises only by gas intake pipe and easily removable without affecting the physical premises, was so affixed to building as to be a part of the realty for the safety of which for the purposes intended owner was responsible.

3. Landlord and Tenant ⇨167(8)

That a cabin on premises leased for operation of a motel did not meet statutory

requirements of construction for rental as overnight accommodation for transients did not warrant inference that cabin was defective or that a dangerous condition existed on leased premises which would render lessor liable for death of one occupant of cabin and permanent injury to another from inhaling carbon monoxide fumes from unvented and defective butane gas heater installed by lessees, where cabin had a vent which could be connected to heating unit and windows and doors for proper ventilation and renting of cabin by the week or month was permissible under statute.

4. Landlord and Tenant ⇨167(8)

That gas intake pipe entered cabin on premises leased for operation of a motel through wall opposite to that in which vent was located did not constitute such a defective condition in leased premises as would render lessor liable for death of one occupant of cabin and permanent injury to another from inhaling carbon monoxide fumes from unvented and defective butane gas heater installed by lessees, in absence of showing that intake pipe was incapable of extension, that a vented heater could not be installed, or that installation of a proper unvented heater would have been unsafe.

5. Landlord and Tenant ⇨167(8)

Owner of premises leased for a purpose involving admission of the public is not responsible for a latent dangerous condition of property owned by lessee and not a part of the realty, though it existed upon premises at time of execution of lease.

6. Landlord and Tenant ⇨167(1)

Where injury to third persons results from activity of lessee upon premises, which, by reason of some defect, are not reasonably suitable for such conduct, lessor may be held liable, not for the fault of lessee, but only for his own fault in leasing property not safe for the activity to be conducted thereon.

7. Landlord and Tenant ⇨167(8)

Owner of premises leased for operation of a motel had duty to see that leased property was reasonably safe for the purposes for which it was to be used and the

right to repair such defects as it might discover in the premises, but owner was under no obligation to inspect property which it did not own and which its lessee intended to use in operation of his business.

8. Landlord and Tenant ⇨167(8)

Owner of premises leased for operation of a motel was not liable for injury to guests resulting from defects in or negligent operation of property brought upon leased premises by lessee for conduct of his business.

9. Landlord and Tenant ⇨167(8)

Owner of premises leased for operation of a motel was not liable for injury or death of guests from inhaling carbon monoxide fumes from unvented and defective butane gas heater installed by lessees but not so affixed to premises as to become part of the realty, in absence of any defect in leased premises which might have caused or contributed to injury or death.

Belli, Ashe & Pinney, Melvin M. Belli, Betsy Fitzgerald Rahn and Van H. Pinney, San Francisco, for appellants.

Robert H. Gerdes and Frederick W. Mielke, Jr., San Francisco, for respondent.

EDMONDS, Justice.

Arthur Ralph Goodman, Jr., died and Janet McCrum sustained permanent injuries as the result of inhaling carbon monoxide from a butane gas heater in a cabin which they were occupying overnight. Janet and the heirs of Arthur have appealed from a judgment of nonsuit in favor of Pacific Gas and Electric Company, the owner of the property where the accident occurred.

E. L. Harris, the corporation's tenant, and his wife Dorothy were in possession and control of the premises. Mr. and Mrs. Harris, Helen M. Karteus, his mother, and P. G. & E. were sued for damages by Janet and the heirs of Arthur.

According to the complaint, the Harris "were the lessees in possession who * * * operated and maintained certain tourist cabins, a restaurant and bar" and a garage, which property was owned by P.

G. & E. The property and improvements, it was alleged, were leased by P. G. & E. with knowledge that they were to be used "for rental as lodgings by the general public" and that there existed upon the premises "a dangerous and defective condition" in that the "tourist cabins were so negligently constructed, maintained and operated, and the heating appliances thereon were so dangerous and defective as to be dangerous, unsafe and unsuited for the purpose for which they were to be used". The complaint further alleged that Arthur and Janet were "invited to and did rent one of the tourist cabins * * * as a lodging for the night" and that the "defendants so negligently maintained, heated, supervised, constructed, managed and operated" the cabin "that the gas stove * * * and the premises * * * were defective, dangerous and a peril to human life". It was claimed that Arthur died and Janet suffered permanent injuries "solely by reason of such negligence, and as a proximate consequence thereof".

The separate demurrers of the defendants were overruled. Later, a motion by P. G. & E. for judgment on the pleadings was denied.

By its answer, P. G. & E. admitted that it owned the real property and that the Harrises were in possession of and managed it. As stated by P. G. & E., the Harrises were not its lessees, but E. L. Harris was its tenant "holding over on a month-to-month rental under the terms of an agreement of lease for a period of one year". It was alleged that, prior to the lease to Harris, the property had been leased to A. M. Hinman, who had assigned his lease to Arthur W. Dahl and Leonard A. Allen with the permission of P. G. & E. Thereafter, Dahl and Allen "quitclaimed and surrendered" to P. G. & E. all their right, title and interest in and to the Hinman lease.

P. G. & E. denied that it negligently constructed, maintained and operated the premises and that any injury was caused by its acts. It admitted that Arthur and Janet were asphyxiated by "operation of an unvented butane gas heater" in one of the cabins and that Arthur died as a result.

An affirmative defense of contributory negligence also was pleaded.

Copies of the two leases of the property were attached to the answer of P. G. & E. and incorporated therein by reference. The first, to Hinman, provided that the lessee had the right to construct improvements "proper and suitable for residential and recreational purposes" upon the premises. He could remove any improvements which he erected, with certain exceptions not here material, before the termination of the lease, but any structures not so removed "shall be deemed to be fixtures constituting a part of said premises and title thereto shall thereupon automatically vest in" P. G. & E.

The one-year lease to Harris contained a similar provision and provided further that: "Lessee shall not permit any disorderly conduct or nuisance to exist on said premises". P. G. & E. was given the right of entry during the term of the lease "for the purpose of inspecting" the premises and determining if Harris was complying with the terms of the lease. Harris promised to keep the buildings in repair and return them to P. G. & E. in good condition at the termination of the lease. It was provided that any holding over after the expiration of the lease with the consent of P. G. & E. should be considered a tenancy from month to month on the terms and conditions specified in the lease.

The answer of the Harrises and Mrs. Karteus denied all of the material allegations of the complaint and specifically denied that the accident was due to any negligence upon their part. They also interposed the affirmative defense of contributory negligence.

There is virtually no dispute as to the facts. Viewed in the light most favorable to the plaintiffs, with all inconsistencies disregarded and only those inferences favorable to the plaintiffs which reasonably can be drawn from the evidence considered, the evidence may be summarized as follows:

P. G. & E. owned certain real property which it leased to Hinman. Sometime prior to the termination of that lease, im-

provements were placed upon the property, including three streetcars converted into living and sleeping accommodations. These improvements, not having been removed at the time the lease was terminated, became the property of P. G. & E.

Hinman, with the permission of P. G. & E., assigned his lease to Dahl and Allen, who thereafter purported to sublet the premises to Green. Harris originally took possession of the property from Green under an agreement whereby he purchased Green's stock in trade and operating equipment and rented the premises from him. Thereafter, the Harrises purchased and installed the second-hand gas heater which was defective.

When the heater was purchased, the firebrick provided in its construction by the manufacturer to dispel carbon monoxide gas was missing. No repairs were made to the heater, nor was it ever adjusted for the use of butane gas. It was a type designed to operate without a vent, and there was no way a flue could be attached to it. Harris installed the heater by connecting it to a pipe from a central butane gas tank which supplied the various structures on the premises. This pipe entered the streetcar cabin at an opening in the wall opposite the side of the structure in which a vent had been constructed. The tank and gas for the premises were supplied by the Glenbrook Gas Company of Nevada City. The heater was not fastened down, but "was just sitting there" on the floor. It could be removed simply by detaching the pipe connection.

In response to Green's request for a lease, P. G. & E. sent an employee to the premises to determine whether he was "a proper man to run a decent sort of place". This was about three months after the heater was installed. P. G. & E. then discovered that Harris was in possession of the premises. The investigator was expected to determine whether the place was "run sloppy, was it a messy looking place or not * * *," and also if the premises were reasonably safe. Harris informed the investigator that he intended to use the property as a garage, motel and restaurant.

P. G. & E. decided to deal directly with Harris. It secured a surrender of the existing lease from Dahl and Allen and entered into a new one-year lease with Harris. At that time, improvements upon the property consisted of a garage, restaurant, house, pump house, water tower, three converted streetcars, and two log cabins. Beside the house and visible from the highway was a large sign reading, "Cabins 2.50 and Up".

The record contains only the most sketchy description of the streetcar cabins. No dimensions are shown, nor is it clear how many windows and doors each contained. Both the windows and an outside door were in proper working order; all opened easily. The windows were "regular streetcar windows", operated by pushing a strap up and permitting the window to drop down. No directions were provided as to the manner of operating them.

Each streetcar apparently was divided into two so-called "cabins" by an open partition across the car. On each side of the partition was a bed, complete with bedding, and a very limited amount of other furniture. It appears that the space on each side of the partition was heated by a single gas heater installed in one of the two rooms. The streetcars never were licensed for use as a motel.

The record shows that employees of P. G. & E., apparently surveyors and other operating personnel, were on and about the premises upon several occasions after the lease with Harris was executed, but there is no evidence of any further attempt by P. G. & E. to inspect the property. Sometime after the expiration of the term of the lease, while Harris was holding over on a month to month tenancy, an inspector for the Department of Industrial Relations, Division of Housing, inspected the premises. He informed the Harrises that the streetcar cabins did not conform to statutory requirements for an auto court. According to him, they were too small and not of the proper structural dimensions, had insufficient window space, and lacked running water with a drain. Because of these defects, he told the Harrises that the streetcar cabins must not be

offered for overnight occupancy, but could be rented on a weekly or monthly basis. Thereafter, they were not rented for one night except to Arthur and Janet at the time of the accident. They were, however, rented by the week or month during the succeeding year and had been occupied by friends of the Harrises upon several occasions.

On the day preceding the accident, Arthur and Janet left about 5:00 a.m. for a ski trip. They spent the entire day skiing, and were returning home in Arthur's automobile when, about midnight, it broke down near the Harris garage. A heavy snowstorm was then raging. Harris towed the disabled vehicle to his garage and Arthur and Janet took refuge in the adjacent restaurant. There, they fell asleep at a table and, after having been requested to move by a group desiring to play cards, again fell asleep at the counter.

Dorothy Harris awakened them and asked if they would like to sleep in a cabin overnight until the automobile could be repaired. Janet refused, explaining that they were not married, and Dorothy offered them adjoining cabins, which they accepted. Dorothy prepared the streetcar cabin for them and lighted the gas heater, turning it on almost all the way. She did not open any windows, and when she left the cabin she closed the door. Returning to the young couple, she directed them to the cabin through the blizzard.

Upon entering the cabin, Janet took off her ski boots and lay down upon the bed, covering herself with blankets. She noticed that the heater was on, but paid no further attention to it. According to her, Arthur tried without success to open a window and commented that "they wouldn't open". He opened the door, but the wind blew it all the way open so he slammed it shut. Janet fell asleep and remembered nothing further until she awoke more than thirty hours later in a hospital. She recalled only a dim sensation of suffocation during the night and a feeling that she wanted to get out into the fresh air.

The next morning, the Harrises found Arthur dead on the bed in one room and Janet unconscious upon the floor in the

other one. Both were fully clothed except for shoes. The heater was still burning, the windows and door were closed, and snow was piled against the door. Janet was taken to a hospital some miles distant, where she regained consciousness the following day. Medical testimony establishes that she suffered permanent injury as the result of asphyxiation.

At the conclusion of the plaintiffs' case, all of the defendants moved for a nonsuit. The motions were granted as to Mrs. Kar-teus and P. G. & E. Thereupon, the court was advised that the matter had been settled as to the Harrises. The cause was then ordered off calendar and the jury discharged. The appeal is from only the judgment of nonsuit in favor of P. G. & E.

The plaintiffs contend that a landlord who rents property with knowledge that it is to be used for a public or semi-public purpose is liable to third persons injured upon the premises by a defect therein which existed at the time of making or renewing the lease. The questions of the existence of a dangerous condition upon the premises, and its causal relation to the injury, are, they say, ones of fact which should have been left to the determination of the jury.

P. G. & E. does not disagree with the statement of the rule that a landlord is liable for injuries resulting from a defective condition of the premises existing at the time of entering into a lease where the property is to be used for a public purpose. However, it argues that the rule is inapplicable to the facts disclosed by this record. It concedes that a dangerous condition, the defective gas heater, existed upon the premises at the time of making the lease, and that the heater caused the injuries. But the defect, it says, was in the property of the tenant, and not in the premises rented to Harris.

[1] "A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended and to exercise reasonable care to inspect and repair the property before possession is transferred so as to prevent any unreasonable risk of

harm to the public who may enter." *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 380, 240 P.2d 580, 583; *Burroughs v. Ben's Auto Park, Inc.*, 27 Cal.2d 449, 453, 164 P.2d 897. The parties agree that this is the well established rule. The difficulty arises in applying the principle to the facts of this case.

Upon oral argument, for the first time, the plaintiffs contended that whether the defective heater was so affixed to the premises as to have become a part of the realty was a question of fact which should have been submitted to the jury. They based their position in this regard upon *Knell v. Morris*, 39 Cal.2d 450, 456, 247 P.2d 352, 353.

In that case, a question arose as to whether "a nine section, cast iron, gas-fired water heater" constituted a part of the premises. The court said: "Whether a water heater is realty or personalty is, of course, a question of fact (citations), and various factors must be considered, such as the manner of its annexation, its adaptability to the purpose for which the realty is used, and the intention of the party making the annexation. (Citation.) As to innocent third parties, the intent which controls is that which is reasonably manifested by physical facts and outward appearances, rather than any express or implied intent of those making the annexation. (Citations.) In the present case it can reasonably be inferred that the heater was attached to the building by means of gas and water pipes, and the evidence, although meager, is sufficient to permit a finding that the heater was permanently affixed to the realty and was adapted to the purpose for which the premises were used."

[2] Here, there is no evidence from which it could reasonably be inferred that the gas heater was so affixed to the building as to have become a part of the realty. It was a small and easily portable piece of equipment, not fastened down in any manner but "just sitting there" on the floor. It was connected to the gas pipe inlet, but could be detached simply and easily without affecting the premises. The very defect which caused these injuries made it unadaptable to the purpose for which the

realty was used. Even if it had been a proper heater, it would not have been "essential to the ordinary and convenient use of the property". *M. P. Moller, Inc., v. Wilson*, 8 Cal.2d 31, 38, 63 P.2d 818, 821. The ease with which it could be removed and replaced without affecting the physical premises negated any intent to make it a permanent fixture and part of the realty. Thus, the evidence fails to raise any issue of fact which should have been submitted to the jury.

The plaintiffs concede that, if the heater had not become a part of the realty, it was not the property of P. G. & E. and was not leased by the corporation to Harris. However, they argue that it was a defective condition existing "on" the premises at the time the lease was entered into. They also claim that the premises were defective in that the streetcar cabin was not fit for rental as a tourist cabin because it lacked "vents which were connected up with the heaters", adequate space to meet the requirements for sleeping accommodations, and adequate window space for proper ventilation. This combination of defects in the property leased and in a mechanical device belonging to and operated by the lessee, they say, created a dangerous condition for which P. G. & E. may be held liable.

[3] Drawing every reasonable inference favorable to the plaintiffs from the evidence, there is no basis in the record for the argument that the property of P. G. & E., the streetcar cabin, was itself defective. The cabin did not meet statutory requirements of construction for rental as an overnight accommodation for transients. But the State's inspector told the Harrises that it was permissible to rent the cabin by the week or month. In view of this evidence, it is impossible to draw the inference that it was unsuitable for human occupancy. The cabin did have a vent which could be connected to a heating unit and, despite an unwarranted assertion to the contrary in the briefs of the plaintiffs, there is no indication that the vent was faulty. Nothing in the record supports the assertion that the cabin lacked proper ventilation. It had windows and a door which could be opened easily. From the

evidence, it appears that if they had been opened, this tragedy would not have occurred.

[4] Although the point is not raised in the briefs, the District Court of Appeal suggested that the premises were defective because the gas feeder line entered the cabin at a point on the wall opposite the location of the vent. However, there is no showing that the pipe was incapable of extension, or that a vented heater could not have been installed. Nor is there any indication that a proper unvented heater would have been unsafe if installed in the cabin. The point of entry of the gas line, obviously chosen for convenience, is no basis for an inference that, because of its location, a safe heating unit could not have been installed.

The very most which is disclosed by the evidence is the negligent operation of a defective gas heater in a cabin which was otherwise safe and suitable for human habitation. There is no basis in the record for an inference that the heater, although defective, would have caused injury if operated with circumspection in a properly ventilated room. On the contrary, the evidence shows that the heater had been operated in this cabin without incident for a period of several years.

[5] Under the circumstances, liability may be imposed upon P. G. & E. only if it was responsible for a latent dangerous condition of its lessee's property which existed upon the premises at the time of the execution of the lease. Research of counsel and this court has disclosed no decision in any jurisdiction imposing liability for the defective condition of property other than that leased. In every case where, under the rule agreed upon by the parties, a landlord has been found liable, the defect was one existing as a structural part of the property leased. *Hayes v. Richfield Oil Corp.*, *supra*, unguarded grease pit in gasoline service station; *Burroughs v. Ben's Auto Park, Inc.*, *supra*, unguarded drop-off from parking lot retaining wall to areaway 12 feet below; *King v. New Masonic Temple Ass'n*, 51 Cal.App.2d 512, 125 P.2d 559, uneven step from row of seats to floor of auditorium; *Boothby v. Town*

of Yreka City, 117 Cal.App. 643, 4 P.2d 589, faulty stairway in public building. In each instance, the defective condition, being a part of the demised premises was one which the lessor could have repaired and was under a duty to correct.

[6] Frequently, situations arise where injury results from activity of the lessee upon premises which, by reason of some defect, are not reasonably suitable for such conduct. When this occurs, the lessor may be held liable, not for the fault of the lessee, but only for his own fault in renting property not safe for the activity to be conducted. A recent example of this type of situation involved liability of the owner of a fairgrounds for injuries suffered by a spectator at a "hot rod" race being conducted by its licensee. *Gibson v. Shelby County Fair Ass'n*, 241 Iowa 1349, 44 N.W. 2d 362. The petition alleged that the barriers and guards upon the premises were unsuitable for such purposes and that the plaintiff was injured by a wheel which became detached from one of the racing cars. The appellate court reversed an order sustaining a motion to dismiss the petition. It agreed that the landlord could not be liable for negligence in the operation of the race, but held that the corporation owed a duty to see that the premises were reasonably suited to the activity to be conducted.

In *Larson v. Calder's Park Co.*, 54 Utah 325, 180 P. 599, 4 A.L.R. 731, the plaintiff was injured by a bullet from a shooting gallery. The evidence disclosed that the walls of the rented building in which the business was conducted were dilapidated and contained large holes and cracks through which bullets could escape. This condition existed at the time of the lease. The lessor was held liable for the defective condition of the walls which rendered the building unsafe for the operation of a shooting gallery. Here, again, liability was predicated upon the condition of the property leased, not the fault of the lessee in operating the property.

Manning v. Leavitt Co., 90 N.H. 167, 5 A.2d 667, 122 A.L.R. 249, dealt with injuries caused by a mechanical device upon leased premises. The evidence indicated

that a permanent wave machine in a beauty parlor was either defective or negligently operated, or both. Except for the fact that it is not shown when the machine was installed upon the premises, the factual situation is substantially identical to that in the present case. The court stated the rule of liability of the lessor as follows:

"This plaintiff's injuries were not due to any want of care with respect to the condition of the premises. The duty of the invitor-lessor does not extend to matters having to do merely with the lessee's management or operation of premises which would be safe but for such management or operation, at least where the lessee is in sole actual control, as was true in this case. The fact that a fault of the lessee or his servant commonly concurs with the lessor's failure to see to the safety of the premises should not blind us to the basic principle, upon which the invitation cases rest, that the lessor in ordinary circumstances cannot be held for the lessee's fault, but solely for his own." 90 N.H. at page 169, 5 A.2d at page 669.

[7,8] The reasoning of the New Hampshire court is equally applicable to the present case. P. G. & E. had a duty to see that the property which it leased was reasonably safe for the purposes for which it was to be used and the right to repair such defects as it might discover in the premises. But it was under no obligation to inspect property which it did not own and which its lessee intended to use in the operation of his business. Failure to remedy any defect in the appliance was a fault of Harris, not of P. G. & E. The rule that a lessor must make his property safe for the purposes for which it is to be used cannot be extended to require him to insure against defects in, or negligent operation of, the property of another which may be brought upon his premises for the conduct of the business.

[9] Because the evidence discloses no defect in the leased premises which may have caused or contributed to the injuries which are the basis of this action, the mo-

tion for nonsuit was granted properly as to P. G. & E. This conclusion makes it unnecessary to discuss any of the other contentions of the parties.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The facts are stated most favorably to the defendant in the majority opinion, but even that statement of the facts of the tragedy, together with the result achieved and set forth there, are sufficient to shock the conscience and sense of justice of any fair-minded person.

This case came to this Court on an appeal from a judgment of nonsuit entered in favor of the defendant Pacific Gas & Electric Company. A motion for nonsuit can only be properly granted when, disregarding conflicting evidence and giving to plaintiffs' evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, it can be said that there is no substantial evidence to support a verdict for plaintiffs had such a verdict been rendered. That is the test which should have been applied here.

The crucial question here is whether the heater, admittedly defective, which was installed in the streetcar cabin occupied by the two young people, (one of whom met his death as a result thereof, the other young woman receiving permanent and serious injuries as a result of the experience) was a fixture (part of the premises) belonging to the lessor, P. G. & E., or personalty, belonging to the tenant.

It is said in the majority opinion that "there is no evidence from which it could reasonably be inferred that the gas heater was so affixed to the building as to have become a part of the realty. It was a small and easily portable piece of equipment, not fastened down in any manner but 'just sitting there' on the floor. It was connected to the gas pipe inlet, but could be detached simply and easily without af-

fecting the premises. The very defect which caused these injuries made it unadaptable to the purpose for which the realty was used. Even if it had been a proper heater, *it would not have been 'essential to the ordinary and convenient use of the property'*. *M. P. Moller, Inc., v. Wilson*, 8 Cal.2d 31, 38, 63 P.2d 818, 821. The ease with which it could be removed and replaced without affecting the physical premises negatived any intent to make it a permanent fixture and part of the realty. Thus, the evidence fails to raise any issue of fact which should have been submitted to the jury." (Emphasis added.)

With the above statement, I most emphatically disagree. This Court has again paid lip-service to established rules and then proceeded to refuse to apply the rules to the situation at hand. It is admitted that P. G. & E. had a duty to see that the property which it leased was reasonably safe for the purposes for which it was to be used and the right to repair such defects as it might discover in the premises; that "A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended and to exercise reasonable care to inspect and repair the property before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter", *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 380, 240 P.2d 580, 583; *Burroughs v. Ben's Auto Park, Inc.*, 27 Cal.2d 449, 453, 164 P.2d 897. The only way this Court could find to sidestep these rules was to hold that there was no evidence from which it could be inferred that the gas heater was so affixed to the building as to have become part of the realty. This statement ignores the recent case of *Knell v. Morris*, 39 Cal.2d 450, 247 P.2d 352, 355.

In the *Knell* case, *supra*, it was said that "Whether a water heater is realty or personalty is, of course, a question of fact, see *M. P. Moller, Inc., v. Wilson*, 8 Cal.2d 31, 38, 63 P.2d 818; 22 Am.Jur. 772-773, and various factors must be considered, such as the manner of its annexation, its adaptability to the purpose for which the

realty is used, and the intention of the party making the annexation. See *Simms v. County of Los Angeles*, 35 Cal.2d 303, 309, 217 P.2d 936. *As to innocent third parties, the intent which controls is that which is reasonably manifested by physical facts and outward appearances, rather than any express or implied intent of those making the annexation.* See *Simms v. County of Los Angeles*, 35 Cal.2d 303, 309, 217 P.2d 936; *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 397, 175 P.2d 512; *M. P. Moller, Inc., v. Wilson*, 8 Cal.2d 31, 37-38, 63 P.2d 818; *People v. Church*, 57 Cal.App.2d Supp. 1032, 1048, 136 P.2d 139. In the present case it can reasonably be inferred that the heater was attached to the building by means of gas and water pipes, and the evidence, although meager, is sufficient to permit a finding that the heater was permanently affixed to the realty and was adapted to the purpose for which the premises were used. Cf. *Broadway Imp. & Inv. Co. v. Tumansky*, 2 Cal.2d 465, 468-469, 41 P.2d 553." (Emphasis added.) All seven members of this Court concurred in that opinion. Five months later, a majority of this Court now agree that there is no evidence from which it could possibly be inferred that the heater here was affixed to the realty.

"No evidence"? In reviewing a judgment of nonsuit, we are supposed to state the facts most favorably to plaintiff and to draw all reasonable inferences therefrom in his favor, *Knell v. Morris*, *supra*, 39 Cal.2d 450, 247 P.2d 352.

The cabin was one presumably intended for use by members of the public; it was located in the high Sierras; it was open on February 3rd (the time of the death and injury) during the skiing season which, in itself, allows the inference that the weather was inclement, to say the least; the windows of the cabin were not opened by Mrs. Harris, and *could not be opened* by the deceased; the door was so arranged that when opened, it was blown wide open by the blizzard; the heater in the cabin was admittedly defective and *was connected to the gas pipe inlet*. From this evidence alone, it is certainly reasonable to infer

that a cabin located in the mountains and apparently available for use by the public during the winter season must have some means by which it could be heated; that the heater was to be used for that purpose; that its presence there would be considered by an innocent third person, if he gave the matter a second thought, as much a part of the premises as the walls of the building. From the fact that plaintiff's decedent, an apparently healthy young man (inferable from the fact that he had been on a skiing trip) *could* not open the windows, it may easily be inferred that the windows were difficult to open. To say, as it is said in the majority opinion, that "Even if it had been a proper heater, it would not have been 'essential to the ordinary and convenient use of the property'" is so ridiculous, when applied to this case, that it justifies the appellation of Mr. Bumble in Dickens' *Oliver Twist* that "the law is a ass, a idiot." It completely ignores the practicalities of trying to stay in a cabin, without heating facilities, in zero and sub-zero weather.

Rather than drawing inferences and stating facts favorable to the plaintiffs, as we are required to do, the majority of this Court goes to great lengths to draw unfavorable inferences and state facts unfavorable to plaintiffs. It is said that the heater was easily removable, that it was "just sitting there" on the floor; that it was undaptable to the purpose for which the realty was to be used because of the "very defect which caused these injuries". *Of course*, an innocent third person would at once be aware of the defects in the heater, and say to himself that "this heater is not part of the realty" before putting himself to bed. It is also inferred that even a "proper heater" would not have been essential to the ordinary and convenient use of the property! It is stated in the majority opinion that "Nothing in the record supports the assertion that the cabin lacked proper ventilation. It had windows and a door which could be opened easily." "Nothing in the record" is an erroneous statement. The record shows that an inspector for the

Department of Industrial Relations, Division of Housing, inspected the premises and that one of the reasons this cabin could not be used for motel purposes was that there was inadequate window space for proper ventilation. The record also shows that the windows could *not* be opened easily.

In *M. P. Moller, Inc., v. Wilson*, 8 Cal. 2d 31, 63 P.2d 818, 822, the Court said that "Whether under the circumstances of each case the property has lost its character as personalty and has become a fixture is primarily a question of fact to be determined by the evidence." In *Simms v. County of Los Angeles*, 35 Cal.2d 303, 309, 217 P.2d 936, 940, it was said: "It is settled that three tests must be applied 'in determining whether or not an article is a fixture—namely: (1) the manner of its annexation; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation.' *San Diego Trust & Savings Bank v. San Diego County*, 16 Cal.2d 142, 149, 105 P.2d 94, 97, 133 A.L.R. 416. It is also settled that for tax purposes the 'intention' must be determined by the physical facts or reasonably manifested outward appearances without regard to the annexor's status as landlord or tenant." In *Trabue Pittman Corp. v. County of Los Angeles*, 29 Cal.2d 385, 393, 175 P.2d 512, 518, it was said "Section 660 of the Civil Code defines 'fixtures' as things that are permanently resting upon or attached to the land or building, but the fact that a trade fixture is removable under Civil Code, section 1019, does not, as plaintiff contends, necessarily negative such element of permanence. We have already indicated that for the most part assessors must be allowed to act on the basis of outward appearances. Moreover, in distinguishing permanence from transitoriness it is not necessary to identify it with perpetuity. *Southern California Tel. Co. v. State Board of Equalization*, supra, 12 Cal.2d 127, 136, 82 P.2d 422. 'It appears to be sufficient that it (the article annexed) is intended to remain where placed as long as the land or building to which it is annexed may be used for the same purpose.' (36 C.J.S., Fixtures,

WHALEN v. RUIZ et al.

Sac. 6309.

Supreme Court of California, in Bank.

Feb. 20, 1953.

§ 2, p[age] 900.) 'It is sufficient if the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose.' *San Diego Trust & Savings Bank v. County of San Diego*, supra, 16 Cal.2d 142, 151, 105 P.2d 94, 98, 133 A.L.R. 416; 26 C.J. 657."

The question of whether or not an appliance attached to realty is a fixture or personality is always a question of fact unless the evidence is undisputed and is susceptible only of one inference, *San Diego Trust & Savings Bank v. County of San Diego*, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416.

Applying the three tests set forth in the *Simms* case, supra, it is at once apparent that the evidence was more than sufficient to permit submission of the question of whether or not the heater in question was a fixture or personality to the jury. The heater here was physically annexed to the realty by a gas pipe inlet. Its adaptability to the use and purpose for which the realty was used is apparent. It was the only heater available to produce warmth in a cabin located in the mountains where zero and sub-zero weather prevailed during the winter time which was when this tragedy occurred. The intention of the party making the annexation must be determined by that which is reasonably manifested by physical facts and outward appearances "rather than any express or implied intent of those making the annexation." *Knell v. Morris*, supra, 39 Cal.2d 450, 247 P.2d 352, 355. Certainly the article here involved appeared to be intended to remain where it was fastened until it was worn out, or until the purpose to which the realty was devoted had been accomplished or until the article was superseded by another article more suitable for the purpose, *San Diego Trust & Savings Bank v. County of San Diego*, supra, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416.

I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

Action for injuries sustained by passenger when bus in which he was riding plunged through guard rail of bridge owned by railroad. The Superior Court, Sacramento County, B. F. Van Dyke, J., entered judgment for railroad, and plaintiff appealed. The Supreme Court, Spence, J., held that agreement by which railroad gave counties easement over upper deck of bridge across river, with obligation on railroad to repair, operate and police upper deck, imposed no obligation on railroad to make structural changes to meet changing traffic conditions.

Judgment affirmed.

Carter, J., dissented.

Prior opinions; 242 P.2d 78, 242 P.2d 940.

1. Automobiles ⇨290

Agreement under which railroad built double deck bridge over river between two counties, giving to such counties the right, easement and privilege of using overhead structure and approaches thereto for highway purposes, granted exclusive right of way to counties over upper deck, but did not, by the mere grant of the easement, impose obligation upon railroad to maintain the easement in a safe condition for the protection of those using it at the invitation of the easement owners, or to alter the structural features of the bridge to meet changing traffic conditions.

2. Contracts ⇨170(1)

The construction given to a contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.

3. Automobiles ⇨290

Where railroad which had granted right of way to counties over upper deck of bridge built by railroad across river between two counties had agreed to keep the upper deck in repair, and to operate and police same, with such obligation to

be chargeable after certain date to counties as owners of the easement, but which obligation was, as matter of convenience, performed by railroad in return for annual payment, railroad was not required to make structural changes in upper deck, especially when conduct of parties was such as to indicate that no such obligation was imposed, and railroad was not liable to bus passenger for injuries sustained in accident involving structural insufficiency of bridge.

4. Easements ⚡54

Both parties to an easement have the right to insist that so long as it is enjoyed, it shall remain substantially the same as it was at time the right accrued, regardless of question as to relative benefit and damage that would ensue to parties by reason of change in mode and manner of its employment. Civ.Code, § 806.

5. Automobiles ⚡290

Where railroad had granted easement to counties to use upper deck of bridge, agreement by which state undertook to make structural changes because of changed conditions due to increased traffic, requiring additional policing, was merely in recognition of state's statutory authority to make structural changes in interest of safety, and did not indicate belief of parties that railroad had obligation under agreement to make any change in structure over which easement was granted. Streets and Highways Code, § 100.

Mull & Pierce, A. M. Mull, Jr., Fred Pierce and Benjamin H. Brown, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff and Horace B. Wulff, Sacramento, for respondents.

SPENCE, Justice.

This case presents the question of the liability, if any, of a railroad company for failure to make structural changes to meet changing traffic conditions on the highway deck of a bridge, which bridge it owned and operated and which highway deck was used as a public highway under the terms of an agreement with the public authorities.

Plaintiff sought damages for injuries sustained by him when an autobus, in which he and other farm laborers were riding, ran off the highway deck of the "I" Street bridge over the Sacramento River at Sacramento and crashed to the ground below. Plaintiff alleged negligence against defendant railroad in the maintenance of the bridge and against defendant Al Ruiz in operation of the bus. Defendant Frank King was sued as owner of the bus and as employer of the driver Ruiz. The trial court found that the accident occurred as the "proximate and contributing result" of negligent operation of the bus by the driver, as employee of defendant King, and negligent maintenance of the overhead structure of the bridge; that defendant railroad was the owner and operator of the bridge; that construction of the overhead or roadway portion of the bridge was controlled by an agreement dated September 6, 1910, executed by the railroad and the counties of Sacramento and Yolo, whereby the railroad granted to the counties the "right, easement and privilege of using the overhead structure and approaches thereto for highway purposes and for the life of the bridge for railroad purposes"; that the agreement also provided that the railroad would "repair, police and operate" the overhead structure and approaches thereto but that it "did not include any obligation" on the part of the "Railroad Company, or any other defendant herein, to do more than to maintain said structure according to the design and plan under which said bridge was originally built and that there was no obligation * * * to make structural changes to meet changing traffic conditions." It was also found that the overhead structure and approaches thereto were part of the state highway system; that plaintiff was the employee of defendant King and engaged in the course of his employment when injured; and that both were subject to the Workmen's Compensation Act. Labor Code, § 3201 et seq. From such findings the court concluded that plaintiff's sole remedy against defendant King was within the jurisdiction of the Industrial Accident Commission, and that the court had no jurisdiction; and further, that plaintiff should take nothing

by his complaint. Accordingly, judgment was entered in favor of all defendants. Plaintiff appeals from that portion of the judgment which decrees that he take nothing against the railroad.

The original construction of the bridge and overhead structure, as completed in 1912, is conceded to have been proper. However, appellant claims that with the increased use of motor vehicle travel, respondent was negligent in failing to maintain an adequate guardrail and curbing along the edge of the pavement on the overhead highway deck of the bridge. At the time of the accident, September 6, 1947, the roadway was equipped with an 8-inch curb and an iron railing, as provided in the original specifications. But this is not a case where the common-law principle of tort liability applies against respondent incident to a duty to maintain the highway deck of the bridge in a reasonably safe condition for use by the traveling public at its express or implied invitation. *Comstock v. Great Northern Ry. Co.*, 157 Minn. 345, 196 N.W. 177; *Calley v. Boston & Maine R. R.*, 93 N.H. 359, 42 A.2d 329, 159 A.L.R. 115. Rather the controlling factor is the mentioned agreement of 1910 fixing the rights and obligations of the parties thereto with regard to the bridge and overhead structure. We have concluded that the trial court properly construed the terms of said agreement as not imposing on respondent the obligation to make structural changes on the highway deck of the bridge to conform to changing traffic needs and modes of travel.

The 1910 agreement provided for respondent's construction of a double track bridge, with an overhead structure for highway purposes, connecting the counties of Yolo and Sacramento and extending over the Sacramento River. It recited that the new structure was to replace an existing bridge and overhead span which had been used in part for highway purposes and which were then out of repair. The cost of the new bridge was specified at \$786,000, of which the estimate for the overhead deck and approaches thereto was \$160,671. By the agreement respondent leased the overhead deck to Sacramento

County for a period from the completion of the bridge until December 15, 1916, after which time said county was to (and did) receive a grant of the "right, easement and privilege of using the overhead structure and approaches thereto" for the life of the bridge. For the portion of the bridge located in Yolo County, respondent granted an identical easement to that county, also continuing for the life of the bridge. The enjoyment of such easement and privilege of use was not to "be interfered with" by respondent unless the county was in default in some term of the agreement. The agreement further provided that until December 15, 1916 (the termination of the lease to Sacramento County), respondent would "keep in repair, operate and police at its own expense, the said bridge, including the floor of the overhead structure and the walks and railings thereon" but after said date, during the life of the bridge, it would "keep in repair and operate all of said bridge, except the overhead structure and approaches thereto." To this point of exception, the agreement continued: "Whereas, it is recognized that after December 15th, 1916, the keeping in repair, operation and policing of the overhead structure, and approaches thereto, is properly chargeable to the said Counties of Sacramento and Yolo, and said Counties desire that the said 'Company' should agree to keep in repair and operate and police the same, as it is more convenient for the 'Company' to do so, Now, Therefore, the said 'Company' agrees to keep in repair, operate and police the said overhead structure, and approaches thereto, after December 15th, 1916, and during the life of said bridge for railroad purposes, and in consideration thereof" Sacramento County was to pay \$1,500 per year and Yolo County, \$500 per year; and "if, for any reason, any payment * * * shall not be made * * * said Company * * * shall not be further obligated to keep in repair, or operate, or police said overhead structure, and the approaches thereto."

[1] It is plain from the agreement that the respective counties were granted an exclusive right of way or easement over the highway deck of the bridge. Admit-

tedly the highway deck and approaches thereto were built according to the agreed plans and specifications, and they were then in a safe and proper condition for use of the existing traffic. Respondent, as owner of the servient tenement, did not become obligated by the mere grant of the easement to maintain the easement in a safe condition for the protection of those using it at the invitation of the easement owners, the two counties. 9 Cal.Jur. § 8, p. 954; *Linton v. Miller & Lux, Inc.*, 83 Cal.App. 481, 484, 257 P. 105; see, also, Rest., Torts, § 349. The constructed curb and railing on the highway deck of the bridge formed a part of the subject matter of the easement, and it was not incumbent upon respondent to alter these structural features of the roadway or substitute others therefor to accommodate the changing needs of public travel according to future development, in the absence of an agreement devolving such duty upon respondent as owner of the servient tenement. 28 C.J.S., Easements, §§ 72, 94, pages 750, 773; *Carson v. Jackson Land & Mining Co.*, 90 W.Va. 781, 111 S.E. 846, 847.

By the agreement of 1910 respondent had the obligation to "keep in repair, operate and police" the overhead structure of the bridge. The agreement recognized that after the effective date of the easement to Sacramento County (December 15, 1916, upon termination of its lease arrangement with respondent), such obligation was properly chargeable to the counties as owners of the easement, *Crease v. Jarrell*, 65 Cal.App. 554, 559, 224 P. 762, but as a matter of convenience, respondent was made responsible for the performance of this work in return for an annual payment by the counties. This contractual undertaking must be examined as fixed by the contracting parties.

[2,3] It does not appear that respondent's obligation to "keep in repair, operate and police" the highway deck of the bridge contemplated the making of structural changes thereon. The word "repair" in its ordinary sense relates to the preservation of property in its original condition, and does not carry the connotation that a new thing should be made or a distinct entity

created. 76 C.J.S., p. 1169. As was said in *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, at page 576, 194 P. 1024, at page 1029: "To repair means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence." See, also, *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628, 633, 45 P. 863. Appellant cites *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 43 P.2d 547, 552, where the railroad's duty to "keep in repair" was likened to the "duty to maintain". But under the facts there involved, no broader definition was thereby contemplated. There the duty "related to the structure itself", a viaduct, including the "duty to repair or replace weakened or worn portions" thereof, and the railroad was held liable when the viaduct was allowed to "fail or decline" and injury was sustained as the result of certain splinters projecting from its worn and dilapidated wooden curbs. 2 Cal.2d at page 758, 43 P.2d 552. There the failure to repair was a failure to keep the curbs in their original condition. Consistent with such definition of the word "repair," respondent had the duty to keep the overhead structure at the "standard of efficiency" it had according to the design and plan under which it was originally constructed, but not to make structural changes to meet developing exigencies of traffic over the years. See *In re Morris Ave. Bridge in City of New York*, 105 Misc. 659, 174 N.Y.S. 682, 683.

Moreover, the parties did not interpret their agreement as imposing upon respondent the duty to make structural changes in the highway deck of the bridge. Respondent's Division Engineer testified that in his thirty years' experience with respondent, he knew it to "have at various times made repairs to the overhead structure * * * when the railing becomes broken * * * [and] restored it to its original condition" but the "railroad * * * made no structural changes." The counties acquiesced in this interpretation of the agreement and never made "any demand" upon respondent "to alter the nature of the construction or the construction

features of the bridge." He further testified that such "structural changes or alterations" as were made were done by the state, twice with respondent's consent and once without. The "construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court." *Woodbine v. Van Horn*, 29 Cal.2d 95, 104, 173 P.2d 17, 22; *Gillespie v. City of Los Angeles*, 36 Cal.2d 553, 561, 225 P.2d 522; *Trottier v. M. H. Golden Construction Co.*, 105 Cal.App.2d 511, 516, 233 P.2d 675. Here the construction placed by the parties upon their agreement is not only reasonable, but a contrary construction would not reflect the ordinary meaning of the language used. Civil Code, § 1644.

Nor do the words "operate and police" place upon respondent the duty to make structural changes on the overhead structure. Built across the Sacramento River, the bridge is a drawbridge constructed so as to allow the passage of river navigation. Normally the word "operate" when used in connection with machinery or something that moves, as here the drawbridge, means to "put in action and supervise the working of", to "run." 67 C.J.S. p. 502; see *Gallenkamp v. Garvin Mach. Co.*, 91 App. Div. 141, 86 N.Y.S. 378, 384, 179 N.Y. 588, 99 N.E. 718. Respondent's Division Engineer testified that over the years of the agreement, respondent's operation of the bridge had been confined exclusively to "operation of the draw span". Such procedure indicates the parties' practical construction of their agreement in reference to respondent's operation of the mechanism which controlled the movable part of the bridge. As to the purport of respondent's "policing obligation", the same witness testified that it related to respondent's closing of the gates when the bridge was about to open and stopping the traffic before the gates were closed; also sweeping and removing rubbish from the upper deck. The construction the parties placed on their agreement extending over some 35 years is entitled to great weight in the solution of any difficulty as to the meaning of the

language used. *Mitau v. Roddan*, 149 Cal. 1, 14, 84 P. 145, 6 L.R.A., N.S., 275; *Thermalito Irr. Dist. v. Cal. Water S. Co.*, 108 Cal.App.2d 329, 341, 239 P.2d 109.

[4] It is fair to assume that had the parties intended to impose the sweeping obligation on respondent to make such structural changes in the highway deck of the bridge as would keep it reasonably safe for ever changing traffic conditions, some mention thereof would have been made in their agreement. But no such provision appears and respondent, in its unconditional grant of the easement to the counties for use of the highway deck, reserved no right to interfere therewith for the purpose of making alterations or structural improvements. Under the circumstances the parties presumably intended the California law declaring the rights and obligations flowing from the grant of an easement to be applicable. Section 806 of the Civil Code provides that the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired; and it is well settled that "both parties have the right to insist that so long as the easement is enjoyed it shall remain substantially the same as it was at the time the right accrued, entirely regardless of the question as to the relative benefit and damage that would ensue to the parties by reason of a change in the mode and manner of its enjoyment." *Allen v. San Jose Land & Water Co.*, 92 Cal. 138, 141, 28 P. 215, 216, 15 L.R.A. 93; see *Hannah v. Pogue*, 23 Cal.2d 849, 854, 147 P.2d 572.

The record shows that such structural changes as were made on the overhead structure from time to time were done by the state and at its expense. The first of such changes was in pursuance of an agreement of March 23, 1934, to which the state, the counties and respondent were parties. Thereby the state undertook to make all necessary changes in the overhead structure—"said work consisting of widening of the pavement for vehicular traffic, reconstruction of sidewalks, shifting of railings and lighting standards, and shifting curbs in locations shown" on the specifications—as would facilitate its use as a de-

tour during the construction of the new "M" Street bridge. It was also agreed thereby that the state would "maintain the roadway of [the] overhead structure and approaches at its expense, and in the event conditions due to increased traffic require additional policing to properly maintain and safeguard traffic during the period of detour State shall assume the entire cost thereof".

[5] This 1934 agreement demonstrates that the state had knowledge of the 1910 agreement between respondent and the counties as to the nature of the easement granted and secured their consent before undertaking to alter the manner of its use and enjoyment. Civ.Code, § 806. Moreover, two subsequent structural changes were made on the overhead structure by the state and at its expense. Having knowledge of the 1910 agreement, the state would not have voluntarily undertaken to make such structural improvements if any such duty were imposed on the parties to the said agreement. Rather the state's action coincided with its statutory duty in reference to the roadway running across the overhead structure as constituting a traversable state highway. Stats.1933, ch. 767, p. 2034, § 7.

Section 100 of the Streets and Highways Code, enacted in 1935 and in effect at the time of the accident in question, provided: "The [state] department [of public works] shall have *full possession and control* of all State highways. The department is authorized and directed * * * to *improve and maintain* such highways as provided in this code. * * * The department may do any act *necessary or proper* for the construction, *improvement, maintenance or control* of all highways and properties which are under its control * * *." (Emphasis added.) Section 27 of the same code defines maintenance to include "(b) The necessary provision for special safety conveniences and devices" and further provides: "*The degree and type of maintenance* for each highway * * * shall be determined" by the state agency. Under these provisions the state, not respondent, would have authority to make structural changes in the highway deck of the

bridge and would be chargeable with the undertaking of appropriate safety measures pursuant to its maintenance of the state highway system. Gillespie v. City of Los Angeles, supra, 36 Cal.2d 553, 557-558, 225 P.2d 522.

In view of these observations, the trial court's exoneration of respondent from liability is fully sustained by the record. Neither by express provision nor as practically construed by the parties did the controlling 1910 agreement impose upon respondent an obligation to make structural changes on the highway deck of the bridge to conform with changing traffic needs, but rather all changes of that character proceeded at the instance and cost of the state pursuant to its statutory duty. Having neither obligation nor authority to make structural changes in the highway deck of its bridge, respondent is not chargeable with responsibility for the happening of the accident here involved.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion holds that since an easement was granted by the Railroad Company to the counties to use the bridge for road purposes, the Company was under no obligation to keep the bridge in a safe condition. The whole tenor of the 1910 agreement and other factors points to at least joint control of the roadway part of the bridge by the Railroad Company and the counties.

The 1910 agreement stated that it was made under statutory authority. Stats.1907, p. 982. That statute authorizes agreements between counties and private persons for the acquisition and maintenance of bridges. Such an agreement shall provide for the "joint use" of a bridge by the parties and it shall be referred to as a "joint" bridge. With that statutory base the obvious purpose of the 1910 contract was that the bridge was to be "jointly" used and hence

"jointly" owned and controlled by the Railroad Company and the counties.

The 1910 contract, after referring to the easement to be granted to the counties, provides that the Railroad Company (after 1916) shall, for a stated sum, "keep in repair and operate and police" the road portion of the bridge. Why was that undertaken by the Company? This question is answered by the contract as it states, immediately preceding the covenant to repair and operate, as follows: "Whereas, it is *recognized*" (emphasis added) that after 1916, the upkeep is chargeable to the counties but the counties desire that the Railroad Company should agree "to keep in repair and operate the same, as it is *more convenient* for the [Company] to do so." (Emphasis added.) This clearly shows that the Railroad Company should continue as before—have *control* of the bridge including the roadway and be in charge of its maintenance; that although the counties may, in a technical sense, have an easement for a roadway over the bridge, the Railroad Company still had joint control and obligated itself to do anything the counties would be required to do with reference to keeping the bridge safe.

This thought was further indicated by the 1934 contract between the counties, state, and the Railroad Company, in which the state was authorized to make some improvements in the road part of the bridge. If the Railroad Company no longer had *any* control or interest in the road part of the bridge by reason of the easement granted to the counties, there would have been no occasion for it to be a party to that contract and consent to the improvements. It is recited in that contract that the *Railroad Company* and the counties are willing to permit the state to make the improvements on specified conditions however. The conditions are, among others, that the work must be performed to the *satisfaction* of the *Railroad Company*; that during the time the bridge is being used by the state for detour purposes the state shall *maintain* the road portion at its expense, and if traffic conditions require additional policing during that time the state shall furnish same, all of which indicates that the state was as-

suming that which was the duty of the Railroad Company; and finally that all the terms of the 1910 contract shall remain in force, that is, shall become revitalized from thenceforth, although the traffic conditions and requirements to keep the bridge safe had vastly increased in 1934 from those existing when the 1910 contract was made.

The only reasonable conclusion from these factors is that the words "repair," "operate" and "police" were not used in a narrow sense; that the Railroad Company retained at least joint control of the road part of the bridge and was obligated to maintain it in a safe condition.

Reliance is placed by the majority on the testimony of the Railroad Company's division engineer that the Company had made no structural changes in the road part of the bridge for 30 years and the counties never made demand for any. The complete answer to this argument is that it does not appear that the counties were apprised that any changes were necessary.

The words "operate" and "repair" must be defined according to the context in which they were used. The thing to be maintained was a roadway. The counties would be concerned with only one thing, namely, that the bridge be kept safe for those who used it, the travelling public. "Operate" means to have control of, *State v. Thomason*, 224 Iowa 499, 276 N.W. 619; *Booth v. State*, 179 Ind. 405, 100 N.E. 563, L.R.A.1915B, 420; *Southern Ry. Co. v. Flynt*, 203 Ala. 65, 82 So. 25; *Bosse v. Marye*, 80 Cal.App. 109, 250 P. 693, and includes doing so safely. *McKim v. City of Philadelphia*, 217 Pa. 243, 66 A. 340, 19 L.R.A.,N.S., 506. "To repair the *roads* in question means to make them over, not necessarily exactly like they were before, nor in exact accord with the original plans, but, utilizing the work done in constructing the roads originally under the original plans, make them over with such material for resurfacing as *experience and advance in the science of road building teach* will be the best and the most economical in the long run, thereby giving the landowners value received for their investment." *Cowan v. Thompson*, 178 Ark. 44, 9 S.W.2d 790, 792. (Emphasis added.) The obliga-

tion to repair was to run indefinitely in the future, thus contemplating that future conditions must be considered in determining what would be necessary to do to keep the road portion in repair. Those conditions thus include changes in traffic conditions and also methods of operation which may produce the necessity for extensive repairs. The obligation to make such repairs was placed on the Railroad Company by the 1910 agreement and continued in force until the happening of the accident here involved. Since the court found that the unsafe condition of the roadway on the bridge was a proximate cause of the accident, the liability of the Railroad Company was established.

I would therefore reverse the judgment.



40 Cal.2d 271

**SIMPSON et al. v. CITY OF
LOS ANGELES et al.
L.A. 21945.**

Supreme Court of California, in Bank.
Feb. 20, 1953.

Rehearing Denied March 19, 1953.

Action to enjoin enforcement of a city ordinance relating to regulation of the surrender of unclaimed impounded animals for medical research. The Superior Court of Los Angeles County, Clarence M. Hanson, J., sustained demurrers to complaint and entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that city ordinance is not invalid for any of the reasons assigned.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 240 P.2d 647.

I. Municipal Corporations ⇨994

Resident taxpayers of city were entitled to sue to enjoin alleged illegal expenditures of municipal funds in the enforcement of city ordinance providing for surrender of unclaimed impounded animals for purposes of medical research. Code Civ. Proc. § 526a.

2. Elections ⇨271

Courts will not invalidate an election unless required to do so by the plain mandate of the law.

3. Municipal Corporations ⇨108.3

Erroneous instructions allegedly given opponents of proposed city ordinance by assistant city attorney concerning preparation of printed arguments to be mailed to voters with sample ballots did not constitute grounds for invalidating adoption of ordinance, in absence of showing that assistant city attorney had any authority to bind city by giving such instructions or that city clerk, who was authorized by city Charter to prescribe the form of printing and character of paper to be used, acted improperly or was aware of instructions allegedly given opponents of measure.

4. Evidence ⇨32

Supreme Court cannot take judicial notice of city ordinances.

5. Municipal Corporations ⇨122(1)

Complaint was insufficient to show invalidity of adoption of city ordinance on ground that argument of proponents mailed to voters with sample ballots failed to conform with provisions of city election code, where complaint did not quote language of Election Code provision allegedly violated, state its effect, or give the title or date of passage of such provision. Code Civ. Proc. § 459.

6. Municipal Corporations ⇨592(1)

The licensing, impounding and disposition of dogs is not exclusively a municipal affair, and hence state law with respect thereto will prevail in event of any conflict with city ordinance. Const. art. 11, § 11.

7. Municipal Corporations ⇨589

Under its police power, city may enact local measures which do not conflict with general statutes. Const. art. 11, § 11.

8. Municipal Corporations ⇨592(1)

Provisions of Agricultural Code, regulating seizure and disposition of estrayed stock and domestic animals generally and expressly providing that nothing therein should affect municipal regulations regarding estrays, do not invalidate city ordinance providing for surrender of un-

claimed impounded animals for purposes of medical research. Agricultural Code, §§ 391-403, 400; Const. art. 11, § 11.

9. Municipal Corporations ⇨592(1)

City ordinance providing for surrender of unclaimed impounded animals for purposes of medical research applies only to dogs which have been lawfully impounded, and hence is not in conflict with general statute which relates to running at large of dogs and protection of livestock and provides for licensing, impounding and disposition of dogs, but expressly recognizes power of local bodies to provide for the killing in some humane manner or other disposition of lawfully impounded dogs. Gen.Laws, Act 384, §§ 6, 7.5; Const. art. 11, § 11.

10. Municipal Corporations ⇨592(1)

City ordinance providing for surrender of unclaimed impounded animals to hospitals or research institutions certified by city health officer as organizations which will use animals humanely for good of mankind in medical research does not conflict with Penal Code provisions which define and prohibit cruelty to animals, though research institutions other than medical colleges may receive animals under ordinance for experimental purposes, particularly in view of provisions of Health and Safety Code for regulation of use of animals for medical research, recognizing right of cities to regulate such use of animals. Pen. Code, §§ 597, 599b, 599c; Health and Safety Code, §§ 1650-1677, 1651, 1667, 1670; Const. art. 11, § 11.

11. Animals ⇨38, 106

The basic purpose of Penal Code provision that nothing in sections relating to cruelty to animals shall be construed as interfering with properly conducted scientific experiments or investigations performed under authority of the faculty of a regularly incorporated medical college or university of the State is to limit the effect of provisions prohibiting cruelty to animals and not to regulate the disposition of impounded animals. Pen.Code, §§ 597, 599b, 599c.

12. Animals ⇨4, 106

Municipal Corporations ⇨604

The licensing of dogs and regulation of the manner in which they shall be kept and controlled are within the legitimate sphere of the police power and statutes and ordinances may properly provide for impounding dogs and for their destruction or other disposition.

13. Animals ⇨106

Constitutional Law ⇨293

Where dogs have been lawfully impounded under police power of city and have become subject to disposition by any of the means provided by city ordinance, private property rights in such dogs must, in the interests of public welfare, be treated as having been terminated, and hence city ordinance providing for surrender of unclaimed impounded animals for purposes of medical research is not invalid as depriving owners of their property without due process of law.

14. Animals ⇨106

Provision of city ordinance prohibiting surrender of any unclaimed impounded animal for medical research except as authorized by law requires compliance with all other applicable provisions of ordinance, including provision that within one day after any dog is impounded, city must act to give owner, if known, notice of such impounding.

15. Constitutional Law ⇨48

Whenever possible, a statute will be given that interpretation which will render it constitutional.

16. Animals ⇨51, 61

Under city ordinance providing that owner, if known, must be notified of the impounding of his dog, without specifying the method by which such notice should be given, owner was entitled to actual notice.

17. Animals ⇨106

Under city ordinance providing that in order to give owner time within which to reclaim it, no impounded animal should be surrendered for medical research until it had been impounded for at least five

days, the five-day period did not begin to run against a known owner until he had received actual notice of the impounding.

18. Animals ⚡106

Under city ordinance providing for surrender of unclaimed impounded animals for medical research, but providing that no animal shall be surrendered except as authorized by law and until he has been impounded for at least five days, owner, if known, is entitled to actual notice of impounding of dog and five days thereafter in which to reclaim him, and hence ordinance is not invalid as failing to provide for adequate notice to owners of impounded dogs.

19. Animals ⚡106

Unknown owner of impounded dog not wearing a license tag, as required by city ordinance, cannot complain of failure to receive notice of impounding and opportunity to reclaim dog before surrender for medical research pursuant to city ordinance providing for adequate notice to owner whose identity is known, since ordinance imposes upon owner duty to make certain that dog wears license tag except when indoors or in enclosed pen.

20. Animals ⚡107

Under city ordinance providing for redemption of impounded animal upon payment of specified fees and charges and delivery of unlawfully impounded animal to owner upon demand, owner is entitled to a hearing on question of whether impounded animal has been legally seized, and further provision of ordinance for surrender of unclaimed impounded animals for medical research is not invalid as depriving owners of such animals of their property without a hearing.

21. Municipal Corporations ⚡871

Unclaimed impounded animals surrendered pursuant to city ordinance to private research laboratories and institutions for medical research are to be used for a "public purpose", and hence ordinance does not provide for a gift of public property in violation of Constitution. Health

and Safety Code, § 1650; Const. art. 4, §§ 22, 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Purpose".

22. Municipal Corporations ⚡591

City ordinance providing for surrender of unclaimed impounded animals for purposes of medical research to such reputable institutions as city health officer shall certify will use such animals humanely for specified purposes sets up a sufficient standard for guidance of health officer and is not unconstitutional as giving city health officer uncontrolled arbitrary discretion to determine which institutions are qualified to receive impounded animals.

23. Constitutional Law ⚡237

Municipal Corporations ⚡111(3)

City ordinance providing for surrender of unclaimed impounded animals to such reputable institutions of learning, hospitals and laboratories in the city as city health officer shall certify will use such animals humanely in medical research for the good of mankind sets up a proper classification having a reasonable relation to promotion of the general health and welfare of the public and is not unconstitutional as special legislation which discriminates in favor of some institutions and denies equal protection of the laws to others.

Brooks Gifford, Pasadena, and Morris Lavine, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., William H. Neal and Bourke Jones, Asst. City Attys., and Alan G. Campbell, Deputy City Atty., Los Angeles, for respondents.

Musick & Burrell, Howard Burrell, James E. Bednar, Stephens, Jones & La Fever, Raymond W. Stephens, McGinley & Hanson and John P. McGinley, Los Angeles, for interveners and respondents.

GIBSON, Chief Justice.

Plaintiffs seek to restrain defendant city and two officials from carrying into effect subsection (h) of section 53.11 of a Los

Angeles city ordinance¹ which provides, in part, that the Department of Animal Regulation shall surrender unclaimed animals which have been impounded for five days to reputable institutions of learning, hospitals and laboratories that have been certified by the city health officer as organizations which will use animals humanely for the good of mankind in medical research. General demurrers were sustained with leave to amend. Plaintiffs failed to amend, and judgment was thereafter entered in favor of defendants.

The complaint alleges that three of the plaintiffs are resident taxpayers who own dogs licensed by the city, that the fourth plaintiff resides in adjacent unincorporated territory and owns a dog licensed by the county, that these dogs have recently become estrays without fault on the part of their respective owners and that plaintiffs have made due and diligent inquiry but have been unable to locate their pets. There is no allegation as to what happened to the dogs, but it is alleged that they are subject to seizure and impounding by the Department of Animal Regulation and that defendants threaten to enforce subsection (h) of section 53.11 and to surrender unclaimed impounded dogs for medical research. It is contended that this portion of the ordi-

nance is invalid because of asserted irregularities in connection with the election at which it was adopted, that it conflicts with state law, that its enforcement will deprive plaintiffs of their dogs without due process of law and constitute an unlawful taking of private property, and that it provides for a gift of public property. It is also asserted that the ordinance improperly vests uncontrolled discretion in the health officer and permits him to discriminate arbitrarily between research institutions and that it is invalid as special legislation because it grants privileges to a limited class of institutions.

[1] A preliminary question has been raised as to plaintiffs' right to bring the action, but it is sufficient to note that the complaint alleges that three of the plaintiffs are resident citizens and taxpayers of the city and that enforcement of the ordinance will result in unlawful expenditures of municipal funds. As such taxpayers, they are entitled to sue to prevent the alleged illegal expenditures. Code Civ.Proc. § 526a; *Clouse v. City of San Diego*, 159 Cal. 434, 438, 114 P. 573; *Wirin v. Horrall*, 85 Cal.App.2d 497, 504-505, 193 P.2d 470; see *Crowe v. Boyle*, 184 Cal. 117, 152, 193 P. 111; *Yarnell v. City of Los Angeles*, 87 Cal. 603, 610, 25 P. 767.

1. The ordinance is known as the Los Angeles Municipal Code. Subsection (h) provides: "Whenever any reputable institutions of learning, hospitals, research laboratories or their allied institutes in the City of Los Angeles shall make application to the Health Officer of the City of Los Angeles for permission to use humanely unclaimed impounded animals for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease, the Health Officer, on being satisfied that the said animals are to be so used, shall, from time to time, certify to the Department of Animal Regulation the names and addresses of said institutions of learning, hospitals, research laboratories and their allied institutes which he is satisfied will use animals humanely for the purposes above specified.

"It shall be the duty of the Department of Animal Regulation to surrender unclaimed impounded animals for such uses only when applied for by the institutions of learning, hospitals, research lab-

oratories and their allied institutes which have been certified by the Health Officer as herein provided. No animal shall be surrendered except as authorized by law.

"In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days.

"No animal shall be surrendered for medical research, the owner of which has turned over such animal to the Department of Animal Regulation for destruction. Any such request for destruction of an animal by the owner thereof shall be complied with by the Department.

"The Department of Animal Regulation shall adopt and enforce rules and regulations providing for the care of animals so surrendered comparable to Supplement 211 Public Health Reports, 1949, Federal Security Agency, entitled, 'Care of the Dog Used in Medical Research.'

[2, 3] In support of their claim that subsection (h) was not legally adopted, plaintiffs allege that the opponents of the measure followed instructions from an assistant city attorney that any printed arguments which the opponents desired to have mailed to the voters with the sample ballots must be on newsprint of a specified size and that no rotogravure would be allowed. Plaintiffs complain that the city clerk permitted proponents of the measure to use leaflets of a larger size which were processed by rotogravure on slick paper, and that as a result a substantial number of voters cast their votes in favor of the measure because of the more attractive appearance of proponents' arguments. Courts are reluctant to defeat the fair expression of popular will in elections and will not do so unless required by the plain mandate of the law. See *Davis v. County of Los Angeles*, 12 Cal.2d 412, 426-427, 84 P.2d 1034; *In re East Bay etc. Water Bonds of 1925*, 196 Cal. 725, 744, 239 P. 38; *Rideout v. City of Los Angeles*, 185 Cal. 426, 430, 197 P. 74. It is asserted by defendants, and not disputed by plaintiffs, that the arguments were prepared pursuant to sections 275 and 289 of the Los Angeles City Charter, which provide that the clerk shall prescribe the form of printing and the character of paper to be used. There is no allegation in the complaint that the city clerk acted improperly or that he was aware of the instructions assertedly given to the opponents of the measure by the assistant city attorney. Moreover, it does not appear that the assistant city attorney had any authority to bind the city by giving such instructions. It follows that the matters complained of do not constitute grounds for invalidating the adoption of the measure.

[4, 5] Plaintiffs also allege that the argument of the proponents which was mailed to the voters failed to conform with the provisions of section 343 of the Election Code of the City of Los Angeles. The complaint, however, does not quote the language of the section or state its effect, nor does it give the title or date of passage. See Code Civ.Proc. § 459. We cannot take judicial notice of city ordinances. See *City of Oakland v. Brock*, 8 Cal.2d 639, 641, 67

P.2d 344. Under the circumstances the pleading is insufficient. *City of Tulare v. Hevren*, 126 Cal. 226, 229-231, 58 P. 530.

[6, 7] The next question is whether the portion of the ordinance under attack is invalid because of asserted conflicts with state laws. In our opinion, the licensing, impounding and disposition of dogs is not exclusively a municipal affair, and, therefore, if there is any conflict between the ordinance and the state law, the latter will prevail. Const. art. XI, § 11; see *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 666, 177 P.2d 558, 170 A.L.R. 225; *In re Portnoy*, 21 Cal.2d 237, 239-240, 131 P.2d 1; *Pipoly v. Benson*, 20 Cal.2d 366, 370-371, 125 P.2d 482, 147 A.L.R. 515. The city, however, under its police power, may enact local measures which do not conflict with general statutes. Const. art. XI, § 11.

[8, 9] Sections 391 to 403 of the Agricultural Code do not operate to invalidate the ordinance. The code sections regulate the seizure and disposition of estrayed stock and domestic animals generally, and it is expressly provided that nothing therein shall affect municipal regulations regarding estrays. Agr.Code, § 400. Similarly there is no inconsistency between subsection (h) and another general law which relates to the running at large of dogs and the protection of livestock and provides for the licensing, impounding and disposition of dogs. *Deering's Gen.Laws, Act 384, Stats. 1921, p. 1306*, as amended. Subsection (h) will, of course, be read as applying only to dogs which have been lawfully impounded, and the statute expressly recognizes the power of local bodies to provide for "the killing in some humane manner or other disposition of" lawfully impounded dogs. *Deering's Gen.Laws, Act 384, §§ 6, 7.5.*

[10, 11] Sections 597, 599b and 599c of the Penal Code which define and prohibit cruelty to animals are applicable generally throughout the state, but they do not occupy the field in which the ordinance operates, and there is nothing therein which conflicts with their provisions. Section 599c of the Penal Code provides that nothing in the sections relating to cruelty to animals shall be construed as "interfering

* * * with properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university of this state." It thus appears that the basic purpose of section 599c is to limit the effect of the provisions prohibiting cruelty to animals rather than to regulate the disposition of impounded animals. The section does not purport to designate all the institutions which may receive such animals for experimental purposes or to forbid experimentation by other than those it names, and it cannot reasonably be said that the Legislature intended to indicate that proper and humane experiments can be conducted only under the authority of the faculty of a regularly incorporated medical college or university. While it is true that, under the ordinance, research institutions other than medical colleges or universities may receive animals for experimental purposes, this obviously does not conflict with the Penal Code prohibition of cruel or improper experiments. Instead, as we have seen, it is specifically provided that the hospitals or research institutions which receive dogs must have been certified as organizations which will use them "humanely * * * for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease." Our conclusion in this connection is strengthened by sections 1650 to 1677 of the Health and Safety Code, enacted in 1951, which provide for state regulation of the use of animals for medical research. Sections 1651 and 1667 permit such use by any "'person' * * * laboratory, firm, association, corporation, copartnership, and educational institution", upon compliance with certain rules, and section 1670 expressly provides that nothing in this chapter shall be construed to limit or restrict the right of cities to adopt or enforce ordinances regulating the use or procurement of animals for medical research.

2. Subsection (b) provides: "In the case of dogs, the Department of Animal Regulation shall hold such animal for a period of one (1) day after the impounding of such animal, during which time the owner of said animal, if known, shall be notified, after which time said animal

[12, 13] We come next to plaintiffs' contention that enforcement of the ordinance will deprive them of their property without due process of law. It is well settled that the licensing of dogs and the regulation of the manner in which they shall be kept and controlled are within the legitimate sphere of the police power, and that statutes and ordinances may provide for impounding dogs and for their destruction or other disposition. *Hofer v. Carson*, 102 Or. 545, 203 P. 323, 326; see *In re Ackerman*, 6 Cal.App. 5, 13-14, 16-17, 91 P. 429; *Sentell v. New Orleans & C. Railroad Co.*, 1897, 166 U.S. 698, 17 S.Ct. 693, 695-696, 41 L.Ed. 1169, 8 A.L.R. 67, 74-76; 2 Am. Jur. 719, 721, 799. The complaint does not attack the right of the city to provide for the impounding of stray dogs or for the disposition of impounded dogs by such methods as are covered by other portions of section 53.11 of the ordinance, namely sale, destruction, or gift to the armed forces, but plaintiffs assert that the surrender of animals for medical research pursuant to the ordinance amounts to an unlawful taking of private property. It is clear, however, that when dogs have been lawfully impounded under the police power and have become subject to disposition under the terms of the ordinance by any of the means noted above, private property rights in such dogs must, in the interests of public welfare, be treated as having been terminated.

[14, 15] Plaintiffs also contend that subsection (h) is invalid because it does not contain any provision for notice to the owner of an impounded dog. This subsection provides that "no animal shall be surrendered [for medical research] except as authorized by law" and that "in order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days." Under subsection (b)² the owner, if known, must be notified

may be sold by an officer of the Department in the same manner as provided in this Section for the sale of other animals except that notice of sale need be posted for only two (2) days in the places named in this section."

in every case where a dog is impounded, regardless of the proposed method of disposing of the animal, and the city must act to give such notice within one day after the dog is impounded. The provision of subsection (h) that no animal shall be surrendered except as authorized by law clearly contemplates and requires compliance with all other applicable subdivisions, including the notice provisions of subsection (b). The courts, whenever possible, adopt that interpretation of a statute which will render it constitutional, and, therefore, the subsections should be read together for the purpose of avoiding any question of invalidity arising from the lack of a specific notice requirement in subsection (h).

[16-18] When considered together the subsection require that the city must act to give notice to the owner, if known, within one day after a dog is impounded and that the owner must have at least five days after receipt of such notice in which to reclaim the animal. Subsection (b) does not specify the method by which the owner shall be notified of the impounding, and since there is nothing elsewhere in the ordinance to indicate that any particular form of notice is contemplated, the owner, under the authorities, is entitled to actual notice. See *Colyear v. Tobriner*, 7 Cal.2d 735, 743, 62 P.2d 741, 109 A.L.R. 191; *Johnson v. Barreiro*, 59 Cal.App.2d 213, 218, 138 P.2d 746; cf. *Stockton Automobile Co. v. Confer*, 154 Cal. 402, 408, 97 P. 881; *Long v. Chronicle Pub. Co.*, 68 Cal.App. 171, 179, 228 P. 873; *Alphonzo E. Bell Corp. v. Listle*, 55 Cal.App.2d 300, 306, 130 P.2d 251. We need not speculate as to the possible methods by which actual notice may be given to a known owner, since we may assume that the city will proceed in a manner sufficient to meet all requirements of law. The provision of subsection (h) that, "in order to give the owners * * * time within which to reclaim the same," no animal shall be surrendered for medical research until it has been impounded for "at least five days" was obviously intended to afford an owner ample opportunity to reclaim his animal, and in our opinion the subsections should be construed as providing that the five day period

does not begin to run against a known owner until he has received actual notice of the impounding. So construed, the ordinance affords adequate notice to an owner whose identity is known.

[19] If a dog is wearing a license tag as required by section 53.15 et seq. of the ordinance, the name and address of its owner will be available to the Department of Animal Regulation so that notice may be given. By prescribing a system of licenses and requiring dogs to wear a numbered tag at all times when at large on the streets, the city has done all it can to make sure that it will know the owner's identity. The tag requirement is reasonable, and an owner can insure his getting notice in all but exceptional cases by complying with the ordinance. If a dog is not wearing a license tag when impounded, its owner will not have any ground to complain of a failure to receive notice, because the ordinance places upon him the duty to make sure that the dog wears its license tag at all times except when it is indoors or in an enclosed yard or pen. Ordinance, § 53.21. In view of the foregoing it is unnecessary for us to consider whether an ordinance of this type would be invalid if it did not contain a provision for notice. See *Sentell v. New Orleans & C. Railroad Co.*, 1897, 166 U.S. 698, 704-706, 17 S.Ct. 693, 695-696, 41 L.Ed. 1169; and cases cited in 8 A.L.R. 67, 74-76.

[20] There is no merit to plaintiffs' contention that the ordinance deprives them of their property without a hearing. Section 53.13 provides that an owner may redeem an impounded animal upon payment of certain fees and charges, and section 53.12, which sets forth the charges to be collected by the Department of Animal Regulation, states that "No fees whatsoever shall be charged or collected for or on account of any animal which has been unlawfully taken up or impounded, and any such animal shall be immediately delivered upon demand therefor to the owner or person entitled to the custody thereof." The ordinance thus contemplates that a factual or mixed factual and legal determination shall be made by the department, and under these circumstances it must be interpreted to provide for a hearing, when requested

by the owner, upon the question of whether a dog has been legally seized. Cf. *Fascination, Inc., v. Hoover*, 39 Cal.2d 260, 246 P.2d 656. If, on the other hand, the owner of a dog concedes the legality of the impounding and fails to redeem the dog or to exercise his right under the subsection to demand that the dog be destroyed rather than turned over for medical research, there is no further need for a hearing.

[21] The surrender of impounded, unclaimed animals to private research laboratories and institutions is not a gift of public property within the meaning of sections 22 and 31 of article IV of the California Constitution, since the animals are to be used for a public purpose. Cf. *California Employment etc., Comm. v. Payne*, 31 Cal. 2d 210, 216, 187 P.2d 702; *County of Los Angeles v. La Fuente*, 20 Cal.2d 870, 877, 129 P.2d 378; *County of Alameda v. Janssen*, 16 Cal.2d 276, 281-282, 106 P.2d 11, 130 A.L.R. 1141. Under the terms of the ordinance animals may be turned over only to such institutions as will use them "for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease," and the Health and Safety Code expressly recognizes that "public health and welfare depend on the humane use of animals" for medical research. Health & Safety Code, § 1650. Under these circumstances the fact that private laboratories may derive some incidental benefit from the use of the animals is immaterial. *California Employment etc., Comm. v. Payne*, supra, 31 Cal.2d 210, 216, 187 P.2d 702; *County of Alameda v. Janssen*, supra, 16 Cal. 276, 281, 106 P.2d 11.

[22] Another ground of asserted unconstitutionality is that the city health officer is invested with uncontrolled arbitrary discretion to determine which institutions are qualified to receive impounded animals for purposes of medical research. As we have seen, however, the ordinance describes the kinds of institutions which may apply for unclaimed animals and provides that the health officer is to certify any reputable organization on being satisfied that the animals will be used humanely for the specified purposes. In our opinion this consti-

tutes a sufficient standard for the guidance of the city health officer. It is obviously unnecessary for the ordinance to define what constitutes a reputable institution or a humane use of animals, and in view of the number and variety of medical experiments involving the use of animals and the rapid changes in medical science this appears to be a situation in which the broad type of standard set forth in the ordinance is appropriate. Cf. *Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 344, 364, 139 P.2d 908; *Butterworth v. Boyd*, 12 Cal.2d 140, 148-149, 82 P.2d 434, 126 A.L.R. 838; *Gaylord v. City of Pasadena*, 175 Cal. 433, 439-440, 166 P. 348.

[23] The final objection is that subsection (h) is special legislation which discriminates in favor of some institutions and denies equal protection to others because the city health officer is empowered to certify only certain types of institutions and only those located within the city of Los Angeles. However, the organizations which the health officer is authorized to certify are reputable institutions of learning, hospitals and laboratories which will use animals humanely in medical research for the good of mankind. This classification is designed properly for the promotion of the general health and welfare of the public. Nor is there anything improper in restricting the institutions which may receive animals to those which are located within the city of Los Angeles. Since the city health officer may certify only those institutions which he is satisfied will use animals for the designated purpose, it is not unreasonable to confine his investigations to organizations which are within the city limits.

The judgment is affirmed.

SHENK, TRAYNOR and SPENCE, JJ., and VAN DYKE, Justice pro tem., concur.

SCHAUER, J., did not participate.

CARTER, Justice.

I dissent.

I cannot agree with the construction placed by the majority on the sections of the ordinance in question or that the notice provisions contained in those sections are

sufficient to afford due process of law. Subsection (b) of section 53.11 provides that an owner must be notified within one day after a dog is impounded and that the animal may be sold thereafter if notice of sale is posted for two days; under subsection (h) it is provided that no dog may be *surrendered to a certified institution for experimental purposes* unless it has been impounded for at least five days. The majority of this Court indulges in some legerdemain in the field of judicial legislation and comes up with the startling result that these two sections must be read together: that the one day notice provision in subsection (b) applies to subsection (h). By reading them together, the majority rewrites the ordinance so that it provides that an owner has five days after receipt of actual notice in which to reclaim his dog before it is surrendered for experimental purposes. This is done, we are informed, "for the purpose of avoiding any question of invalidity arising from the lack of a specific notice requirement in subsection (h)." Using reasoning such as this, any statute could be "interpreted" in such a way as to render it constitutional.

The *only* notice provision applies to dogs about to be sold. There is no notice provision in the subsection providing for surrender of such dogs for experimental purposes. The sale of a dog and its surrender for experimental purposes are two entirely different things and there is no basis in logic for the statement of the majority that these two subsections must be read together and that the notice provision of the sale subsection applies to the surrender subsection. Subsection (b) deals specifically and exclusively with the sale of impounded dogs; subsection (h) deals only with the surrender of unclaimed, impounded animals for experimental purposes. The only provision of subsection (h) of section 53.11 which could possibly be construed as providing for any notice is that which reads: "In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days." But we are informed by the majority that subsection (b) which

provides that the owner of the animal, if known, shall be notified within a period of one day, applies "regardless of the proposed method of disposing of the animal." We are told that this means "actual notice" but that "We need not speculate as to the possible methods by which actual notice may be given to a known owner, since we may assume that the city will proceed in a manner sufficient to meet all requirements of law." The subsection provides that the Department of Animal Regulation "shall hold such animal for a period of one (1) day after the impounding of such animal, during which time the owner of said animal, if known, shall be notified, after which time said animal may be sold * * *." (Emphasis added.)

The notice provision in subsection (b) which is to be read into subsection (h) does not take into consideration the fact that even if the name of the registered owner appears on the license tag, that one day's mailed notice in the city of Los Angeles is unreasonable and insufficient. It is pointed out in the briefs, that due to the present condition of the mail delivery service, it usually takes two days for ordinary mail to reach its addressee who resides within the city limits. It does not take into consideration the fact that the owner of the dog may not have a telephone; that the owner of the dog might be out of town. It does not take into consideration the length of time it might take an employee of the particular pound in question to ascertain, from the Department of Animal Regulation, the full name, address, telephone number, etc. of the owner of the dog. And, it should not be overlooked that the majority, in construing the notice required to be actual notice received by the owner, has overlooked the provision of the subsection which provides, by the use of mandatory language, that the animal shall be held for one day, during which time the owner shall be notified, and that after that time, the animal may be sold after posting notice of sale for two days. *This section provides for a three day period at the most before an impounded animal may be sold.* It should be noted, in this respect, that the posted notices are to be placed at (1) the public pound; (2) the

city hall; (3) the central police station. There are five public pounds in Los Angeles. At which one is the notice to be posted?

I cannot understand how the one day provision in subsection (b) can possibly be construed to mean that the owner of the dog must be given actual notice which must be received and that he thereafter (subsection (h)) has five days within which to reclaim his dog. However, by such reasoning, a majority of this Court has now placed the constitutional stamp of approval upon the ordinance. In my opinion the notice provisions are insufficient to afford due process of law.

In judging what is due process of law, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand, respect being had to the cause and object of the taking. *Wulzen v. Board of Supervisors*, 101 Cal. 15, 35 P. 353; *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14, 120 P. 780. While it is impossible to define with precision "due process of law" it means, broadly speaking, that before a man's property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard. It means further that the notice shall be a real and reasonable one, and the hearing, such as is ordinarily, or at least reasonably, given in similar cases. *Beck v. Ransome-Crummey Co.*, 42 Cal.App. 674, 184 P. 431. Particularly applicable here is the statement found in *People v. Broad*, 216 Cal. 1, 12 P.2d 941, 944, where this Court said " * * * the essential validity of the law was to be tested not by what has been done under it, but by what may by its authority be done; and where a statute * * * makes no provision for hearing or notice, either actual or constructive, *such defect is not supplied by the voluntary adoption by public officers of rules covering the situation.*" In *Roller v. Holly*, 176 U.S. 398, 409, 20 S.Ct. 410, 414, 44 L.Ed. 520, it was said "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the

question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson v. New Orleans*, 96 U. S. 97, 24 L.Ed. 616; *Hagar v. Reclamation District*, 111 U.S. 701-712, 4 S.Ct. 663, 28 L.Ed. 569". In that case, it was held, 176 U.S. 413, 20 S.Ct. 415, that "Without undertaking to determine what is a reasonable notice to nonresidents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law * * *." The *Roller* case was followed in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L.Ed. 865, where it was said "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.*" *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278; *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; *Priest v. Las Vegas*, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; *Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance * * *. But when notice is a person's due, process which is a mere gesture is not due process." And in *Griffin v. Griffin*, 327 U.S. 220, 228, 66 S.Ct. 556, 560, 90 L.Ed. 635, it was said "It is plain in any case that a judgment *in personam* directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the state's power over him, without some form of notice by personal or substituted service. *Wuchter v. Pizzutti*, 276 U.S. 13, 18-20, 48 S.Ct. 259, 260, 261, 72 L.Ed. 446; *Restatement of Conflict of Laws*, § 75; and compare *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278. *Such notice can-*

not be dispensed with even in the case of judgments in rem with respect to property within the jurisdiction of the court rendering the judgment. Roller v. Holly, 176 U.S. 398, 409, 20 S.Ct. 410, 414, 44 L.Ed. 520." (Emphasis added.)

If the dog is not wearing a license tag, the majority says that "its owner will not have any ground to complain of a failure to receive notice, because the ordinance places upon him the duty to make sure that the dog wears its license tag at all times except when it is indoors or in an enclosed yard or pen." Apparently we now forget about the one day notice, actual and received, and the dog is held for the prescribed (subsection (h)) period of five days before being surrendered to a hospital or institution for experimental purposes. Under reasoning of the type indulged in by the majority, we can read the ordinance as circumstances warrant. So now, no notice being practicable, we just look to the five day provision. This period of time is unreasonable. It does not take into consideration the fact that duly licensed dogs may lose their tags after straying; that they may, and do, break their collars thereby losing their tags; that strangers may remove either collar or tag; that dogs may escape from enclosed pens, or get out of the houses of their owners (where they are not required to wear tags) and wander far afield. It does not take into consideration the not-unusual cases of theft of valuable, registered dogs. It does not take into consideration the size of the city of Los Angeles with its five pounds, and four private shelters, and nineteen pounds and animal shelters in Los Angeles County, or the fact that the owner of the dog might be out of the city when his dog escapes from his home and the person caring for it, or from a kennel where he has left it to be cared for.

The majority, in placing its approval upon this five day period, has failed to consider that when a dog is missing, the owner assumes, often correctly, that the dog will come home the next day and therefore does nothing for a one day period; that the dog may be a "wanderer" who has always returned from his prior wanderings; and that dogs do not seek the nearest pound, or shel-

ter, upon running away. No consideration is given to the obvious fact that the owner of the dog may advertise for his lost pet, that he may for the first few days of the dog's absence call at the pounds and shelters with no success, only to have the dog picked up later when he has started to advertise for its return. In my opinion, due process of law requires that the ordinance provide for some type of notice in cases where the dog is not wearing a license tag. That notice could be by newspaper advertisement, giving the description of the dogs impounded, or by radio announcement, or by posting descriptions in various places throughout the city.

The ordinance here involved is, in my opinion, unconstitutional in that it constitutes a taking of property without due process of law as the Courts have defined that guarantee in both the Constitution of the United States and of California.

I would therefore reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



116 Cal.App.2d 227

GOLDMAN v. GOLDMAN et al.

Civ. 19141.

**District Court of Appeal, Second District,
Division 2, California.**

Feb. 19, 1953.

Quiet title action wherein validity of deed and assignment by plaintiff's husband to husband's son by former marriage were attacked. The Superior Court, Los Angeles County, Charles B. MacCoy, Judge of the Municipal Court, Designated, entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence was insufficient to sustain finding of incompetency on part of plaintiff's husband at time of execution of deed and assignment, or that son had been guilty of undue influence.

Judgment reversed.

I. Assignments ⇨137

Deeds ⇨211(1)

In quiet title action wherein plaintiff attacked the validity of a deed and assign-

ment executed by plaintiff's husband in favor of husband's son by prior marriage, asserting that husband was mentally incompetent at time of execution and delivery of the document, evidence as to husband's mental condition at time of execution of deed and assignment was insufficient to sustain finding of incompetency.

2. Deeds ⇨68(3)

Where one is able to understand his acts and the relation in which he stands to the objects of his bounty, free from any delusion, he has the capacity to dispose of his property, notwithstanding he may be suffering pain and physical disability.

3. Gifts ⇨36

Even though a donor suffers physical and mental debility, he is not thereby rendered incompetent to make a gift of his property so long as he has sufficient mental power to grasp and comprehend the nature of his act, the character of his property and his relation to the natural objects of his bounty.

4. Deeds ⇨211(3, 4)

In quiet title action where plaintiff attacked the validity of deed and assignment made by plaintiff's husband to his son by prior marriage at time husband was in hospital with incurable cancer, evidence was insufficient on issue of fraud or undue influence to sustain finding that husband's son had procured him to execute the deed by fraud, force and coercion and by taking advantage of a close and intimate relationship with father, or that son had been motivated by a desire to defraud and cheat.

5. Deeds ⇨196(2, 3)

A plaintiff who attacked validity of deeds by her husband to defendant on ground of fraud and undue influence had burden of proving that defendant had made false representations as to material facts or had exercised pressure which overpowered the mind and bore down the volition of plaintiff's husband at time deed was made, and of showing not only that undue influence had been exercised, but also that it produced an effect upon the mind of plaintiff's husband by which deed he executed was not the expression of his own desires.

6. Deeds ⇨196(3)

To rebut the presumption of undue influence of a son upon his father, it is necessary only to prove by uncontradicted evidence that the act in question had its genesis in the mind of the parent and that he was not goaded to a completion by any act of such child.

7. Deeds ⇨211(4)

The fact that a son of the grantor may have had a strong general influence over his father is unavailing to prove undue influence in suit attacking validity of deed to son, unless it was brought to bear directly upon the act of his executing the deed, and it is not sufficient to merely prove circumstances consistent with the exercise of undue influence.

8. Deeds ⇨211(4)

Circumstances relied upon as proof of charge of undue influence by son upon his father in connection with execution of deed must be shown to have been inconsistent with the voluntary action of the grantor.

9. Property ⇨11

Subject to the privileges of sovereignty, a citizen has absolute dominion over his property, and his right to alienate it depends neither upon the justice of his prejudices nor the soundness of his reasoning.

10. Gifts ⇨49(2)

A gift will not be set aside upon suspicion or because the actions of the donor do not conform with the standards or wishes of others.

11. Gifts ⇨38

Influence gained by means of kindness is not undue if no deceit is practiced on the donor and the gift is the voluntary act of the donor.

12. Gifts ⇨49(2)

Acts done by a child in service to a parent while the latter is suffering an affliction, do not in and of themselves give rise to an inference that undue influence has been imposed upon the parent to induce a gift inter vivos of property, but in order to effect annulment of such gift, court must be convinced that conveyance was not voluntary act of donor.

13. Frauds, Statute of Ⓒ56(1)

An oral agreement not to terminate joint tenancy during the lifetimes of the joint tenants is unenforceable, such contracts being required to be in writing when concerning real property.

14. Acknowledgment Ⓒ60

In quiet title suit wherein plaintiff attacked validity of deed from her husband to husband's son by former marriage, evidence was insufficient to sustain finding that husband had not acknowledged the deed, but disclosed an affirmative acknowledgment.

15. Acknowledgment Ⓒ5**Deeds** Ⓒ8

A deed bearing the genuine signature of the grantor, even though not formally acknowledged, operates to convey his interest, and deed is valid to convey grantor's interest, even though it purports to convey a greater interest.

Leader & Leader, Los Angeles, for appellants, Robert P. Dockeray, Los Angeles, of counsel.

Harold Shire, Beverly Hills, and Sam Bubrick, Los Angeles, for respondent.

MOORE, Presiding Justice.

From a judgment quieting title in Dorothy Goldman and decreeing that she is entitled to possession of lot 23, tract 450, in Los Angeles county, appellants Louis and Shirley Goldman have transferred the matter by appeal to this court.

It appears that after Benjamin Goldman had reached his sixtieth year and was the father of Louis and three daughters, he married Dorothy in 1944 in Nevada. On November 9, 1945, they purchased lot 23 and took the title as joint tenants, respondent paying \$6,000 of her separate funds on the purchase price of \$20,000. Respondent and her husband resided in the structure thus acquired which contained four rental units besides that which they occupied. Respondent continued to live on the property from the time of its purchase until the decease of Benjamin, April 15, 1950. She made no transfer of her interest during Benjamin's

lifetime. But about January 24, 1950, the latter executed a grant deed conveying his entire interest in fee to appellants. Six days after the execution of such deed Benjamin was hospitalized at the Cedars of Lebanon Hospital where he remained until February 8. On the latter date he was moved to the Madison Rest where he lingered with an incurable cancer.

The circumstances of the conveyance by Benjamin were as follows: while he was still at his home he requested Louis to have a deed prepared for the transfer of title to lot 23 to appellants. Pursuant to such instruction, the son caused the Security-First National Bank to prepare a deed for the purpose of enabling the father to effect such conveyance. The deed in proper form was delivered to Benjamin who acknowledged his execution thereof before Mr. Russell Peyton, a notary public. The latter delivered it to Louis at his store.

During the period of hospitalization, Mr. Goldman had no knowledge of the fact that he had cancer. He believed he was going to return to his home and referred to the property described in the deed as his own and continued to pay all bills necessary for its maintenance.

It might not be amiss to interject at this point that on February 14 Benjamin assigned the pink registration certificate of his motor car to Louis. In a separate suit Louis undertook to recover possession of such vehicle. Cal.App., 253 P.2d 483. Civil No. 19142. Both actions were consolidated for trial. A separate judgment denied Louis possession of the car. Prior to his father's decease, Louis gave no notice to respondent or to the tenants on the property of the transfers which had been made to him by his father. About a month prior to the father's decease, he gave Louis his half interest in their store which they had operated in partnership. However, that property is not involved in the litigation.

Respondent contends (1) that grantor was mentally incompetent at the time of the execution and delivery of the deed and the assignment; (2) that such conveyances were effected by the fraud and undue influence of Louis.

Appellants demand a reversal of the judgment on the ground that the evidence does not support the findings.

Insufficient Evidence of Incompetency.

[1] The court found that Benjamin Goldman was an incompetent person on the day of the execution of the conveyance to Louis and that such incompetency was known to appellants. The evidence of decedent's mental condition does not sustain those findings. The testimony of respondent was that grantor was in such agony that while he spoke normally at times, all of a sudden something would happen to him. His mind would wander. He would sit and his eyes would stare, his mouth open. However, such behavior was observed in 1950 after he had gone to the Madison Lodge. It did not occur in 1949 or prior to the conveyances. Withal, respondent admitted that while her husband was in the hospital and at the lodge, he was able to transact various matters and sign checks for bills and converse intelligibly. She testified that she did not know the meaning of the word *incompetent*.

Dr. Peterfy was decedent's physician. He visited his patient on the very day of the execution of the deed and had seen him four times in January prior to the 24th. On the latter date, Benjamin was normally competent and was not under the influence of opiates or narcotics. He knew what he was saying and what he was doing.

Dr. Leonard Goldman, a nephew of decedent, visited him in November and December 1949 and in the following January. He testified that Mr. Goldman was fully competent in December and also had the ability to think clearly when he visited him at the hospital on January 30. It was his opinion that his uncle was fully competent at that time. Whenever he saw Mr. Goldman the latter was mentally sound and in full control of his faculties at all times. Decedent's sister, Mrs. Brown, visited him twice at the hospital. On the first occasion she was with him thirty minutes. He did not seem listless or stupefied. It was her opinion that there was nothing wrong with him mentally. On the second occasion a number of members of his family were

present. He recognized and conversed with all of them. She testified that his eyes were natural, he did not appear to be short of breath; "he was just as natural as could be"; he was clean shaven, felt good, showed no signs of mental confusion, knew what he was talking about and discussed matters in a co-ordinated manner. She did not observe that in the midst of a discussion he would change his conversation to an entirely different subject. It was her opinion that his mind was clear and competent. When she visited him in February at the Lodge, he stated to Mrs. Brown that he did not wish to go home because he would have better care at the Lodge. On February 18th she considered his eyes and respiration normal. He did not appear stupefied and inquired about the members of her family and was in his right mind. The notary public, an acquaintance of Benjamin for ten years, visited him at the hospital February 1st and found him perfectly normal.

Not only does such testimony establish decedent's normal understanding and control of his will, but the testimony of respondent, standing alone, is insufficient to establish mental incompetency at or near the dates on which Benjamin executed the deed and the transfer of the automobile.

[2] Where one is able to understand his acts and the relation in which he stands to the objects of his bounty, free from any delusion, he has the capacity to dispose of his property notwithstanding he may be suffering pain and physical disability. *Avery v. Avery*, 42 Cal.App. 100, 103, 183 P. 453; *In re Estate of Dobrzensky*, 105 Cal.App.2d 134, 139, 232 P.2d 886. In *Estate of Dobrzensky* the decedent was a tiny old lady weighing less than 90 pounds, a sufferer from arthritis for twenty years prior to her death and stooped from curvature of the spine. Her hands were swollen, her health was poor. She had not recovered from the shock of her husband's death. In the eleven months following she was confined in hospitals and rest homes much of the time and when at home physicians visited her two to three times a week. Her heart condition caused her pain, made her weak, short of breath and nervous. She

slept only with the aid of drugs and then fitfully. On the day she executed her will she stated that she had not slept at night for weeks. She was emotionally upset by the grief over the loss of her husband. Her memory was impaired. She was forgetful and kept repeating, over and over. She would forget that her visitors had called on her. She believed that certain household articles had disappeared, even after they were shown to her. Notwithstanding the illness, the weak mind, the physical debility of the old lady, the court determined that she had possessed testamentary capacity.

[3] In the absence of an opinion of a qualified physician or of an intimate acquaintance, it would indeed be singular to declare that Mr. Goldman was incapacitated to make a gift of his share in a property to his son rather than leave it to respondent. See *In re Estate of Selb*, 84 Cal.App.2d 46, 49, 190 P.2d 277. Even though a donor suffers physical and mental debility, he is not thereby necessarily rendered incompetent to make a gift of his property so long as he has sufficient mental power to grasp and comprehend the nature of his act, the character of his property and his relation to the natural objects of his bounty. *In re Estate of Arnold*, 16 Cal.2d 573, 589, 107 P.2d 25; *Estate of Perkins*, 195 Cal. 699, 703, 235 P. 45; see *In re Estate of Dobrzensky*, *supra*. That decedent had such power is shown by his repeated statements that he intended to give his possessions to Louis and that he had done so as well as by the want of proof of his incapacity to carry on his business transactions.

No Evidence of Fraud or Undue Influence.

[4] The court found that at about the time of the execution of the grant deed Mr. Goldman was an inmate of the Cedars of Lebanon Hospital, suffering from extreme pain; was under the influence of opiates and such facts were known to appellants; that appellants procured him to execute the grant deed by fraud, force and coercion by taking advantage of their close and intimate relations with him, and also that they were motivated by a desire to defraud and cheat respondent.

[5-8] No evidence is found to support such findings. There is not the slightest proof that at the time of the execution of the deed he was under the influence of opiates or that he executed the deed in favor of appellants by reason of any fraudulent representation. In order to substantiate such findings as those made by the court, it was obligatory upon respondent to prove that appellants made false representations as to a material fact or exercised pressure which overpowered the mind and bore down the volition of the donor at the very time the deed was made, and to show that not only had undue influence been exercised but also that it had produced an effect upon the mind of the grantor by which the deed he executed was not the expression of his own desires. It was incumbent upon her to show that the influence exercised by appellants was such as effectually to destroy the grantor's free agency and to substitute the will of appellants. *In re Estate of Dobrzensky*, *supra*, 105 Cal.App.2d at page 143, 232 P.2d 886; *In re Estate of Arnold*, 16 Cal.2d 573, 577, 107 P.2d 25; *In re Estate of Hinde*, 200 Cal. 710, 714, 254 P. 561. To rebut the presumption of undue influence of a son upon his father it is necessary only to prove by uncontradicted evidence that the act in question had its genesis in the mind of the parent and that he was not goaded to a completion by any act of such child. *In re McDevitt's Estate*, 95 Cal. 17, 33, 30 P. 101. The fact that the son of the grantor may have had a strong general influence over his father is unavailing to prove undue influence unless it was brought to bear directly upon the act of his executing the deed; in other words, to be actionable and undue, such influence must amount to coercion. *In re Estate of Keegan*, 139 Cal. 123, 127, 72 P. 828. Neither is it sufficient to prove circumstances consistent with the exercise of undue influence. The mere fact that Louis had free access to his father and conversed with him during his illness and prior to the date of the deed and its delivery is not sufficient to establish undue influence. If circumstances be relied upon as proof of the charge of undue influence, they must be shown to have been inconsistent with the voluntary action of the

grantor. *Reiss v. Reiss*, 45 Cal.App.2d 740, 745, 114 P.2d 718.

[9, 10] Respondent should bear in mind that—subject to the privileges of sovereignty—a citizen has absolute dominion over his property. Its transfer to another results solely from the owner's inviolable rights of ownership and of alienation. His will in the matter of disposing of his property is paramount. His right to alienate it depends neither upon "the justice of his prejudices nor the soundness of his reasoning." Therefore, a gift will not be set aside upon suspicion or because the actions of the donor do not conform with the standards or wishes of others. In *re Kaufman's Estate*, 117 Cal. 288, 295, 49 P. 192; see *In re Estate of Smith*, 200 Cal. 152, 160, 252 P. 325.

[11] Undue influence contemplates and includes the exercise of such coercion as is calculated to destroy or hamper the free agency and will of another. Affection for one's child or a wish to please him does not amount to undue influence in the sense that a gift by reason thereof is rendered void. Also, influence gained by means of kindness is not undue if no deceit be practiced and the gift is the voluntary act of the donor. *Kelly v. McCarthy*, 6 Cal.2d 347, 364, 57 P.2d 118. In that case, John J. Kelly, 73 years of age, had accumulated a modest sum in savings accounts. They stood in his name, his wife having predeceased him by ten years. Two years prior to his death, he closed his bank accounts and opened new accounts in favor of John J. Kelly or Mrs. Alice McCarthy. He died twenty months later without making any other disposition of his wealth. His brother thereupon sued Mrs. McCarthy to recover the amounts she had thus obtained from the decedent on the ground that the lady had taken advantage of the control she had over John J. Kelly and induced him to make his deposits in their names jointly. Judgment of the lower court was reversed. Mr. Kelly had been a devoted friend of Mrs. McCarthy's husband for forty years and lived in the latter's home for three months prior to his decease. He thus formed an attachment for the relict of his departed friend and freely

made the gift to her of all his money. The entire evidence was to the effect that the donor had disposed of his property to his friend in accordance with his own wish and not that he had been imposed upon. (See *Knadler v. Stelzer*, 323 Mo. 499, 19 S.W.2d 1054; *Brewer v. Allhands' Adm'r*, 251 Ky. 178, 64 S.W.2d 469; *Johnson v. Andreasen*, 227 Wis. 415, 278 N.W. 877; *Green v. Michael*, 183 Md. 76, 36 A.2d 923; *Bronx County Trust Co. v. O'Connor*, 226 App. Div. 126, 234 N.Y.S. 414. Each of foregoing was also reversed for lack of evidence of fraud or undue influence operating on the mind of the donor.)

The attitude of Benjamin Goldman was expressed to his sister, Mrs. Brown, in November, 1949, when he said he was going to change his will and "put Louis on his half of the property"; he did not want respondent to have his share; he was not happy with her; while half of the property belonged to her he did not desire to give her his portion. At the hospital early in February 1950 Mr. Goldman told his sister that he had drawn up a will signing over his half interest to Louis. In the middle of February while she was visiting Benjamin alone he told her that everything "was signed over to Lou; that his share of the Gardner property [lot 23] was signed over to Lou." He told her also at that time he had assigned the pink slip of his automobile to Louis; he wanted his son to have it; did not desire to leave it to respondent; was not happy with her.

In February 1950 Louis Davis visited Mr. Goldman at the Madison Lodge and they discussed the property in question. Mr. Goldman told the witness he had transferred the interest in the property and in the store to his son; that Louis was the only one of the family that had remained loyal to him and had paid his doctor bills and cost of operations while he was in the hospital. From such proof it is clear that decedent executed his deed in conformance with the purposes which he had cherished for months prior to his illness.

The unsupported claim that decedent executed the deed while under the influence of opiates pales into nothingness in contrast with the foregoing testimony of the

witnesses Brown and Davis. Such proof is given additional significance by the testimony of Dr. Peterfy that he did not administer opiates that would weaken the mind of his patient or prevent him from knowing what he was doing at about the time of the deed. The doctor testified positively that on January 24 no narcotics or opiates had been given to Mr. Goldman and when the doctor called at the hospital on February 1 he found his patient stronger and his mental and physical attitude improved; also, his patient was not under the influence of narcotics or opiates, and the tablet of Emperin No. 3 compound which he administered to Benjamin was not such a drug as would have rendered the afflicted man incapable of normal understanding and of normal mental functions. Finally, the doctor testified none of the drugs administered for Mr. Goldman's relief from pain were given to him prior to the fifteenth day of February 1950.

[12] Respondent relies upon *Myrick v. Bruetsch*, 13 Cal.App.2d 219, 56 P.2d 591, and *Sparks v. Mendoza*, 83 Cal.App.2d 511, 189 P.2d 43, in support of her proposition that a different rule prevails as to evidence of undue influence necessary to set aside gifts *inter vivos* from that which applies with reference to wills. From the authorities cited and those quoted it appears to be the rule that in cases of gifts *inter vivos* the natural influence which obtains in close intimate relations, as of a father and son who are in business together, is an undue influence and that gifts made by virtue of such influence will be set aside unless the party benefited can show affirmatively that the donor was placed in a position that would enable him to form an absolutely free and unfettered judgment. Such is undoubtedly a wholesome doctrine, calculated to intercept the avaricious. However, there is no evidence in this record which shows that the grantor was at any time hindered from exercising his own free will or from making his own decisions with reference to the disposition of his property. He had but recently been engaged in conducting a commercial house. Neither the malady from which he suffered nor his subsequent confinement to the hos-

pital appeared to impair his power for making decisions. Everything that he did affecting his property interests was initiated in his own mind. No statements were made to him by Louis that were calculated to divert his mind from its normal course; no promises, no threats, no bargains were proposed by his son for the purpose of gaining an advantage. The only circumstances suggested that might indicate Benjamin held Louis in special esteem were: (1) they collaborated in a business together; (2) the son served his father after the latter succumbed to his malignancy, and gave the father comfort in the sunset of life. Such loyalty is no more than natural. Acts done by a child in service to his parent while the latter is suffering an affliction, do not in and of themselves give rise to an inference that undue influence or fraud has been imposed upon the parent to induce a gift of property. But in order to effect the annulment of such a gift, the court must be convinced that the conveyance to the child was not the voluntary act of the donor. *Jorgensen v. Dahlstrom*, 53 Cal.App.2d 322, 334, 127 P.2d 551. The mere parent-child relationship is not sufficient to raise a presumption of fraud or undue influence. *Best v. Paul*, 101 Cal. App. 497, 499, 281 P. 1089. To raise such a presumption, the relationship must be coupled with proof of activity in procuring the conveyance of property. *Jorgensen v. Dahlstrom*, *supra*, 53 Cal.App.2d at page 333, 127 P.2d 551. There is no proof of baneful activity by Louis in any service to or dealings with his father. His conduct was kindly and urbane, nothing more.

By virtue of the doctrine announced in *Myrick v. Bruetsch*, *supra*, and by reason of the fact that Louis did not proceed to show that his father was placed in "such a position as would enable him to form an absolutely free and unfettered judgment," respondent proceeds upon the assumption that the court was required to presume the exercise of undue influence by the son over the father. The application of such a presumption is wholly unjustifiable. Before the time arrived for appellants to present their own evidence, respondent had placed Louis on the witness stand and by cross-

examination had shown: the father was a business man of long experience; the latter himself had first conceived and suggested the plan of conveying his property to Louis; he requested Louis to have a conveyance of lot 23 prepared with Louis as grantee; the latter made no argument, nor did he suggest that the property be conveyed to appellants; he did only what he was told and returned the prepared instrument to his father who made no further reference to the matter; Louis heard nothing more of the deed until its return six days later to him at his store, properly executed by the notary. Louis testified also that his father did not complain of pain or discuss death or the cancer at the time he suggested the conveyance, but merely said he did not wish his wife to have his interest in the property. Louis explained that while he alone conducted the store of the partnership, he paid Benjamin his share of the profits during his entire absence. He testified that he first learned from Dr. Peterfy of the cancer after Benjamin had been moved to the Madison Lodge; on the occasion of a visit to the lodge about March 1, 1950, he found his father crying; the latter asked Louis to send Mr. Peyton to him as he desired to transfer his automobile and his interest in the store. Nothing was said by Louis in searching cross-examination by respondent's counsel to indicate that his desires bore down upon or supplanted the judgment of his father. In fact, nothing was shown that was even calculated to influence the father's judgment.

So, instead of resting after proving the fiduciary relationship of father and son, respondent herself developed from Louis the latter's entire knowledge of the conveyance and its preparation and execution. It was shown thereby that he was not present or near the premises when the deed was executed. Therefore, at no time was Mr. Goldman fettered by fear or fairy tales. He was never kept from association with others. Prior to his removal to the Cedars of Lebanon Hospital he lived in his home with respondent, and there, as well as at the hospital and the lodge, he saw and conversed with all such people as he de-

sired. Louis never denied him the slightest wish nor did he indicate a desire that Benjamin do otherwise than as the latter wished. The two men appeared to bear the attitude toward each other of brothers on the same plane rather than that of a weakened father and an avaricious son.

Therefore, by virtue of the aggressive action of respondent's counsel, appellants were effectually denied the privilege of "affirmatively showing that the donor was placed in such position" as would enable him to form a free, unfettered judgment. Why should Louis have repeated his story to the same judge? Benjamin was 66 years of age. His mind had not shown infirmity in January or February, 1950. Nor was any circumstance proved from which it could reasonably have been inferred that the deed "was the product of coercion". *Myrick v. Bruetsch*, supra, 13 Cal.App.2d at page 224, 56 P.2d at page 594.

The authorities cited by respondent do not support her contention. In those instances in which undue influence was found, the behavior of the donees was not only such as would support an unfavorable inference, but the conduct complained of was reprehensible.

In the case of *Myrick v. Bruetsch*, 13 Cal.App.2d 219, 56 P.2d 591, where it was contended unsuccessfully that the evidence was insufficient to support the finding of undue influence, the facts were vastly different from those in the case at bar. The principal defendant in the *Myrick* case, one of the decedent's two children by his second marriage, clearly occupied a confidential relationship to her father and abused her position of trust to the detriment of her father's two children by his first marriage. The father had desired his property to be divided equally among his four children and had told them so on many occasions, yet less than nine months before his death he conveyed his property to himself and the defendant in joint tenancy. Eight days after his death she vested title to the property in herself and her brother, the co-defendant, as joint tenants.

Among the salient facts reinforcing the finding of undue influence in the *Myrick*

case were the following: presence of the defendant while the conveyances were being executed; lack of consideration; lack of independent advice; deceased's failing health; his inability to read or write; his ability to speak English only brokenly; services of defendant as her father's interpreter and business adviser; false accusations by defendant against plaintiff; access of defendant to her father's safe deposit box; improper destruction of her father's will. Further, the defendant discouraged visits from her father's other children and suppressed the facts of the conveyance to herself until after her father's death. Yet when the plaintiff saw her father shortly before he died, he told her he was taking care of all his children equally.

Campbell v. Genshlea, 180 Cal. 213, 180 P. 336, quoted in support of the Myrick decision is equally distinguishable from the story of the Goldmans. That action was brought by a senile, paralyzed, feeble-minded woman of advanced years to regain property extorted from her by a faithless daughter. On the death of the mother during the trial, her administrator was substituted as plaintiff. The facts of the case included the use of imprisonment, drugs, abuse, threats and coercion—all of which the ruthless would-be donee found necessary to use despite her mother's weakened mental and physical condition. Certainly, the moral conduct of Mrs. Genshlea cannot be likened to that of Louis Goldman who aided, supported and comforted his father with never a suggestion that he be given the paternal estate or a preference over his sisters or respondent.

The facts in *Azeveido v. Leavitt*, 76 Cal. App.2d 321, 172 P.2d 704, approach more nearly those at bar. While adhering to the doctrine announced in *Soberanes v. Soberanes*, 97 Cal. 140, 31 P. 910; *Longmire v. Kruger*, 80 Cal.App. 230, 251 P. 692, and in the cases of *Myrick v. Bruetsch* and *Campbell v. Genshlea*, *supra*, the court affirmed a judgment in favor of the defendant.

There is no substantial difference between the merits of the conduct of Louis Goldman toward his father and that of Mrs. Leavitt toward her father. Neither tried unduly to influence the donor. How-

ever, it is appropriate here to observe that in most of such actions the claims of undue influence are generally made by a sister or brother who had a stronger moral case against an aggressive member of the parent's family than can be made by a step-mother who had married the donor late in life, had done little to increase his wealth and had paid less than a third of the purchase price of the property involved. Moreover, inasmuch as none of the sisters of Louis appeared in the action, it is fair to assume that they acquiesced in the gift. Not one of them offered testimony in support of respondent's contention of undue influence.

[13] Respondent contends that the oral agreement between herself and decedent not to terminate the joint tenancy in their lifetimes has binding virtue. Such agreement is of no value. It is not in writing as required of contracts concerning real property. Therefore, decedent was free to make a transfer of his share at his pleasure. Also, it is argued that the donor had no knowledge of his malignancy, believed he would return to his home, continued to refer to the property as his own and paid the bills for his maintenance; hence he could not have intended to make a gift of it. But the best proof of his intention was the deed itself, solemnly executed in the sole presence of the notary.

Proof was made that Louis was seen addressing words to his father that were not heard by any witness, implying thereby that the son enforced a demand for the deed or the assignment of the automobile. It would be a novel decision in the extreme if a court could make a finding based wholly upon gesticulations. Because there is a total want of proof that Louis actively undertook to induce Benjamin to favor him, the presumption of a confidential relationship is not sufficient to overcome the parent's intention expressed to others and incorporated in a deed executed with all legal formalities.

Acknowledgment to the Deed.

[14,15] The finding that Benjamin did not acknowledge the deed to Louis is contrary to the evidence. Mr. Peyton testified that his place of business was near that of

Mr. Goldman; he had known the donor about ten years; had seen him during that period almost daily; had acted as his insurance broker; had prepared bills of sale for him. He saw Benjamin at the Cedars of Lebanon about February 1, 1950 and conversed with him alone; the sick man said "he had a paper he wanted me to put my seal on, and he produced this and showed it to me. It had already been signed." After Mr. Peyton had inquired how the donor could convey the property by a deed without Mrs. Goldman's signature, Benjamin replied that "it must be all right" because "the bank made it." The notary testified that Benjamin "asked me to take it and put my seal on it." Having placed his certificate and the imprint of his notarial seal upon the document, he delivered it to Louis Goldman. Such testimony proved that Benjamin Goldman acknowledged the deed to be his act. But, even though such performance were not tantamount to a formal acknowledgment, a deed, bearing the genuine signature of the grantor, operates to convey his interest. *Schuur v. Rodenback*, 133 Cal. 85, 88, 65 P. 298; *Gordon v. City of San Diego*, 101 Cal. 522, 36 P. 18. And even if it includes a greater interest than is owned by the grantor, the deed is a valid instrument to the extent of his interest. *Gaffey v. Welk*, 46 Cal.App. 385, 390, 189 P. 300.

Judgment reversed.

McCOMB and FOX, JJ., concur.



116 Cal.App.2d 911

Louis B. GOLDMAN, plaintiff and appellant,
v. **Dorothy GOLDMAN**, defendant and respondent.

Civ. 19142.

District Court of Appeal, Second District,
Division 2, California.
Feb. 19, 1953.

Appeal from Superior Court, Los Angeles County; Charles B. MacCoy, Judge of Municipal Court, designated.

Leader & Leader, Los Angeles, for appellant, Robert P. Dockeray, Los Angeles, of counsel.

Harold Shire, Beverly Hills, and Sam Bubrick, Los Angeles, for respondent.

MOORE, Presiding Justice.

This action was consolidated with cause 19141, Cal.App., 253 P.2d 474, for trial. The entire record has been reviewed and consideration has been given to the arguments in both cases. For the reasons set forth in the opinion in 19141 filed this day, *supra*, the judgment herein is reversed.

McCOMB and FOX, JJ., concur.



116 Cal.App.2d 203

MOSS CONST. CO. v. WULFFSOHN et al.

Civ. 19283.

District Court of Appeal, Second District,
Division 2, California.
Feb. 18, 1953.

Action by construction company for amount allegedly due on building contract, which provided for award of attorney's fees to the successful party in an action to enforce the contract, for foreclosure of mechanic's lien, and for attorney's fees. Defendants counterclaimed for alleged faulty construction, for delay in completion of building, and for attorney's fees. The Superior Court, Los Angeles County, Morgan Galbraith, Judge of the Municipal Court of Los Angeles, assigned, found contractor was entitled to \$4,054.29 on its complaint, that defendants were entitled to offset of \$1,400 on their counterclaim, and awarded each party \$1,000 attorney's fees, and each party appealed. The District Court of Appeal, Moore, P. J., held that contractor was the "successful party" within meaning of contract and that award of attorney's fees to defendants was error.

Judgment modified, and as modified, affirmed.

I. Appeal and Error $\S$ 842(1)

Where interpretation given building contract, was determined by trial court as

a matter of law from instrument itself, District Court of Appeal was free to adopt its own construction thereof and was not bound by trial court's determination. Code Civ.Proc. § 1032, subd. a.

2. Costs ⇨32(5)

In action for amount allegedly due on building contract, which provided for award of attorney's fees to successful party in any action on the contract, wherein defendants counterclaimed for alleged faulty construction and delay in completion of building, contractor who recovered \$2,654.29, after deduction of defendants' partial offset, was the "successful party", and, therefore, allowance of attorney's fees to defendants was error. Code Civ.Proc. § 1032, subd. a.

See publication Words and Phrases, for other judicial constructions and definitions of "Successful Party".

4. Judgment ⇨203

Generally, there can be only one final judgment in an action, and, although a cross-complaint has been filed and matters therein stated are put to issue, the cross-complaint is not such a pleading that requires or permits rendition of two separate judgments.

4. Costs ⇨229

Where the Superior Court adjudged plaintiff's award to be less than maximum jurisdictional amount of the Municipal Court, judgment for costs was properly denied, but, where the District Court of Appeal granted plaintiff a judgment in excess of the maximum jurisdictional amount, the judgment would be so modified as to require payment of plaintiff's costs by defendants.

Kaufman & Leland, Los Angeles, for appellant.

Gordon Stater, Los Angeles, and Edmund I. Read, Wilmington, for respondents and cross appellants.

MOORE, Presiding Justice.

Moss Construction Company, a corporation, sued to recover the sum of \$6,085 allegedly due under the terms of its build-

ing contract with defendants. It demanded also attorney's fees in the sum of \$1,500 and the foreclosure of its mechanic's lien. Defendants denied the indebtedness in any amount and by way of counterclaim sought \$4,842.50 as damages for alleged faulty construction and delay in completion of the building. They, also, demanded a reasonable sum as attorney's fees.

The court made its finding that plaintiff was entitled to recover \$4,054.29 on its complaint, that defendants were entitled to an offset of \$1,400 on their counterclaim and that therefore plaintiff was entitled to a net judgment in its favor of \$2,654.29. The court further adjudged that "each party * * * is entitled to \$1,000 attorney's fees."

On this appeal each party contends that the trial court erred in awarding attorney's fees to the other.

[1] The basis for the award of attorney's fees is found in section 1032, subd. a, of the Code of Civil Procedure and in paragraph 17 of the building contract executed by the parties. It is there provided that "should either party hereto bring suit in court to enforce the terms hereof, any judgment awarded shall include court costs and reasonable attorney's fees to the successful party." Thus the sole question for decision is whether both parties were the "successful party" or whether only one was successful and if so which of the two? The trial court found that since plaintiff was "successful" in establishing its cause of action as set forth in the complaint and that since defendants were "successful" in recovering pursuant to their counterclaim, both were entitled to counsel fees. Such determination, however, is not binding on this court. Inasmuch as the interpretation to be given the building contract is determined as a matter of law solely from the instrument itself, this court is free to adopt its own construction. *Texas Company v. Todd*, 19 Cal. App.2d 174, 185, 64 P.2d 1180.

[2, 3] Under the pleadings and findings the award to plaintiff makes it the victor in the contest. Defendants denied owing any sum whatever to plaintiff and

sought by way of counterclaim to recover certain damages. Hence, by all rules of logic when at the conclusion of the trial it was determined that plaintiff was entitled to \$2,654.29 after allowing defendants a partial offset, it became necessarily the "successful party" within the meaning of that term as used in the contract.

Not only do logic and reason dictate such a conclusion, but analogous authority points to the same result. It is well established that generally there can be only one final judgment in an action and although a cross-complaint has been filed and matters therein stated are put to issue it is not such a pleading that requires, or permits the rendition of two separate judgments. *Nicholson v. Henderson*, 25 Cal.2d 375, 381, 153 P.2d 945; *Sjoberg v. Hastorf*, 33 Cal.2d 116, 118, 199 P.2d 668. Hence, there could have been only one judgment entered herein and that was and is the net judgment rendered in favor of plaintiff. Where such is the case it has uniformly been held that the party awarded the *net* judgment is the prevailing litigant and thus the *successful party*. *Dobbins v. Horsfall*, 58 Cal.App.2d 23, 27, 136 P.2d 35; *Shelley v. Hart*, 112 Cal.App. 231, 243, 297 P. 82. It follows that since defendants were neither "successful" nor "awarded judgment" the allowance to them of attorney's fees was erroneous and that counsel fees and costs should have been awarded to plaintiff pursuant to the terms of the contract. In a contest such as this, after a cross-action has been filed and the court has found that all or a part of the counterclaim is payable to the defendant and is consequently offset against the award of plaintiff, the parties are then in the same position they would occupy had they agreed to the net indebtedness of defendants prior to the filing of the action. In the latter situation there could be no doubt that plaintiff would be the successful party and defendants would be the losing party. Therefore, defendants are entitled to no attorney's

fees. *Dobbins v. Horsfall*, *supra*; see *Murphy v. F. D. Cornell Co.*, 110 Cal.App. 452, 454, 294 P. 490.

[4] In view of the foregoing, it is necessary to remove from the decision the finding (IX) that defendants are entitled to recover attorney's fees in the sum of \$1,000 and so to modify conclusion 1 and the judgment as to give plaintiff the benefit of its recovery. The trial court having adjudged plaintiff's award to be less than the maximum jurisdictional amount (\$3,000) of the municipal court, judgment for costs was properly denied. But inasmuch as the judgment of this court grants plaintiff the sum of \$3,654.29, the judgment should be so modified as to require the payment of costs of plaintiff by defendants. See *Holm v. Davis*, 8 Cal.App.2d 328, 330, 47 P.2d 537.

It is therefore ordered that finding IX and conclusion 1 be and they are hereby stricken, and in lieu of such conclusion the following be inserted:

That plaintiff is entitled to recover from defendants, *in solido*, the sum of \$4,054.29 as the balance due on the contract, less the sum of \$1,400 due by plaintiff to defendants as damages, or the net sum of \$2,654.29 and in addition thereto the sum of \$1,000 as attorney's fee or the total sum of \$3,654.29.

It is further ordered that from paragraph 2 of the conclusions the figures \$2,654.29 be stricken and in lieu thereof the sum \$3,654.29 be substituted and that the latter sum be inserted in the judgment in all places instead of \$2,654.29.

It is ordered that plaintiff recover its costs which are hereby taxed in the sum of \$——.

As thus modified, the judgment is affirmed, plaintiff to recover all costs on appeal.

McCOMB and FOX, JJ., concur.

116 Cal.App.2d 264

KESSON v. CLY et al.

Civ. 19344.

District Court of Appeal, Second District,
Division 1, California.

Feb. 25, 1953.

Hearing Denied April 23, 1953.

Action by vendor for rescission of contract for conditional sale of duplex, to quiet title, and for damages for fraud following purchasers' failure to make payments according to terms of contract and following notice of rescission to purchasers. The Superior Court, Los Angeles County, James Snell, J., rendered judgment for vendor, and purchaser appealed. The District Court, Doran, J., held that evidence sustained judgment for vendor.

Affirmed.

Fraud ⚡58(1)

Quieting Title ⚡44(3)

Vendor and Purchaser ⚡104

In action by vendor for rescission of contract for conditional sale of duplex, to quiet title, and for damages for fraud following purchasers' failure to make payments according to terms of contract and following notice of rescission to purchasers, evidence sustained judgment for vendor.



Jacob Forst, Los Angeles, for appellants.

R. R. Colby and Walter W. Heil, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendant from the judgment.

Plaintiff sold defendant certain property under the terms of a conditional sales contract. The property was a "duplex" and the selling price was \$6,500. Defendant took possession and collected the rents. The contract was dated February 28, 1949.

The complaint, in several causes of action, seeks a rescission, quiet title, and damages for fraud. A notice of rescission was served on defendant on June 30, 1950, following defendant's failure to make the payments according to the terms of the contract, and the within action followed.

It is defendant's contention that "(1) the pleadings and judgment are lacking in

any of the essential elements of any cause of action; (2) the Judgment cannot be sustained on any theory of Unlawful Detainer, Fraud, or Trusteeship; (3) the Judgment should be reversed and remanded for a new trial."

It is unnecessary to go into further detail. The appeal is on the judgment roll and the record supports plaintiff's position in every respect.

The appeal is without merit.

Affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 5

UPPER v. POTEET et al.

Civ. 19281.

District Court of Appeal, Second District,
Division 1, California.

Feb. 10, 1953.

Personal injury action. The Superior Court, Los Angeles County, Stanley Mosk, J., denied defendants' motion for judgment notwithstanding the verdict for plaintiff, but granted defendants' motion for new trial. Plaintiff appealed from the order granting defendants a new trial, and defendants appealed from the order denying judgment notwithstanding the verdict, and from the judgment in plaintiff's favor. The District Court of Appeal, Doran, J., held that order denying defendants' motion for judgment notwithstanding the verdict was reviewable on plaintiff's appeal from order granting the motion for new trial and would be dismissed as unnecessary and improper, without prejudice to defendants' right to appeal from the original judgment.

Appeal from order denying judgment notwithstanding the verdict dismissed, without prejudice to defendants' appeal from original judgment.

Appeal and Error ⇨ 109, 874(5)

Where plaintiff appealed from order granting defendants' motion for new trial, and defendants appealed from order denying their alternative motion for judgment notwithstanding the verdict, and appealed from judgment in plaintiff's favor, order denying defendants' motion for judgment notwithstanding the verdict was reviewable on plaintiff's appeal from order granting the motion for new trial and would be dismissed as unnecessary and improper, without prejudice to defendants' rights to appeal from the original judgment. Code Civ. Proc. § 629; Rules on Appeal, rule 3(a).

William Barnett Spivak, Beverly Hills,
Jacob Chaitkin, Pasadena, for plaintiff-appellant.

Schell, Delamer & Loring, Los Angeles,
for defendant-appellants.

DORAN, Justice.

After rendition of a verdict in plaintiff's favor in a personal injury action, the named defendants made a motion for judgment notwithstanding the verdict, and in the alternative, for a new trial, pursuant to Section 629 of the Code of Civil Procedure. The trial court denied defendants' motion for judgment notwithstanding the verdict but granted a new trial, and from the latter order plaintiff has appealed. The defendants then appealed from the order denying judgment n. o. v., and from the judgment in plaintiff's favor.

Plaintiff's memorandum of points and authorities in support of the motion to dismiss defendants' appeal, states: "Plaintiff has offered to dismiss her appeal from the order granting the new trial, provided that defendants consent to a dismissal of their appeal from the denial of their motion for judgment n. o. v. Defendants have refused so to stipulate. This motion has as its object the dismissal of the defendants' appeal, the plaintiff consenting to the dismissal of her appeal."

Section 629 of the Code of Civil Procedure provides that "Where a new trial is granted to the party moving for judgment notwithstanding the verdict, the order deny-

ing the motion for judgment notwithstanding the verdict shall not be reviewed on appeal, unless the adverse party appeal from the order granting a new trial, in which case the order denying judgment notwithstanding the verdict may be reviewed on appeal".

Construing Section 629, Estate of Green, 25 Cal.2d 535, 154 P.2d 692, 697, says: "As the latter order (denying motion for judgment notwithstanding the verdict) is reviewable on contestant's appeal from the order granting proponents' motion for a new trial, the latter's appeal from the order denying their motion for judgment notwithstanding the verdict is not necessary nor is it proper under the provisions of section 629 of the Code of Civil Procedure just quoted. The appeal from the order denying the motion for judgment notwithstanding the verdict should be dismissed. However, proponents have lost no rights by such dismissal as the order denying their motion for judgment notwithstanding the verdict is reviewable under contestant's appeal from the order granting proponents' motion for a new trial as fully and completely as it would have been had the latter been entitled to a direct appeal from the order adverse to them".

The defendant-appellants, Louis Poteet and United Parcel Service, "concede that if no appeal had been taken by Alberta Upper, plaintiff, * * * the defendants could not have taken an appeal in this case, inasmuch as their motion for a new trial was granted. However, in this instance plaintiff filed her appeal. Rule 3(a) so far as pertinent to this situation provides as follows:

"When a valid notice of intention to move for a new trial is served and filed by any party within 60 days after entry of judgment, * * * (2) if the motion is granted *and an appeal is taken from the order granting it, the respondent*, within 20 days after mailing of notification by the clerk of such appeal, *may file notice of appeal from the judgment, and on that appeal may present any question which he might have presented on an appeal from the judgment had the motion for new trial been denied.* (Defendants' italics.)

"In the instant case, plaintiff did appeal from the order granting the motion for new trial, and within the time allowed defendants filed their notice of appeal from the judgment. Transcripts of the testimony have been obtained at considerable expense, and defendants desire to present their contentions to this court".

Plaintiff's concluding memorandum refers to an "abandonment of her appeal from the order granting a new trial". However, plaintiff's original memorandum says nothing about an "abandonment", nor does the record elsewhere show such abandonment. In plaintiff's own words, there was merely an offer "to dismiss her appeal from the order granting a new trial, *provided* the defendants consent to a dismissal of their appeal from the denial of their motion for judgment n.o.v.". (Italics added.) Defendants "have refused so to stipulate".

Under section 629 of the Code of Civil Procedure, since plaintiff appealed from the order granting a new trial, the other order denying judgment notwithstanding the verdict then became reviewable, "fully and completely", as said in *Estate of Green*, hereinbefore cited, although in itself it was not appealable. Therefore, technically, as stated in the *Green* case, the defendants' appeal from the order denying the motion for judgment notwithstanding the verdict, should be dismissed, since it was neither necessary nor proper.

The *Green* case might well be decisive of the present controversy were it not for the fact under Rule 3(a), cited by defendants, the latter had the undoubted right to file notice of appeal from the original judgment, as was done in this case. After the defendants had exercised this right, which it may be noted, was instituted and called into being by the plaintiff's own appeal, it hardly lies within the plaintiff's power to defeat such right by the technicality of offering to dismiss the first appeal. Certainly the defendants had a right to assume that plaintiff's appeal was in good faith, and then to protect defendants' rights by filing an appeal from the original judgment as provided in Rule 3(a).

As said in defendant's memorandum, the interpretation of the law as propounded by plaintiff "would be manifestly unfair", after defendants' reliance on plaintiff's appeal and the expenditure of large sums of money in procuring transcripts of the testimony, etc., necessary for an appeal on the merits. Moreover, an appeal from the original judgment against defendants will necessarily present any question of sufficiency of evidence or possible judicial errors in the trial itself, and in that respect benefit both parties by furnishing a final determination of the rights involved.

Defendants' attempted appeal from the order denying a judgment non obstante veredicto is dismissed without prejudice to the defendants' appeal from the original judgment.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 155

PERRY v. MAGEE.

Civ. 15226.

District Court of Appeal, First District,
Division 2, California.

Feb. 18, 1953.

Action to rescind conditional sales contract. The Superior Court, County of Alameda, A. J. Woolsey, J., rendered judgment for buyer, declaring contract void and seller appealed. The District Court of Appeal, Nourse, P. J., held that where buyer did not rely on statements of opinion of seller's agent as to efficiency of poster drying machine, but made independent examination of the machine, no actionable fraud was shown.

Judgment reversed.

I. Evidence 434(11)

Parol evidence is admissible to prove fraudulent representations in procurement of written sales contract for the purpose

of rescission, even though there is a written waiver of oral representations.

2. Sales $\S$ 120, 261(5)

Where seller's agent made statements as to efficiency of a poster drying machine, but buyer expressed doubt as to machine's efficiency, agent's statements were not warranties, but mere expressions of opinion and would not support rescission. Civ. Code, $\S$ 1732.

3. Sales $\S$ 262

Where buyer had many years of experience with poster drying machines, statement of seller's agent that he could "almost guarantee" that poster drying machine which was the subject of the contract would work was not a warranty. Civ. Code, $\S$ 1732.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Almost Guarantee".

4. Fraud $\S$ 20

Where buyer did not rely on statements of seller's agent as to efficiency of poster drying machine, but made his own independent examination before execution of the contract, no actionable fraud was shown.

Phillip Barnett, San Francisco, Rodney H. Robertson, San Francisco, of counsel, for appellant.

Edmund S. Barnett, Walnut Creek, for respondent.

NOURSE, Presiding Justice.

On October 3, 1949, Perry (plaintiff, cross-defendant and respondent) entered into a conditional sales contract with Magee (defendant, cross-complainant and appellant) for the purchase of the Magee Poster Drier for \$5,098.50—\$3,300 down payment and \$158.51 to be paid in 11 monthly installments beginning December 1, 1949. On March 3, 1950, Perry through his attorney notified Magee by letter he was rescinding the contract upon the ground of misrepresentation and breach of warranty of quality, offering to return the machine upon the condition that his money be refunded. Defendant did not act

and on May 18, 1950, plaintiff filed his complaint pleading six causes of action, the first and fourth being dismissed by plaintiff at the trial. The remaining causes are:

(2) Damages sought for breach of oral warranties allegedly made by defendant. (3) Damages for alleged oral fraudulent representations made by defendant. (5) Rescission of written contract sought for breach of oral warranties allegedly made by defendant. (6) Rescission of written contract sought for alleged fraudulent representations made by defendant.

Because of the written waiver of oral warranties plaintiff would be limited to his action for rescission without damages for alleged fraud under the rule of *Speck v. Wylie*, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760. Hence, this appeal should be properly limited to the issue of rescission raised in the fifth and sixth causes of action. But more definitely it should be limited to the fifth cause—for rescission of the contract because of breach of oral warranties—since the sixth cause which was based on fraudulent representations is not supported by the slightest evidence of fraud.

Plaintiff on the entire complaint sought judgment against defendant for \$11,304.51 plus 7% interest on said sum from March 3, 1950, the date of rescission. Defendant's demurrer was overruled and on June 16, 1950, he filed his answer and cross-complaint denying all material allegations of plaintiff's complaint and cross-complaint for breach of the written contract, asking for the return of the machine, retention of moneys previously paid by plaintiff and attorneys' fees. June 25, 1951, the court entered its minute order rendering judgment for plaintiff and thereafter filed its findings and entered judgment July 9, declaring the contract null and void and granting plaintiff recovery of the money paid to defendant on the contract with 7% interest from March 3, 1950.

The situation out of which the action arose is in brief: For about eighteen years respondent Perry was in the business of making posters and placards such as are generally seen on outdoor billboards by the silk screen printing process. Huff, a grad-

uate engineer with about six months of business experience, became interested in the Merco tube, designed somewhat like a fluorescent lighting tube, learned the tubes were being successfully used in a poster drier in the poster plant of Marshall Bros. in Seattle. Huff contacted defendant Magee who was engaged in the wholesale business of selling hospital supplies and equipment, and succeeded in interesting Magee in financing the machine if Huff could find a buyer. Huff approached Perry who was at first very dubious concerning the merits of such a machine but finally decided to accompany Huff to examine the Marshall poster drier in Seattle. Perry examined the machine while in operation, questioned the Marshalls and their plant foreman and was advised that paint and paper and atmospheric conditions were critical items in the operation of the machine—that certain types of paint faded and that experimentation was necessary to work out the proper technique. (Appellant claims it was the materials used and not the machine which caused Perry's later difficulties.) Magee was with Perry and Huff in Seattle during their inspection of the Marshall machine, but according to appellant, and it is not refuted, the only comment he made to Perry regarding the machine was that it looked like a good machine and he ought to have one.

After the Seattle trip Perry requested Huff to build a similar machine for him but to be designed somewhat differently to meet Perry's special needs. Magee agreed to finance the construction and sale provided Perry would execute a written contract of conditional sale and make a substantial down payment.

Approximately six weeks after the contract was executed the machine was installed. According to appellant when Perry failed to make payments as provided in the contract and demand was made he complained for the first time that the machine caused the paper to crack, paint to fade, caused a high degree of waste and broke down.

Appellant contends that in view of the written contract the court could not ignore the parol evidence rule to permit the in-

troduction of evidence of oral warranties to vary the terms of the written contract. The court made findings as to oral warranties basing its judgment thereon. Plaintiff admitted having read and understood the contract. Paragraph 6 of the contract reads: "It is further understood and agreed that this contract contains the complete agreement between the parties hereto, that no representations or warranties, express or implied, have been made except those which are set forth in this agreement; that purchaser has made an independent investigation of the property and has relied solely upon his own investigation with reference thereto in entering into this contract, and has placed no reliance nor acted upon any representation or warranties upon the part of Seller or Seller's Agent not specifically set forth herein." Appellant claims the judgment is against the law because the court ignored the parol evidence rule, permitted, over appellant's objections, evidence concerning oral warranties, and devoted a substantial portion of the findings to alleged breach of oral warranties. The court found that defendant made a minimum of six separate and distinct oral warranties concerning the machine, which warranties were untrue and thereupon concluded that the written contract was null and void and wholly ineffective for any purpose. The court further ignored the disclaimer of warranty rule under which a buyer who executes a written contract containing a disclaimer of warranty is bound by that provision. Respondent answers that the parol evidence rule shall not apply to establish fraud, that parol evidence is admitted not to vary the terms of a written instrument but to prove that it was procured by fraud.

[1] The answer is sound so far as it goes but it does not settle the controversy. Under the rule of *Speck v. Wylie*, 1 Cal.2d 625, 628, 36 P.2d 618, *supra*, parol evidence is admissible to prove fraudulent representations in the procurement of a written contract for the purpose only of rescission but not for damages for fraud. The principle of the decision is that a party is not to be bound by his written waiver of oral representations made by an agent which

are shown to have been fraudulently made. The controlling factor in such a situation is that these representations were fraudulent, made with the purpose to deceive, and had been relied on by the contracting party. That factor is not present when the representations were not fraudulently made, were not relied upon as warranties of facts, but were mere expressions of opinion. Sec. 1732, Civil Code.

[2] Here the respondent relied on six distinct warranties. As stated by respondent the first was that the Merco tube which Huff proposed to install in the new machine "was a tube specially *designed* to dry paint without affecting the moisture content of the paper upon which the paint had been placed." All the witnesses agreed that this was one of the purposes for which the Merco tube was *designed*. But the respondent testified further that he expressed doubt as to the efficiency of the tube, that he did not believe Huff's statement that the new design would solve the difficulty of the moisture content of the paper. Manifestly this statement of Huff's as to what the new Merco tube would accomplish was merely an expression of the opinion of Huff which was taken as such by respondent who immediately expressed his view that the opinion was not sound. An expression of opinion not relied on by the complaining party does not support a rescission. Sec. 1732, Civil Code. No actionable fraud is shown where a party makes his own inspection before the contract and the latter is performed according to his own specifications. *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 570, 203 P.2d 758, citing *Nielsen v. McKenna*, 8 Cal.2d 690, 67 P.2d 1044.

It is alleged that Huff represented that the new machine could be successfully used for multi-color operations and that the paper would be moist enough to fold without injury to the paint. The respondent did not believe these statements and, because of his disbelief, he accompanied Huff to Seattle to inspect the Marshall machine which was in operation there. At that time Mr. Marshall, who had been in the business for thirty years, advised respondent that all these machines had mechanical

difficulties—that paint and paper were critical items, that considerable experimentation was necessary to reach satisfactory results. Thereupon the respondent expressed his disbelief in Huff's statements and offered no evidence that he at a later time changed his opinion.

It is also contended that Huff represented to respondent that the new machine would dry colors regularly and without removing the moisture content. This is essentially the same matter as that just considered—both are based on respondent's testimony that Huff represented to him that the new Merco tube was "designed" to remove these difficulties. All the witnesses agreed that the new tube was designed for that purpose. All agreed that if this tube performed as it was designed it would be a substantial improvement in the operation of such machines. All through the negotiations respondent was apprehensive and told Huff that he did not believe his hopes could be fulfilled.

[3] Both parties recite in their briefs a quotation from respondent's testimony that, after the return from the Seattle trip, Huff told the witness: "Using the Seattle machine as a model, I can almost guarantee that the machine will work." (We are unable to find this exact language in the reporter's transcript but both parties agree on the quotation and cite it in their briefs so we may accept it as correct.)

Now what does "almost" mean when we come to the question of warranties? Does it not imply an expression of hope and an opinion rather than a promise of fulfillment of the desired result? When King Agrippa said to the apostle Paul "Almost thou persuadest me to be a Christian" surely the apostle could not conclude from that statement that he had made a convert of the Roman tyrant. And when we sing the old song

"Almost cannot avail,
Almost is but to fail."

we are impressed with the admonition that "almost" is always somewhat less than the ultimate. When the respondent by his own evidence disclosed that after the Seattle trip (before which all the statements relied on as warranties had been made) Huff

assured him that he could "almost guarantee" respondent that the machine he planned to construct would work, and when the respondent thereupon expressed the belief that it was impracticable, he belied his own testimony that he relied on the previous statements as warranties of perfection or guaranties that the machine would work as desired. When therefore Huff was directed to go to work in accordance with the specifications dictated by respondent the prior assertions by Huff as to what he expected to do or what he hoped to do were all summarized in his final statement that he could "almost guarantee" or "practically guarantee" that the result would be successful. But almost, but not all, of a guarantee or warranty cannot form the basis of an action for fraudulent representation. It was for that reason apparently that the parties entered into the written contract wherein respondent expressly stipulated that he made his independent investigation and that he had placed no reliance upon any representation or warranty made by the seller's agent. This waiver disclosed that respondent was fully aware of what "almost" a guaranty meant.

Hence when the respondent testified that Huff told him he could "almost guarantee" or "almost" warrant that the machine would do the work desired, no reasonable man having respondent's years of experience in the operation of similar machines could have relied on the statement of the unexperienced engineer as a warranty of perfection.

[4] Without further discussion we conclude that the case comes squarely within section 1732, Civil Code, since all the representations specified were but expressions of the hopes and the opinion of the seller's agent, and since the respondent testified as to all these statements that he frequently told the agent that he did not believe that the proposed changes were practical or that they could accomplish the desired results. Similarly when the respondent testified that Huff said he could "almost" or "practically" guarantee success he thereby effectively disclaimed any reliance upon past statements of Huff and disclosed that he made an independent examination before he ex-

ecuted the contract. No actionable fraud is shown under such circumstances. *Carter v. Seaboard Finance Co.*, supra, 33 Cal. 2d at page 570, 203 P.2d at page 762. Other questions raised by appellant do not require consideration.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.



116 Cal.App.2d 162

WINSTON et al. v. PENNEY et al.

Civ. 19128.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1953.

Action for injuries sustained when plaintiffs' automobile made U-turn in highway and stalled at an alleged 60-degree angle against curb where it was struck by defendants' automobile. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Doran, J., held that refusal of instruction that if plaintiffs' vehicle was unable to proceed prior to accident, then plaintiff driver was not required to park parallel to curb with rear wheels less than 18 inches from curb, was not prejudicial, in view of fact that there was evidence of negligence on part of plaintiff driver in attempting turn, and plaintiffs' theory of case was properly covered in other instructions.

Judgment affirmed.

I. Appeal and Error ☞1067

Trial ☞260(8)

In action for injuries sustained when vehicle of plaintiffs, made U-turn in highway and automobile stalled at angle against curb where it was struck by defendant's automobile, refusal of instruction that if plaintiffs' vehicle was unable to proceed prior to accident, then plaintiff driver was not required to park parallel to curb with rear wheels less than 18 inches from curb,

was not prejudicial, in view of fact that there was evidence of negligence on part of plaintiff driver in attempting turn, and plaintiffs' theory of case was properly covered in other instructions. Vehicle Code, § 588(a).

2. Automobiles ⇨245(80)

In action for injuries sustained when plaintiffs' automobile made U-turn in highway and stalled at angle against curb where it was struck by defendant's automobile, whether plaintiff driver was negligent in attempting turn was for jury. Vehicle Code, § 588(a).

3. Automobiles ⇨246(13)

In action for injuries sustained when plaintiffs' automobile made U-turn in highway and stalled at an alleged 60-degree angle against curb where it was struck by defendant's automobile, giving instruction governing parking of motor vehicle on highway was proper. Vehicle Code, § 588(a).

4. Appeal and Error ⇨1064(4)

In automobile accident case, assignment that trial court unduly emphasized certain part of instruction on last clear chance doctrine by repeating that defendants must have had clear opportunity to avoid accident did not present reversible error, in view of fact that matter of voice intonation in giving instruction was not presented by affidavit, and that instructions were correct.

5. Appeal and Error ⇨1064(4)

Trial ⇨229

Repetition of correct instructions so that jury may have matter firmly in mind is not erroneous or prejudicial.

Manasse & Crowley, Herbert Manasse, Hollywood, for appellants.

Knight, Gitelson, Ashton & Hagenbaugh, Van A. Hagenbaugh and Robert A. Eaton, Los Angeles, for respondents.

DORAN, Justice.

The plaintiffs have appealed from a judgment in defendants' favor after a verdict denying recovery in a personal injury

action arising out of an automobile collision which occurred on February 26, 1950, on Alameda Boulevard south of Compton.

The accident occurred after plaintiff L. B. Winston had attempted to make a U-turn at a place other than an intersection, but had not completed the turn. "His (Winston's) front wheel struck against the east curb. The motor stalled. * * * His starter was working satisfactorily but he never tried to move his car by means of the starter so that it would be parallel to the curb and within 18 inches thereof", as required by the Motor Vehicle Act. Vehicle Code, § 588(a).

It may be noted that there is a street intersection "approximately one mile from the scene of the accident and north of it", and that another intersection is located "about one-quarter of a mile south". Mr. Winston "stated in his deposition that he started his turn from the lane next to the center line * * * At the time of trial he stated that he started his turn from the extreme west lane * * *". Shortly before reaching the scene of the accident, Winston "slowed down, looked for traffic from either direction, and seeing no traffic he made a signal with his left hand, turned on his blinker lights" and attempted to make the U-turn by cutting the steering wheel to the left as far as it would go, but because of the curb was unable to complete the maneuver. He testified that "he was stopped for one or two minutes".

D. A. Morelli, an instructor in physics, testified to making certain tests in respect to turning radius at the point in question, and that "if plaintiff's turn were made from the lane next to the center that it would be impossible for plaintiff to get much further around in the turn than about an 80-degree angle between the right side of plaintiff's vehicle and the east curb. If the turn were made from the westernmost lane of traffic with the wheel cramped to the left the turn could be made with three feet to spare".

There is a conflict of evidence concerning the angle at which the Winston car came to a rest. Plaintiff testified that the rear of the car was "2 or 3 feet from the curb"; other witnesses placed the distance

at "from five to eight feet". Defendant estimated that the Winston car "was headed at around a sixty degree angle to the curb", and extended "about 2 to 4 feet into the lane". Another car had drawn up behind the Winston car and stopped, according to plaintiff's testimony, "eight or ten car lengths back of him". The defendant Penney testified that this so-called "X" car was "two or three car lengths back of the Winston car."

Plaintiff's car was a black Packard sedan; defendant was driving a Chevrolet sedan at a speed of approximately 35-40 miles per hour. It was the defendant's testimony "that he saw the X car stopped in the lane * * * about 1 foot from the curb". Defendant did not slow down, "but he turned to the left to pass the X car and did pass the X car while straddling the white line * * * he started to swerve his car back into the curb lane and then for the first time his headlights picked up plaintiff's vehicle and he first noticed the Winston car. He then immediately swerved back to the left, but the right portion of his car struck the right rear portion of the Winston car". Penney and a passenger testified "that they saw no lights on the Winston Vehicle". L. B. Winston testified that "he had his lights on at all times".

Appellants contend that "The trial court committed error in not giving a basic instruction requested by appellants, based on their theory of the case, when there was evidence in the record to support the giving of such instruction". The refused instruction was as follows: "If you find that plaintiffs' vehicle was disabled or temporarily unable to proceed prior to the accident, then I instruct you that plaintiff was not required to park parallel to the curb with the rear wheels of his vehicle less than 18" from the curb". As authority for this instruction *Flemming v. Flick*, 140 Cal. App. 14, 35 P.2d 210, is cited, holding that where a rear axle broke on a grade, and embankments prevented getting the car off the highway, and a tow car further obstructed the highway, plaintiff was not negligent as a matter of law in thus blocking the highway.

Respondents' brief, answering this argument, observes that, "The instruction offered was properly refused since the element that the vehicle must have been disabled through no negligence of the plaintiffs was omitted". Considering the matter on motion for a new trial, the trial judge called attention to the fact that there was evidence "from which the jury could have found that the plaintiff, Mr. Winston, was negligent in attempting to make his turn at that point, in attempting to turn so close to the east curb that he could not complete his turn and was going to be stalled at a place where he could not proceed without backing up and going ahead. It was not until he hit the curb that the engine stalled. * * * Your instruction did not say any such thing. It said that he was excused if his engine stalled, no matter how it stalled. I pointed this out to you * * * I told you that element was lacking, but there was no offer made to give any other instruction. However, I think the matter was fully covered by the instruction which was given twice, that he was not negligent in doing so if under all the circumstances that was excusable".

[1,2] A survey of the instructions as a whole indicates that appellants' theory of the case was properly covered, and that no prejudice could have resulted from the court's failure to give the requested instruction. As noted by the trial court, there was evidence of negligence on the plaintiffs' part in attempting to make the turn, and the weight and effect of this evidence was for the jury to decide. The requested instruction, as phrased by plaintiffs, might have led the jury to believe that such negligence, if any, was immaterial.

[3] Appellants also claim that "The jury should not have been instructed concerning the rule governing the parking of a motor vehicle on the highway", namely Section 588(a) of the Motor Vehicle Code, for the reason that "there is no evidence * * * showing that appellants had ever stopped their car voluntarily", and that the court erred in assuming that appellants had "parked" the car. However, as noted by respondents, the jury was instructed that Section 588(a) requires that every vehicle

be "stopped or parked" parallel and within 18 inches of the righthand curb. Appellants' car was certainly "stopped" on the roadway. As hereinbefore indicated, whether appellants' stopping was excusable or justifiable was, under all the evidence, a question for the jury. No reversible error is here apparent.

Further complaint is made that "The trial court erred in unduly emphasizing certain instructions * * * by repeating and stressing unfavorable aspects of the instructions so far as appellants were concerned". More specifically, appellant points out that the trial judge, in discussing the last clear chance doctrine, emphasized by repetition that defendant might be liable if, after acquiring actual knowledge of plaintiffs' perilous situation, he had a clear opportunity—that means just what it says, a clear opportunity to avoid the accident, and that the court "raised its voice and emphasized this portion by voice intonation and slower phrasing". The jury was further told that, as to the last clear chance, "It is not a matter of split seconds", but whether defendant "did have an opportunity to avoid the accident after he became aware of the danger, and what a reasonable man would have done," etc., which was a matter for the jury "to determine from all of the evidence". In explaining the doctrine the judge mentioned that "Law students and judges study this doctrine a long time, and some do not understand it even then. However, I am trying to make it clear to you, ladies and gentlemen".

[4, 5] Appellants' contentions in respect to this matter present no reversible error. The matter of voice intonation in giving the above instructions is not presented by affidavit, and the repetition of correct instructions so that the jury may have the matter firmly in mind, cannot be deemed either erroneous or prejudicial to the appellants' rights.

Finally, it is claimed that "as a matter of law, appellant, L. B. Winston, under the stipulated facts, was not chargeable with any negligence which was a proximate cause of the accident". As hereinbefore noted, the evidence was in conflict as to various facts, and the question of appel-

lants' negligence was for the jury to determine. It cannot be doubted that the record discloses substantial evidence in support of the verdict. No prejudicial error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 198

**COMUNALE et al. v. TRADERS &
GENERAL INS. CO. et al.**

Civ. 19101.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1953.

As Corrected on Denial of Rehearing

March 6, 1953.

Hearing Denied April 15, 1953.

Action by insureds against insurer to recover for insurer's alleged breach of terms of an automobile policy, in refusing to defend personal injury suit brought against insureds as result of an accident involving a hired truck, or to pay any expense of defense, or to pay judgment rendered against insureds. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered judgment for insureds, and insurer appealed. The District Court of Appeal, McComb, J., held that the policy which contained clause that insurance for bodily injury liability applied with respect to use of any other automobile by or in behalf of named insured or spouse, covered accident involving hired truck, where truck was neither hired as part of a frequent use of hired automobiles nor furnished for insureds' regular use, within clause limiting liability with respect to use of other automobiles.

Affirmed.

1. Appeal and Error ⇨173(14)

Interpretation placed upon clause of insurance policy by insurer in trial of action by insureds for breach of policy terms was binding upon insurer on its appeal.

2. Insurance ⇨435.2

Where automobile policy provided that the agreement did not apply to any automobile "hired as part of a frequent use of hired automobiles by, or furnished for

regular use to the named insured," the general clause "furnished for regular use", which, standing alone, would exclude from coverage all hired automobiles, was qualified by the particular clause "hired as part of a frequent use of automobiles", and the provision for limitation of liability, governed by the particular clause, did not operate to relieve insurer from liability merely because vehicle involved in accident had been hired by insured. Civ.Code, § 3534.

3. Insurance ⇨668(10)

In action by insureds, against insurer to recover for insurer's alleged breach of terms of automobile policy, in refusing to defend suit brought against insureds for personal injuries arising out of accident involving hired truck, or to satisfy judgment rendered against insureds therein, whether the use of the truck was "frequent" within policy provision excluding coverage from hired automobiles hired as part of a frequent use of hired automobiles, was question for determination of trier of facts. Insurance Code, § 11580 (b) (2).

4. Appeal and Error ⇨1010(1)

Findings of trial court, sitting without jury, are binding upon Appellate Court, if supported by substantial evidence.

5. Insurance ⇨665(4)

Evidence that insured had used hired truck, other than on the occasion of accident involving such truck, at the most for 10 days to drive to and from work, a distance of approximately 10 miles on each occasion, sustained finding that insured's use of hired truck was not "frequent", within provision of automobile policy excluding coverage from automobiles hired as part of a frequent use of hired automobiles.

6. Insurance ⇨146(3)

Where language is susceptible of two constructions, it should be construed most strongly in favor of the insured.

7. Insurance ⇨665(4)

Evidence which disclosed that truck involved in accident had been used by in-

sured solely for purpose of driving to and from his work, and that the only occasion on which insured had used truck other than for this purpose was on night of accident, sustained finding that truck was not furnished for regular use, within provision of automobile policy excluding from coverage an automobile so furnished the insured.

8. Insurance ⇨435.2

Automobile policy which contained provision that insurance was applicable with respect to use of any other automobile by or in behalf of named insured or spouse, covered accident involving hired truck, where truck was not hired by insured as a part of a frequent use of hired automobiles or furnished to insured for regular use, within clause limiting liability for use of other automobiles.

9. Insurance ⇨559

Insurer, by denying liability under policy which it had issued, thereby waived any claim that the notice provisions of the policy had not been complied with.

W. P. Smith, Los Angeles, for appellant.

Newlin, Holley, Tackabury & Johnston, Frank R. Johnston, Los Angeles, for respondents.

McCOMB, Justice.

Defendant appeals from a judgment in favor of plaintiffs in an action to recover for breach of the terms of an insurance policy after trial before the court without a jury.

Facts: In July of 1947, Percy Sloan purchased from defendants through its agent, Frank Sloan (who is not related to the other Sloans involved herein), a policy of automobile insurance. The policy was written in the name of Percy Sloan's wife, Felie Sloan, as the insured, but the same coverage existed in favor of Percy Sloan as that of his wife.

At the time of the issuance of the policy Percy Sloan owned a 1941 Plymouth. The policy was for a one-year term from July 9, 1947 through July 9, 1948. In addition to specifically providing coverage for the

Plymouth the policy contained a clause, hereinafter set forth, with reference to defendant's liability to the insured, for injuries resulting while using other automobiles.

Percy Sloan paid Frank Sloan the premiums required according to the terms of the policy.

On Saturday, March 27, 1948, Percy Sloan, while en route to his aunt's for a social visit and while driving his brother John's truck, struck plaintiffs who were crossing Olympic Boulevard on foot. Percy Sloan was driving his brother John's truck under the following circumstances:

John had purchased the truck to establish another route in his business of picking up and delivering clothes for dry cleaning. Percy asked John if he might use the truck while John was not using it to go to and from work, and said he would pay John what it would cost Percy to pay for public transportation between his home and place of business. One payment of \$3.00 was made by Percy to John. Percy drove the truck to and from work, a distance of about five miles, each day for 10 days before the date of the accident and did not drive it at all after that date. The only occasion for which he used it other than traveling to and from his place of business was on the evening of the accident in question.

On the Monday following the accident, March 29, 1948, Percy Sloan called Frank Sloan on the telephone and advised him of the accident and asked if he were covered. He was told that inasmuch as he was driving someone else's truck he was not covered.

In November of 1948, the Comunales (plaintiffs herein) filed suit against Percy Sloan. On or about February 3, 1950, Mr. Leppek, attorney for Percy Sloan, tendered the defense of the action to defendant herein. On May 18, 1950, defendant advised Mr. Leppek that there was no coverage for the accident in question.

Anthony J. Comunale recovered a judgment in the amount of \$25,000 against Percy Sloan and plaintiff Carmela Comunale recovered a judgment in the amount of \$1,250 against him. Both judgments have be-

come final and no part of either has been satisfied.

Plaintiffs herein brought the instant action under the provisions of Section 11580 (b) (2) of the Insurance Code and Clause II, Condition 6 of the policy issued by defendant.

Questions: First: Did Clause V of the policy of insurance issued by defendant limit its liability so as to relieve it from liability for the accident in the instant case?

No. Clause V of the policy reads in part as follows:

"V. Use of Other Automobiles:

"Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile classified as 'pleasure and business' applies (1) to the named insured, if an individual and the owner of such automobile, or if husband and wife either or both of whom own such an automobile, and (2) to the spouse of such individual if a resident of the same household, to the employer of such named insured or spouse, and to the parent or guardian of such named insured or spouse, if a minor, as insured, with respect to the use of any other automobile by or in behalf of such named insured or spouse.

"This insuring agreement does not apply:

"(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse."

In the trial court defendant contended that the proper interpretation of the words "hired as part of a frequent use of hired automobiles" appearing in clause (a) of the foregoing provisions should be construed as follows:

"The words 'frequent use' apply only to a hired automobile and have nothing to do with the following provision as to an automobile 'furnished for regular use.' There is an obvious reason for this difference. Hired automobiles are always available for

regular use at garages that rent them, so that the clause 'furnished for regular use,' if used alone, would exclude coverage from all hired automobiles. Since it was desired to cover the insured during an infrequent use of a hired automobile, it was necessary to insert a provision excluding coverage as to an automobile 'hired as a frequent use of hired automobiles.'"

[1,2] Since defendant placed the foregoing interpretation upon the clause in the trial court it is binding upon it on appeal, (*McPherson v. Great Western Milling Co.*, 44 Cal.App. 491, 494[4], 187 P. 80), and since defendant has taken the position that the general clause "furnished for regular use" standing alone would exclude coverage from all hired automobiles, the clause, "hired as part of a frequent use of hired automobiles" is a particular clause which is inconsistent with and qualified the broader expression. Thus the particular clause governs. Civil Code, section 3534 says, "Particular expressions qualify those which are general." (See also *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 151[3], 180 P.2d 888.)

Second: *Did Percy Sloan's use of his brother's truck constitute a "frequent use" thereof?*

[3,4] *No.* The question of whether or not the use was "frequent" was one of fact for determination of the trial court, whose findings supported by substantial evidence are binding upon an appellate court. (*Pacific Automobile Insurance Co. v. Lewis*, 56 Cal.App.2d 597, 601, 132 P.2d 846.)

[5] The evidence discloses in the instant case that Percy Sloan had used his brother's truck other than on the occasion of the accident at the most for 10 days to drive to and from work, a distance of approximately 10 miles on each occasion. This constitutes substantial evidence to sustain the trial court's finding that Percy Sloan's use of his brother's truck was not a "frequent use". Therefore, it cannot be held, as a matter of law, that such finding is not supported by evidence.

[6] This conclusion is supported by the rule relative to the construction of doubtful language in an insurance policy as

stated by Mr. Justice Vallee in *Pendell v. Westland Life Ins. Co.*, 95 Cal.App.2d 766, 769, 214 P.2d 392, 395, as follows: "Where the language is susceptible of two constructions, it should be construed most strongly in favor of the insured."

Third: *Was there substantial evidence to sustain the trial court's finding that the automobile Percy Sloan was driving at the time of the accident was not furnished for his regular use?*

[7] *Yes.* The evidence discloses that the truck had been used by Percy Sloan solely for the purpose of driving to and from his work and not for other purposes, and the only occasion on which he had used the truck other than for this purpose was on the night of the accident. This evidence sustains the trial court's finding. (*Pacific Automobile Insurance Co. v. Lewis*, 56 Cal.App.2d 597, 600 et seq., 132 P. 2d 846.)

[8] It thus appears clear that the policy issued by defendant covered the accident in question by the provisions in Clause V reading thus: "V. Use of Other Automobiles: Such insurance as is afforded by this policy for bodily injury liability * * * applies * * * with respect to the use of any other automobile by or in behalf of such named insured or spouse."

Fourth: *Did the insured fail to comply with the terms of the insurance policy requiring that written notice of an accident be furnished to the insurer or its authorized agent as soon as practical after the accident, by failing to give written notice to defendant until almost two years after the date of the accident?*

No. On May 18, 1950, defendant wrote a letter to the insured's attorney reading in part as follows:

"We appreciate your letter, but can only reiterate the previous position which we have taken that our policy did not cover the accident in question; and that, furthermore, our assured did not comply with the terms of the policy by giving us immediate notice of the accident out of which this litigation arises. We must, therefore, continue to respectfully decline to defend this accident, or to pay any expense of the

defense, or to pay any judgment in the event one is rendered against the defendant."

[9] The law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with. (Kennedy v. American Fidelity & Casualty Co., 97 Cal.App.2d 315, 316[1], 217 P.2d 457; Grant v. Sun Indemnity Co., 11 Cal.2d 438, 440[2], 80 P.2d 996.) This rule is here applicable.

In view of our conclusions other authorities and questions discussed by counsel are immaterial.

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



116 Cal.App.2d 242

PEOPLE v. CHAND,

Cr. 2355.

District Court of Appeal,
Third District, California.

Feb. 20, 1953.

Rehearing Denied March 7, 1953.

Hearing Denied March 19, 1953.

Defendant was convicted in the Superior Court of Sutter County, Coats, J., of second degree murder, and he appealed. The District Court of Appeal, Van Dyke, P. J., held that no prejudicial error was committed in admission and rejection of evidence.

Affirmed.

1. Stipulations ⇨14(7)

Where prosecution in murder prosecution offered in evidence transcript by reporter's notes of alleged dying declaration of deceased, and only objection made by counsel for defense was that transcript was irrelevant, incompetent, and immaterial, and not the best evidence, and no objection was made to admissibility of declaration of deceased as a dying declaration, and court sustained objection made, but counsel

for defense then stipulated that reporter could read declaration of deceased from transcript, no error could be predicated, on appeal, on admission of dying declaration.

2. Criminal Law ⇨1166½(6)

Statement by trial court to prospective jurors in murder prosecution that defendant was presumed to be innocent until proven guilty beyond a reasonable doubt, and that selected juror must start in presuming defendant innocent, but that it was not disqualification, to serve as a juror, that opinion had been formed because of public rumor, statements in public journals, circulars or other literature, provided that it appeared to court, on declaration of juror, that he could, notwithstanding, act impartially and fairly, was not prejudicially erroneous.

3. Criminal Law ⇨655(4)

Where information charged first-degree murder, fact that prosecutor stated to prospective jurors that he would not ask for the death penalty, did not change issues presented by information, and issue of first-degree murder remained in case, and court did not err in pointing out to prospective jurors that charge against defendant was still first-degree murder, which included death penalty, and that prospective jurors could sit only if they believe in the death penalty. Pen.Code, § 1074, subd. 8.

4. Homicide ⇨157(5)

Where third party who was a close personal friend of deceased, and who was involved in family dispute between defendant and his wife, was not present when defendant fatally shot deceased, and there was nothing to indicate that defendant suspected presence of third party, court in murder prosecution properly refused to permit defendant to introduce evidence as to alleged improper activities of third party and defendant's fear of third party, which induced defendant to apply for and receive permit to carry gun with which he killed deceased.

5. Criminal Law ⇨1171(1)

Defendant in murder prosecution was not prejudiced because prosecution called defendant's estranged wife, who jury knew

was defendant's wife, as a witness and thereby compelled defendant to assert wife's disqualification as a witness against him.

6. Witnesses ⇨372(2)

Where it was already in evidence in murder prosecution that widow of deceased had lost deceased by hand of defendant, that she had been discharged as defendant's employee, and that she was plaintiff in a civil suit against defendant to recover \$25,000 for loss of deceased, jury was fully aware that widow was a biased and prejudiced witness, who might well be bitter against defendant, and therefore court did not abuse its discretion in refusing to permit defendant on cross-examination to introduce evidence as to other reasons why widow would be prejudiced against him.

7. Homicide ⇨169(2)

Where defendant in murder prosecution was permitted to introduce in evidence his permit for carrying gun with which he killed deceased, trial court did not abuse its discretion in refusing to permit defendant to testify that permit was obtained by him after he had received telephone call from close personal friend of deceased.

8. Homicide ⇨308(3)

In murder prosecution, evidence justified instruction with respect to first-degree murder.

Goldstein, Barceloux & Goldstein, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Dep. Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant, Karam Chand, was convicted by a jury of the crime of second-degree murder in the killing of Salomon Rios in Sutter County. He appeals from the judgment and from the order denying a new trial.

Chand is a Hindu who had married a Mexican woman by whom he had four children, the eldest being 17 years of age. He was living on a farm owned by himself and his wife and on this property he also

conducted a store. He and his wife, because of marital difficulties, had separated, but both were living on the farm, Chand with the children in the farmhouse and Cirila, his wife, in a small detached dwelling. Cirila's sister Susie and her husband, the decedent Salomon Rios, were visiting her and had spent the afternoon there. About 7 o'clock in the evening they started to drive away. Their car became mired in the mud and they were unable to leave. They asked one Harry Tabata, a Japanese employee of Chand, to help them and he went to look at the situation. While he, Salomon, Susie and Cirila were grouped about the car, Chand came walking toward them. He had been in the house a considerable time and on entering had early learned of the presence of Salomon and Susie on the property despite his having frequently told Salomon not to come there. He took no action, however, but ate dinner with his family, then retired to his living room when another employee, Jack Yokum, came in and told him that there was a car stuck outside. He put on his jacket in which there was a small flashlight and a loaded automatic pistol and walked outside through the yard and to the group around the car. From that point on the testimony as to what occurred is much in conflict. Susie testified that she saw Chand approach the group, heard him curse Salomon and declare his intention to kill him, saw him walk directly up to Salomon, shine the light in his eyes and, at point-blank range, fire two bullets into his chest. She said Salomon turned and ran and Chand pursued him, declaring his intention to "finish" him "now". Salomon disappeared in the darkness and Susie sought him, finding him close to Tabata's house some little distance from where his car was mired. She then phoned for an ambulance and returning to the scene heard Cirila talking to Chand, telling him to forget everything and call a doctor, and she heard Chand reply "Who care", whereupon he walked to the house. Susie said that later on she said to him, "You know what you do, Karam, you kill my husband" and he said "Who care, you got another husband around." The dying declaration of Salomon was admitted in

evidence and his story of the shooting corresponded closely with that of Susie.

The defense did not deny that Chand killed Salomon, but sought to prove that the killing was justified. Chand testified that he merely left his house and went into the yard to see if he could help about the mired car; that he carried the flashlight in his hand, leaving the pistol in his pocket; that he reached the group around the car; that he walked directly toward Salomon, saying, "What are you doing here"; that Susie said something in Spanish he could not understand and then Salomon, saying, "I am going to fix you up now, Karam", grasped Chand's throat, stopping his breathing and causing blindness; that he tried to break Salomon's grasp, but could not, then reached for his gun and shot; that he fired to save his own life, which he was in fear of losing; that Salomon did not release his hold after the first shot and that he, Chand, fired again; that he did not know if he had hit Salomon, but Salomon released his hold after the second shot was fired and went away; that as soon as he got his breath he, Chand, called for help and his four children came out of the house and ran to him; that he said nothing to Susie at any time and had never said during the entire affair that he was going to finish Salomon; that he returned to his house to call the sheriff, but on taking down the telephone heard someone on an extension line calling that officer; that he ordered a doctor called for Salomon.

Salomon lived about 36 hours after the shooting. His attending physician testified that he died from a bullet wound which had caused a paralyzed bowel, a paralytic ileus.

Appellant makes many charges of error which he claims were committed by the trial court. We will first examine the assignment having to do with the admission into evidence of the dying statement of the deceased. Despite the great stress placed upon this point by the appellant we must upon the record here hold that no objection to the introduction of that statement was made. Generally when there is objection to the admissibility of a dying declaration or extrajudicial statements of

an accused the jury is excused while the court takes such evidence as the parties wish to introduce upon that issue. When the court has ruled upon the matter the jury is returned and the case proceeds. This was not done. During the examination of Sheriff Carpenter as a witness he testified he had seen Rios in the hospital on two occasions and on one had taken a statement from him; that there were present Hollan Jones, the reporter, and the district attorney; that the statement purported to relate the facts concerning the shooting of Rios by Chand; that Rios had spoken about dying and that Rios had told the witness he, Rios, was dying; that thereupon the statement was taken. At this point the prosecution had marked for identification as the People's exhibit a transcription of what purported to be the statement of Rios. Copies were given to counsel for the defense and one was handed to the court. The prosecution asked the court to examine the document and the court replied after some time that he had examined the first part of it which was sufficient for the moment. The witness was then turned over to the defense counsel for cross-examination and was examined about many things concerning which he had testified, but no questions were asked concerning the statement of Rios. Thereupon the reporter who took the statement and made the transcription of it was sworn and testified that he did take the statement in shorthand in question and answer form; that he had taken down all the proceedings that took place when the questions were being propounded and the answers given and had made a transcription thereof. He was then shown the document marked for identification and said it was the transcript he had prepared. At that time the prosecution offered in evidence the transcript itself and the following occurred:

By Counsel for Defense: "We object to it as being irrelevant, incompetent and immaterial and not the best evidence.

"The Court: Of course it is not the best evidence. The question is, what was the—it isn't the exhibit—isn't really an exhibit to go into evidence,

the real question is what questions were asked and what answers were made at that time.

"[The Prosecutor]: That is correct, Your Honor, I thought it would simplify matters if I gave counsel a copy of it.

"The Court: He objected, and it is not the best evidence.

"[The Prosecutor]: Very well, Mr. Reporter, will you read from your original notes the questions that were asked by Mr. Rios, by Stevenson and Mr. Carpenter on or about one a. m. on December 29th, 1951, and the answers that he gave thereto?

"[Counsel for Defense]: Mr. Jones [the Reporter] is trying to do a double handed job there of reporting himself, and to have him read his notes would be an awfully hard job. We have full confidence in Mr. Jones and we will stipulate that he may read it from his transcript.

"The Court: Very well, Mr. Reporter."

[1] Thereupon, and without there having been interposed any further objection, the reporter read the transcription of his notes into the record. We cannot predicate error upon this record even if we assume, arguendo, that the dying statement could not have been qualified as such on the point of its admissibility. There was nothing here to tell the trial court that either side desired to make an issue of admissibility. The objection made was clearly to the use of the transcription as evidence and that objection was sustained. No objection was made to the admissibility of the statement itself as a dying statement of Rios. The customary procedure of excusing the jury while admissibility was being tested and ruled on was not invoked and the dying statement was read into evidence without objection and without incident.

Appellant contends the trial court committed error in its actions, conduct and statements during the selection of the jury. When the case was called and the jury box had been filled with prospective jurors the court addressed the panel and informed

them of the name of the accused and that the charge against him was murder in that on the charged date he did wilfully, unlawfully and feloniously and with malice aforethought murder Salomon Rios. The court stated that the defendant was presumed to be innocent until proven guilty beyond a reasonable doubt; that the information bringing him to trial did not constitute evidence, and that a selected juror must start in presuming the defendant innocent. The court stated that it was no disqualification to serve as a juror that an opinion had been formed on questions to be tried founded upon public rumor, statements in public journals, circulars or other literature of common notoriety providing it appeared to the court, on the declaration of the juror, that he could, notwithstanding these matters, act impartially and fairly in the cause; that even though a person had read about the case in the newspapers, if he believed he could govern himself by the law and the evidence he would not be disqualified from serving, the reason being that people read newspapers and if all who did so were disqualified from acting in a cause as to which they had read newspapers no one in the county could qualify. The court further stated that the crime charged was one which under certain circumstances was punishable by death and that one reason for challenging was bias in entertaining such conscientious opinions as would preclude the infliction of the death penalty. Thereupon voir dire proceeded and at the close of the first day the court stated that questions of counsel had indicated some matters which he believed required conference before the jury was finally selected. When the panel was called in on the second day the trial judge stated that it was necessary for him to state more particularly the nature of the offense charged. Thereupon he defined murder in the terms of Penal Code, sections 187 and 189, and defined manslaughter in accordance with section 192. The court stated that the two degrees of murder and also manslaughter were all included in the information and said that a person guilty of murder in the first degree should suffer death or imprisonment in the discretion of the jury trying the cause. The court then said, "During the examination

yesterday, the District Attorney stated that he was not going to ask for the death penalty," and that then counsel for the defendant and for the People "in effect entered into a stipulation to that effect." "However," said the court, "it is not for counsel to stipulate whether or not the jury shall return any specific verdict, so long as the charge stands before the Jury. That charge still stands before the Jury, in which the Defendant is accused of murder in the first degree, and under the law a Juror who entertains conscientious opinions which would preclude him from rendering a verdict finding the Defendant guilty of that offense shall not be permitted to serve or be compelled to serve as a Juror irrespective of any stipulation of counsel."

[2] Appellant first complains that the trial court in effect overstated the lack of disqualification for opinions formed from rumor and reading because many people thus get fixed opinions which do disqualify. Further, appellant says that the court failed to tell the jury that if one had such a fixed opinion which could not be set aside or which might influence the jury adversely that person would be disqualified. The whole statement of the trial court to the jury, as we have related it, appears to have been fair and made only in an effort to be of aid in the selection of a properly qualified jury. If there be any imperfection it was not prejudicial nor was objection made thereto nor was there any request for a further statement than was made. We find no error in these matters.

[3] Appellant next alleges that the court was guilty of misconduct "when throughout the trial, it injected into the case the crime of murder in the first degree, since that degree of crime, as appears from the record, was wholly absent from the case and that issue never should have been submitted to the jury trying the case." Appellant states that the prosecutor "jointly entered into a stipulation in which the District Attorney definitely stated to the prospective jurors and then later to the jury selected to try the case, that he would not ask for the death penalty"; and that the court pointed out to the jurors on its own

initiative that the charge against the appellant was still murder in the first degree which included the death penalty. Thereby, says the appellant, the judge forced prospective jurors to sit "only if they believed in the enforcement of the death penalty" and that "by that action many good people who entertained conscientious scruples against the death penalty were barred from service as jurors." It was proper for the court to take the action it did. The statement of the prosecutor, even if it rose to the dignity of a stipulation that he would not ask the death penalty, did not remove the charge of first-degree murder from the information nor from the issues to be determined by the jury. If counsel for the defendant labored under that misapprehension, and there is nothing in the record to say that they did, it was incumbent upon them to clear the matter up when the court's statements were made. This they did not do and their inaction was probably due to their thorough understanding that first-degree murder was still an issue. One counsel for the accused, when the court had concluded the foregoing remarks, did ask the court to tell the jurors that in what the court had said there was no intimation of any belief on the part of the court in the way of prejudging the case, and to this request the court quite fully and fairly responded. It should be said that counsel for the defense, men of skill and experience, were substituted out of the case when the motion for new trial had been denied. Other counsel were retained to prosecute the appeal. Appellant refers to cases holding that parties to criminal as well as civil actions may dispense with proof of facts through stipulation of counsel, citing, for instance, *People v. Hooper*, 16 Cal.App.2d 704, 707, 61 P.2d 370. The so-called stipulation here was not concerning any proof of any fact. It was but the statement by the prosecution that the death penalty would not be asked. It was nothing more. The trial court was acting with complete propriety when it told the jury what was the truth, that is, that the statement or stipulation that the death penalty would not be asked did not change the issues presented by the information and the

plea thereto. These issues could only be changed by amending the information, which was not done. The record is clear that all parties realized that the issue of murder in the first degree was in the case. Everyone knew that the prosecution had said that it would not ask for the death penalty and it did not. But the charge still stood as murder in the first degree along with included offenses and if the jury, persuaded thereto by evidence of a premeditated and malicious killing, had returned a verdict of murder in the first degree and fixed the penalty at death it would have been acting within its province and the court would have been compelled to receive the verdict and impose the appropriate sentence. So long as the charge includes murder in the first degree it is for the jury and not for the prosecutor to say whether a verdict of murder in that degree shall be returned and if so whether or not the death penalty shall be decreed. It was therefore proper for the court, as the law requires, to see that a jury was selected competent and qualified to pass upon the charge contained in the information and upon the punishment which the law permits therefor. "If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty", sec. 1074, subd. 8, Penal Code, constitutes ground of challenge to a prospective juror for implied bias, and in such a case such a person "must neither be permitted nor compelled to serve as a juror." Code section, supra.

[4] Appellant asserts that the trial court "persistently and with methodical precision committed grave prejudicial error in its rulings on the admission and rejection of evidence in the course of the trial". In support of this general charge appellant sets forth in his brief a great deal of the evidence, including many rulings of the trial court and says that a reading thereof by an unprejudiced mind indicates that the trial court at no time "followed the liberal case law of California". We do not agree. We have read the record and are confident that this gen-

eral charge is not sustained thereby. Appellant next proceeds to particularize by referring to what he calls "some of the most flagrant rulings." It appeared that a Mexican known as Mora, a close personal friend of deceased, was involved in the family dispute between Chand and his wife, Cirila. Appellant attempted to prove that by reason of the improper activities of Mora and his fear of him he had applied for and received a permit to carry the gun with which he killed Rios. He also attempted to prove why he feared Mora, and to prove many other matters having to do with Mora, with his relations with the accused's estranged wife, with the machinations of Mora, Cirila Chand and Salomon and Susie Rios in connection therewith, and like matters. All of this evidence was properly excluded. Mora was not present on the property when Chand killed Rios nor was there anything to indicate; nor did Chand testify, that he suspected his presence there. Knowing that Rios was there with his wife, Susie, Chand went from the safety of his living room, where he was surrounded by his children, into the darkness and directly up to Rios where, according to his story, the fatal altercation was initiated by Rios. If he told the truth defendant might well have been found to have been justified in killing Rios. If Rios and Susie told the truth accused might well have been found guilty of premeditated and malicious murder. The fundamental issue was to which story was the truth and the jury would not have been aided in determining this by any recital as to the domestic difficulties of Chand or the connection of Mora therewith. Such matters would only have drawn a red herring across the path of those called upon to resolve what after all was a simple issue.

[5] Appellant complains of the conduct of the prosecutor in calling his wife, Cirila, to the stand. He states, what is true, that no one had any doubt the witness was the wife of the accused and therefore he charges that the purpose of placing her on the stand was merely to compel the defendant to prejudice himself in the eyes of the jury by asserting her disqualification

as a witness against him. Prejudice cannot be predicated upon these grounds. As was stated in *People v. Klor*, 32 Cal.2d 658, 663, 197 P.2d 705, 708: "Recent authority is to the effect that if the prosecution desires to use the husband or wife of the defendant as a witness the proper procedure is to offer the spouse as a witness, subject to the claim of privilege by the defendant."

[6] When Susie Rios was cross-examined it was sought to elicit from her many matters as tending to show her bias and prejudice in the case. These had to do again with the activities of Mora; with his relations with Mrs. Chand; with the claim that Salomon and Susie Rios, Mora and Cirila Chand had all gone to Mexico while Chand was absent on a trip to India; with the claim that Chand had informed against Mora and Salomon and Susie Rios as being illegally in the United States; and with the claim that on his return from India Chand had discharged Susie as an employee for counseling Cirila against him and urging her to leave him and her children and run away with Mora. Undoubtedly these matters would have tended to establish bias and prejudice on Susie's part against Chand. But on such matters the trial court must often exercise a wise discretion as to how far into collateral and disconnected affairs an inquiry for the purpose of establishing bias and prejudice may go. It was already in evidence that Susie had lost her husband by the hand of Chand; that she had been discharged as his employee and that she was plaintiff in a suit against Chand wherein she sought to recover \$25,000 from him as damages suffered by the loss of her husband. It is hardly to be supposed that the jury were unaware they were listening to a biased and prejudiced witness who might well be quite bitter against the accused. "It has been said frequently that the conduct of the cross-examination of a witness is within the discretion of the trial court, and that the appellate court will not interfere except upon a showing that such discretion has been abused". Ghig-

lione v. American Trust Co., 49 Cal.App. 2d 633, 639, 122 P.2d 301, 304. We find no error in this assignment. In line with the foregoing appellant contends he was wrongfully prevented from showing on the cross-examination of Susie Rios the following additional matters: 1. That Mora had been given groceries without charge by Susie Rios while she was working in appellant's store; 2. That Susie had told Cirila she had better get some money from Chand if she was going to leave him; 3. That Susie had participated in a property settlement which was being made between Cirila and Chand; 4. That she had questioned an inspector of immigration as to who had informed against her in respect of her entry into the United States. It was the position of the trial court that these collateral matters could not properly be gone into merely to show bias and prejudice on the part of the witness since enough had been shown to make it appear that she was affected by such bias and prejudice. We think the court was well within the bounds of discretion in limiting the cross-examination as it did.

[7] Appellant contends that his own examination while a witness in his own behalf was unduly limited by the trial court. The court refused an offer to show the particulars whereunder he received from the sheriff of the county leave to carry a concealed weapon. The fact he had such a permit was shown and the permit was introduced in evidence, but appellant's counsel sought to show further that the permit was sought by accused after having received a telephone call from Mora. These rulings likewise were within the proper discretion of the trial court, and this is particularly true in view of the fact that it was Rios who was killed and not Mora.

[8] Appellant contends the trial court committed error in its instructions to the jury respecting murder in the first degree with reference to the death penalty when as appellant charges "the evidence in the case, as a matter of law, failed to justify any such instructions." Herein appellant

says it is his position that the record of the case as a whole failed to establish one iota of evidence of murder in the first degree, including the death penalty. We have hereinbefore stated in short summary the evidence given. We think it clear that appellant errs in his conclusion that the evidence would not have legally supported a first-degree verdict with infliction of the death penalty. From that evidence the jury could have inferred that under the impulsion of the wrongs he believed Rios had inflicted on him in respect of his marital relations appellant, knowing Rios was on the place in defiance of his orders sat in his dwelling brooding upon these matters until he determined to go out and take the life of Rios; that pursuant to that resolve he went out with flashlight and gun and proceeded straight to the breast of decedent into which he sent two bullets; and that fearing when Rios still managed to run that he had not inflicted death upon him he pursued him with the intention of finishing the task he had undertaken. Of course we do not say such was the fact for that is a matter beyond the scope of review. But clearly the jury could have so viewed the entire situation for here there could have been found premeditation, deliberation and malice eventuating in the purposed killing of the deceased. The court, therefore, was not only justified in instructing the jury fully on the subject of homicide but would have failed in its duty had it not done so. In this connection appellant states that the trial court failed to properly instruct the jury on what constitutes murder in the second degree and manslaughter. It is not clear as to what specific lack in the instructions this assignment is directed. We have examined the instructions given and find that they correctly and adequately state the law on all degrees of murder and on manslaughter. It would serve no useful purpose to discuss the instructions in detail.

The judgment and the order appealed from are affirmed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

DAVIS v. DAVIS.*

Civ. 4603.

District Court of Appeal,
Fourth District, California.

Feb. 20, 1953.

Rehearing Denied March 19, 1953.

Hearing Granted April 20, 1953.

Proceeding by father of a minor child to secure child's custody by modification of a prior custody award. The Superior Court, Kern County, W. L. Bradshaw, J., entered an order changing the custody of the child from its mother to the father, and the mother appealed. The District Court of Appeal, Barnard, P. J., held that trial court's order awarding custody of minor child to father was an abuse of discretion, where father failed to meet burden of proving such a change in conditions as would justify modification of the custody award.

Reversed.

1. Divorce ⇨303(3), 312.6(6)

An application for modification of custody award in divorce proceeding is addressed to trial court's sound legal discretion, and order of modification will not be disturbed on appeal unless record presents clear case of abuse of that discretion.

2. Divorce ⇨303(3)

The discretion of trial judge in modifying custody award in divorce proceeding is not an arbitrary one, but is controlled by fixed legal principles and the evidence.

3. Divorce ⇨303(2, 3)

Where court has originally determined that mother should have custody of her minor child in divorce proceeding, some change in conditions or some unusual circumstance must be shown to justify change of that order, and burden is on one seeking modification of existing custody order to prove that conditions have so changed that modification is justified. Civ.Code, § 138.

4. Divorce ⇨303(3)

In divorce proceeding in which mother had been awarded custody of minor child with right of visitation to child's father, trial court's subsequent order awarding custody of minor child to father was abuse of discretion, where father seeking child's

* Subsequent opinion 261 P.2d 729.

custody failed to meet burden of proving such a change in conditions as would justify modification of award. Civ. Code, § 138.

Siemon & Siemon, Bakersfield, for appellant.

Kenneth N. Hastin, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order changing the custody of a child from its mother to its father.

In this action the appellant was given a divorce on her cross-complaint. The interlocutory decree, dated April 3, 1947, and the final decree dated April 7, 1948, awarded her the custody of the daughter of the parties. On March 14, 1950, a hearing was had on respondent's application for a change with respect to the right of visitation, and for a change of custody. An order was made modifying the decree with respect to the right of visitation, and continuing the other matter for further hearing on June 20, 1950. On that day, evidence was received and a further modification was made with respect to visitation; and the matter was again continued to December 19, 1950. On that day, the matter was continued indefinitely. On December 28, 1951, at the request of the respondent the appellant was ordered to show cause why she should not be found in contempt for disobeying court orders, and why the custody order should not be modified by awarding such custody to the respondent. After hearing this matter on January 11, 1952, the court, without making any findings or reciting any facts on which it was based, entered an order awarding custody of the minor to the respondent. This appeal from that order is presented on a clerk's transcript and on a settled statement.

The respondent testified that in October, 1951, he went to appellant's home in Taft on a day designated by the court's order to pick up their daughter, then four years old; that the appellant was not there and the daughter and appellant's three other children were in the care of a Mrs. Ward; that

Mrs. Ward told him the child was ill and had a high temperature and stated that she did not know what to do as she did not know how to get in touch with the appellant; that he told Mrs. Ward he would take the child to a doctor and promised to call her and inform her of the child's condition; that he brought the child to Bakersfield and took her to a doctor for treatment; that the doctor said she had a temperature of 102° and diagnosed the case as bronchitis and intestinal flu; that the doctor treated the child and gave her penicillin shots every other day; that he called Mrs. Ward and told her the child was under the care of the doctor; that he kept the child for four or five weeks and during this period the appellant made no inquiry of him concerning the child; and that during the last week of the period he himself called the appellant and talked to her. He also testified that on the Saturday before Christmas he went to Taft to pick the child up but neither the child nor the appellant was at appellant's home. He later admitted that the preceding Saturday was the regular day for him to pick the child up, and that on that occasion he had not taken her because she did not want to go with him as she wanted to remain where the others were decorating a Christmas tree.

It appears from the evidence that after the appellant was divorced from the respondent she had married a man named White, and that they were being divorced. She testified that on the occasion in October, 1951, she suddenly got an opportunity to ride to Nevada with her friends Mr. and Mrs. Petty; that she hired a Mrs. Ward to stay with the children and went to Nevada to visit the man she was planning to marry when her interlocutory decree became final; that she picked Mrs. Ward from an ad in the newspaper and contacted her early in the morning of the day she left for Nevada; that she went to Nevada and returned with Mr. and Mrs. Petty; that she was not working at the present time except doing extra work as a waitress at the Taft Hotel; that during the summer she had worked as a waitress at the Taft Hotel and other places; that during March of 1950 she was in Long Beach working as a waitress a

portion of the time, and that during this time the children were left with her mother; that she was away seven days on the trip to Nevada; that after she returned she talked to the respondent on the telephone and he told her he was keeping the child under the doctor's care; that she had several letters from the respondent regarding the child's condition and talked to him several times but did not go to his place to see the child because she was afraid they would get into an argument; that finally the respondent told her the child had been exposed to mumps and she decided the child must be well enough to come home; that she went to Bakersfield but could not locate either the respondent or the child; that she came back the next day and found the child with a neighbor and took her home; that she devoted her full time to the care of the children and preferred to work at night so she could spend the days with the children; and that she had allowed the respondent to take the child on nearly every weekend since October in an attempt to get along with him and avoid hard feelings. The respondent denied having written any letters to the appellant regarding the child's condition, or that he had talked with her on the telephone more than once. There is also a conflict as to whether the appellant returned from Nevada with the Pettys or came on the train, but she did come promptly when she received a telephone call from Mrs. Ward.

Mrs. Ward testified that she had had two years' nursing training and that she worked as a practical nurse; that she was employed by the appellant to stay with these children while the appellant was gone for seven days on a trip to Nevada; that this child had a cold when the appellant left; that the appellant gave her written instructions as to what to do about the children, gave her the names of two doctors to call should they become ill, and left a phone number in Wells, Nevada, if anything should happen; that the child was slightly sick on Friday but was apparently all right that evening; that she did not call a doctor because she did not think that was necessary, and she would not have done so had the child been her own; that the child

had a high temperature on Saturday when the respondent came, and she asked him to take the child because she did not know what to do; that she tried to call the appellant at the number in Wells, Nevada, but no one there knew her by name; that she finally got the appellant by using the name of her intended husband and told her what had occurred; that the appellant stated she would return immediately by train and would arrive late Sunday afternoon; and that the appellant arrived on Monday, saying that her train was late and she had missed a bus.

Mrs. Petty testified that the appellant was a good mother to her children, gave them good care and affection and maintained a good home; that the appellant accompanied them to Nevada and returned with them; and that the appellant had stayed with them in Reno, except for one day when she went to Wells, Nevada.

It also appears that at the prior hearing on June 20, 1950, before the same judge, the respondent testified that for a period of over a year and a half the appellant had refused to let him see the child; and that he had tried numerous times to contact the appellant but was told she was out of town. The appellant admitted that she had not let the respondent visit the child because it upset her family routine, and because he had failed to make the required support payments. The respondent then testified that he had made support payments regularly until he could no longer keep in contact with the appellant, and further stated that he was ready and willing to continue payments. The mother of the respondent then testified that she lived with her son, that they had a three-bedroom apartment, and that she was able and willing to care for the child while the respondent was working.

[1-3] An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court and such an order will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion. *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719. This discretion is not an arbitrary one and is controlled by fixed legal principles and the

evidence produced. Section 138 of the Civil Code provides that neither parent is entitled to the custody of a minor child as a matter of right, and that where other things are equal a child of tender years should be given to the mother. It is well settled that where the court has originally determined that the mother should have such custody some change in conditions or some unusual circumstances must be shown to justify a change in that order, and the burden is on the one seeking the modification of an existing custody order to prove that conditions have so changed that a modification is justified. *Prouty v. Prouty*, 16 Cal.2d 190, 105 P.2d 295; *Moon v. Moon*, 62 Cal.App.2d 185, 144 P.2d 596; *Juri v. Juri*, 69 Cal.App.2d 773, 160 P.2d 73.

[4] At the prior hearings the controversy over the matter of visitation seems to have been adequately disposed of by the modifications of the decree then ordered in that connection. At the final hearing there was no evidence sufficient to show any violation of the amended orders in that respect, and the court made no findings or order in that connection. There was no sufficient showing of any change of conditions, and it would seem that the order appealed from must have been based on the conclusion that the appellant was an unfit person to have such custody, or that the welfare of the child required such a change. There was no evidence which, under the authorities, would support a finding that the appellant was not a fit person to have the custody of the child, and the respondent makes no such contention. He does contend, however, that there is adequate evidence that the welfare of the child would be promoted by the change. In support of this contention it is argued that the evidence shows that the appellant was willing to make this trip to Nevada, leaving her children in the care of a woman she had not previously known; that the children were slightly ill when she left; that she did not remain in one place in Nevada, could not be reached there under her own name, and was finally found only by using the name of the man she was going to marry; that she had left the chil-

dren at previous times; that she had been married three times; that she showed a lack of concern over the health and welfare of the child by making no effort to inquire about her child's health for some four weeks after she returned; that the respondent's concern for the child was shown by his care for the child and nursing it back to health, and by his efforts to locate and advise the appellant of the child's condition; and that the evidence shows that the respondent had a good home for the child.

The only evidence in the record on the real issues involved is that concerning this seven-day trip to Nevada. There is nothing in that evidence which would support a finding that the appellant is unfit to have such custody, or that she was guilty of neglect which could reasonably be supposed to affect the welfare of the child. Such short absences occur in normal homes with the best of parents. Even in such homes children become suddenly ill. This case was not out of the ordinary in this respect, and the appellant took about as much precaution as could be done by the ordinary parent. She left the child with a qualified nurse, gave written instructions as to what should be done for the child, gave the names of two doctors who were to be called in case of illness, and left the only phone number which was available in order that she might be called in case of an emergency. While the evidence is conflicting with respect to her immediately getting in touch with the child when she returned her explanation is more or less reasonable under the circumstances, and the most that can be said is that, knowing the child was under a doctor's care, she entrusted it to the respondent for some four weeks. If her confidence in the respondent was not justified, it would seem that this would seriously reflect on the order appealed from. Having in mind the applicable rules of law, we are of the opinion that an abuse of discretion appears, and that there is no substantial evidence which would support this modification of the previously existing order of custody. *Sorrels v. Sorrels*, 105 Cal.App.2d 465, 234 P.2d 103. Under that order the appellant

had had custody of this young child for nearly five years. While there had been some controversy over the matter of visitation, when that matter was settled the respondent was content to let the issue as to a change in custody remain dormant for another year and a half. There is no evidence that the appellant had violated the visitation order during that period. Even the matter of the Nevada trip was not raised by the respondent until a few days after he had gone to take the child on the wrong weekend, and found that the appellant and the child were not at home. On the record before us, the respondent failed to meet the burden resting on him to prove such a change in conditions as would justify the order made.

The order appealed from is reversed.

GRIFFIN and MUSSELL, JJ., concur.



116 Cal.App.2d 219

PEOPLE v. CLARK et al.
Cr. 2370.

District Court of Appeal,
Third District, California.
Feb. 19, 1953.

Rehearing Denied March 6, 1953.

Hearing Denied March 19, 1953.

Defendants were convicted of burglary in the first degree. The Superior Court, Humboldt County, Christensen, Jr., J., entered judgment of conviction, and two of the three defendants appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law Ⓒ238

Evidence at preliminary hearing was sufficient to constitute reasonable or probable cause upon which to hold defendant for trial on burglary charge.

2. Criminal Law Ⓒ238

The evidence at a preliminary examination need not be such as would be sufficient to support a judgment of conviction.

3. Criminal Law Ⓒ240

"Sufficient cause" for commitment by magistrate under statute providing that defendant must be held where it appears that there is sufficient cause to believe defendant guilty, means no more than "reasonable or probable cause" as specified in statute relating to discharge on habeas corpus, which means such a state of facts as would lead a man of ordinary prudence to believe and conscientiously entertain a strong suspicion of accused's guilt. Pen.Code, §§ 872, 1487, subd. 7.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Reasonable or Probable Cause" and "Sufficient Cause".

4. Burglary Ⓒ41(6)

In prosecution for burglary, where defendant had same last name as codefendant, but their first and middle names were different, and question concerning sufficiency of their identification was not raised at trial, fact that defendant was referred to during trial by his first and sur-name only was not sufficient to make evidence produced at trial insufficient to sustain his conviction.

5. Burglary Ⓒ41(1)

Evidence was sufficient to sustain convictions of burglary in first degree. Pen. Code, § 31.

6. Criminal Law Ⓒ741(6)

Right to draw reasonable inferences from circumstantial evidence presented in criminal proceedings is wholly the function of jury.

7. Criminal Law Ⓒ1159(6)

Where jury's inferences drawn from circumstantial evidence presented in a criminal proceeding are reasonable, jury's conclusion with respect thereto will not be disturbed upon appeal.

8. Criminal Law Ⓒ829(9, 20)

In prosecution for burglary, refusal to give defendant's requested instructions that defendant's loaning of his automobile to another defendant without knowledge that it was to be used unlawfully would not make defendant principal in commission of crime by the other defendant and to instruct jury concerning presumption of innocence was not error in view of fact

that instructions given fairly and completely instructed on every element contained in the refused instructions.

give jury his conclusions as drawn therefrom.

9. Criminal Law ⚡829(1), 834(2)

The court is not compelled to instruct in precise language requested by defendant nor to give each and every instruction proposed by him, no matter how repetitious they might be, but is required only to instruct the jury fully and fairly on all the material elements of the case.

Chester Monette, Eureka, for Clark.

Lionel Browne, San Francisco, for Demchism.

Edmund G. Brown, Atty. Gen., and Gail A. Strader, Dep. Atty. Gen., for respondent.

PEEK, Justice.

10. Criminal Law ⚡824(7)

In prosecution for burglary, where defendant did implicate himself by his own testimony but did not plead guilty, and evidence was sufficient to sustain convictions of all defendants, but jury was instructed upon definition of an accomplice and necessity of corroboration of accomplice's testimony, failure to instruct jury, on court's own motion, that defendant was an accomplice as a matter of law was not error. Pen.Code, § 31.

This is an appeal by John Norman Clark and Joseph Demchism from a judgment of conviction of the crime of burglary. Appellants and three others were charged jointly with feloniously entering a warehouse in the city of Eureka on or about December 15, 1951. Prior to the trial of the case the information was dismissed as to defendant Murphy and upon the date set for trial the defendant Meier withdrew his plea of not guilty and entered a plea of guilty. Following their plea of not guilty the cause proceeded to trial against the remaining three defendants, namely, Ernest Albert Clark, John Norman Clark and Joseph Demchism. At the conclusion of the trial the jury returned verdicts of guilty of burglary in the first degree. Only the defendants John Norman Clark and Joseph Demchism have appealed (1) from the order of the court denying their motion to set aside the information, (2) from the order denying their motions for a new trial, and (3) from the judgments of conviction.

11. Criminal Law ⚡507(1)

Fact that defendant was jointly charged with other defendants of crime of burglary did not make him an "accomplice" of the other defendant. Pen. Code, § 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

12. Criminal Law ⚡730(8)

In prosecution for burglary, where, during course of district attorney's argument, objection was made to certain portions thereof, and court instructed jury that statements made by one defendant should not be considered as evidence against another in absence of a proper foundation, district attorney's comment relative to question of possession of gun by one defendant during course of burglary did not constitute prejudicial misconduct. Pen.Code, § 31.

A summary of the evidence, viewed as we must in the light most favorable to respondent, shows that on the night of December 14, 1951, a warehouse in the city of Eureka was entered and a quantity of liquor stored therein was taken from the building. Several cases of liquor were found stacked in the alley which adjoins the rear of the warehouse, and additional quantities were found in the trunk compartment of an automobile which was parked nearby.

13. Criminal Law ⚡720(8)

In prosecution for burglary, district attorney was privileged to draw reasonable inferences and deductions from the evidence in his argument to jury and to

The automobile belonged to appellant Clark. Clark did not personally participate in the act of entering the warehouse or in removing any of the liquor. His

alleged participation in the crime consisted in his aiding and abetting in the commission thereof and hence he was charged as a principal under the provisions of Section 31 of the Penal Code.

Two police officers testified that at approximately the hour of eleven o'clock on the evening of December 14, Demchism was observed talking with Clark in the latter's bar but when defendants saw the officers their conversation stopped. The actual burglary was alleged to have been committed between 1:00 and 1:30 o'clock the following morning. Officer Hescock testified that while he and officer Moulton were cruising in the vicinity of the warehouse he recognized Demchism standing near the parked car; that by the time they had turned around Demchism and Albert Clark had left; defendant Meier was placed under arrest. Officer Moulton testified that in the course of investigating the burglary and endeavoring to apprehend Demchism he returned to Clark's bar at approximately 1:30 o'clock. He asked Clark if Demchism had offered to sell any whiskey and that Clark had replied "Indirectly yes and no." The officer informed Clark that a car had been found at the scene of the crime but that Clark made no mention of the fact that he had loaned his car to Demchism. At approximately 2:30 o'clock A. M. the officer again saw Clark. At that time Clark was in a taxicab driving past the scene of the burglary. As the cab neared Clark's car it appeared to slow down and then to speed up. The officer called for it to stop and Clark then got out and walked back to his car. Clark stated to the officer that he had loaned his car to Demchism but that he did not know he was going to steal the whiskey.

The record relative to the degree of the offense shows some rather vague and meandering testimony by the defendant Meier. He first stated that earlier that evening while in a bar with the defendants Ernest Clark and Demchism that Demchism pulled back his coat and "showed this forty-five, I guess it was. I don't know. It was a big gun. It was brown with a brown handle and a thing kind of marked on it." He next testified that he saw what he

thought "was a gun" at the LaSalle Bar but that he did not actually see it at any other time. At another point in his testimony he stated that under Demchism's coat he had "seen a big bump but didn't know what it was. I thought it was a gun or something." When asked by the district attorney if he saw a bump where the gun had been, the witness replied, "Yes, sir", and in reply to a further question, if he saw a bump on Demchism while they were in the neighborhood of the warehouse, the witness replied, "Yes sir, I think I did." However, Meier's testimony was not the only evidence that Demchism had a gun. There also was testimony by John Clark that he saw a gun on Demchism earlier in the evening. The defendant Ernest Clark, in a statement given to police officers, stated that he too saw a gun on Demchism at the LaSalle Bar, and in answer to a question from an officer, if he saw a gun while they were taking the liquor from the warehouse, Clark said "He [Demchism] was trying to get rid of it when the police car came along." The following day a gun was found near the scene of the crime. Although it was not identified as the one seen on Demchism there was testimony that it was similar.

Appeal of John Norman Clark

[1] It is this appellant's first contention that he was held to answer in the Superior Court without reasonable or probable cause. The original transcript of the preliminary examination was introduced at the trial as an exhibit and is a part of the record before this court on appeal. From our examination thereof it appears to be substantially the same as the record at the trial and hence we conclude that the evidence introduced at the preliminary examination was sufficient to constitute reasonable or probable cause upon which to hold said defendant to answer in the Superior Court.

[2,3] The rule is too well established to warrant citation of authority that the evidence at a preliminary examination need not be such as would be sufficient to support a judgment of conviction.

As the court said in *Grissom v. Superior Court*, 105 Cal.App.2d 705, 707, 234 P.2d 147, 148:

"The term 'sufficient cause', as used in Section 872, means no more than 'reasonable or probable cause' as used in Section 1487(7). *People v. Nagle*, 25 Cal.2d 216, 222, 153 P.2d 344, 347; *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367; *Cleugh v. Strakosch*, 9 Cir., 109 F.2d 330; *In re Martinez*, 36 Cal. App.2d 687, 98 P.2d 528. "Reasonable or probable cause" means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of guilt of the accused.

* * *"

[4] It is this appellant's next contention that there was not sufficient evidence produced at the trial to sustain his conviction. His main argument in this regard is premised almost wholly upon the similarity of his name, John Norman Clark, to that of his codefendant Ernest Albert Clark. From the record it appears that at no time during the course of the trial was any question raised concerning the sufficiency of the identification of either one of the Clarks. Throughout the course of the trial this appellant was referred to, almost without exception, as John Clark—his middle name was not used. Such contention predicated merely upon the failure to so identify him by the use of his middle name is wholly without merit.

[5-7] Likewise we find no merit in this appellant's argument that he was convicted solely upon his own admissions. As previously summarized the record discloses ample evidence to sustain the conviction. The right to draw reasonable inference from the circumstantial evidence so presented was wholly a function of the jury and where such inferences as have been so drawn are reasonable the conclusion of the jury with respect thereto will not be disturbed on appeal. *People v. Rubio*, 75 Cal.App.2d 697, 171 P.2d 737.

Although the next question as stated in appellant's opening brief is, "Did the Court err in denying defendant's motion for a

new trial?" we find nothing in said brief relating to the question so raised.

His next contention is that the evidence did not show the crime to be burglary in the first degree. In support of such contention counsel has referred to only a very small portion of the testimony given by Meier. If, as appellant contends, the only evidence relating to possession of the gun was that given by Meier, then it might well be said that such evidence was insufficient. But as has been noted his was not the only testimony concerning the possession of a gun by Demchism.

In the recent case of *People v. Barclay*, 40 Cal.2d 146, 252 P.2d 321, 326, it was contended that there was no evidence to show that a deadly weapon had been used in the robbery other than by the testimony of an admitted accomplice, and hence such failure required the judgment to be modified by reducing the degree of the crime. The court noted that section 1111 of the Penal Code "requires only that the corroborative evidence tend 'to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies.'" (Citing cases.) Thus, the court says, the "Proof of the elements of the crime, as contrasted with proof of the connection of defendant with the commission thereof, may rest upon the uncorroborated testimony of an accomplice."

[8,9] Finally this appellant contends that the court erred in failing to give certain instructions. By the first instruction the jury were informed that the mere loaning by Clark of his automobile to Demchism without knowledge that it was to be used unlawfully would not make Clark a principal in the commission of a crime by the borrower. The second instruction related to the presumption of innocence to which a defendant is entitled at every step of the proceeding. The third instruction covered substantially the same subject as the second and in addition informed the jury that it was incumbent upon the prosecution to prove every material element beyond a reasonable doubt. We have read

the entire charge to the jury and it appears therefrom that the jury was fairly and completely instructed on every element contained in the instructions proposed by defendant but which were not given by the court. The court was not compelled to instruct the jury in the precise language used by this defendant nor was the court compelled to give each and every instruction proposed by him, no matter how repetitious they might be. All that was required was that the jury be fully and fairly instructed on all of the material elements of the case. *People v. Young*, 70 Cal.App.2d 28, 160 P.2d 132; *People v. Trawick*, 78 Cal.App.2d 604, 178 P.2d 45.

Appeal of Demchism

What we have heretofore said concerning the first three contentions made by the defendant Clark applies likewise to the identical contentions made by the defendant Demchism.

[10,11] In addition to the contentions above mentioned this defendant further urges that the court erred in failing to instruct the jury on its own motion, that the codefendant Ernest Clark was an accomplice as a matter of law. Our examination of the charge to the jury shows that it was instructed by the court as to whom is an accomplice and the necessity of corroboration of the testimony of an accomplice, leaving to the jury the determination of the factual question so presented. The fact that Ernest Clark was jointly charged with the appellants of the crime of burglary did not make him an accomplice. *People v. Morgan*, 87 Cal.App. 2d 674, 197 P.2d 413. While it is true, as defendant argues, Ernest Clark by his own testimony did implicate himself in the commission of the crime, however, he did plead not guilty and hence the question of his guilt or innocence necessarily had to be determined by the jury. In any event Demchism was not found to be guilty solely upon uncorroborated testimony of accomplices. As previously noted, the record contains ample corroboration to sustain the guilty verdicts.

It is further contended by this defendant that the court erred in denying his motion

for a new trial. His argument in support of such contention is substantially the same as his argument concerning the sufficiency of the evidence to support the verdict. Hence what has heretofore been said concerning the state of the record is clearly applicable to this contention, and therefore the same is without merit.

[12] The final contention of defendant Demchism is that the district attorney committed prejudicial misconduct in his argument to the jury. His basis for this contention relates to the comment of the district attorney relative to the question of the possession of a gun by Demchism during the course of the burglary. Specifically the comment of the district attorney referred to the statements by the defendants John Clark, Ernest Clark and Robert Meier. During the course of the argument objection was made to certain portions of the statements made by the district attorney, and the court instructed the jury that statements made by one defendant should not be considered as evidence against another defendant in the absence of a proper foundation. In addition the jury, in the charge given by the court, were again instructed to the same effect.

A very similar situation was presented in *People v. Torres*, 84 Cal.App.2d 787, 192 P.2d 45, 52. In that case four persons were jointly charged with a violation of section 347 of the Penal Code. The court, in answer to the defendant Torres' attack upon the argument of the district attorney in summarizing certain portions of the evidence, said:

"Those portions thereof which incriminated Torres likewise incriminated and were competent evidence of the guilt of the defendant or defendants making them. Certain portions tended to refute certain testimony of the defense witnesses and it was proper argument to attack the credibility of the latter by directing the attention of the jury to these inconsistencies. Because these admissions were not evidence of the guilt of Torres did not preclude the prosecutor from arguing their full effect within the limits of their competency. There was no

suggestion in his argument that any of these admissions be considered by the jury in determining the guilt of Torres."

[13] Furthermore the district attorney was privileged to draw reasonable inferences and deductions from the evidence in his argument and give to the jury his conclusions as drawn therefrom. *People v. Eggers*, 30 Cal.2d 676, 185 P.2d 1.

The judgment and orders appealed from are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



116 Cal.App.2d 85

SINGER METALS, Inc. et al. v. INDUSTRIAL MANAGEMENT CORP.

Civ. 19042.

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1953.

Action for accounting arising out of a joint venture. The Superior Court, Los Angeles County, Gregory P. Maushart, J., entered judgment favorable to plaintiffs, and defendant appealed. The District Court of Appeal, Patrosso, Justice pro tem., held that evidence supported finding that \$27,000 was reasonable and proper amount to be allowed defendant corporation for general overhead expenses.

Judgment affirmed.

1. Joint Ventures ⇨5(2)

In action for accounting against corporation, which deducted alleged overhead cost, arising out of joint venture agreement whereby corporation was to recondition insecticide bombs and reimburse itself from sales for cost, burden was on corporation to establish by competent evidence that overhead was incurred in operation of venture and cost of such overhead.

2. Evidence ⇨590

Where joint venture agreement of corporation, engaged in various activities, to recondition insecticide bombs provided that corporation was to be reimbursed for costs from sales, but corporation kept no records as to amount of time spent by executives and employees in services charged to overhead expenses, trial court was not obliged to accept, in action for accounting, testimony of officers of corporation as to their estimate of time spent.

3. Joint Ventures ⇨5(2)

In action for accounting under joint venture agreement of defendant corporation to recondition insecticide bombs and deduct its costs from proceeds from sales, alleged fact that it would have been expensive to accurately ascertain amount of overhead expenses incurred exclusive of salaries, was insufficient reason for corporation's failure to supply proof of such expenses.

4. Evidence ⇨22(1)

Court could not take judicial notice of alleged fact that in ascertaining general and administrative overhead costs of particular activity of organization engaged in diverse activities amount of such costs could be determined by applying to total overhead costs percentage that income from particular activity bears to total income.

5. Joint Ventures ⇨5(1)

In action for accounting under joint venture agreement whereby defendant corporation, which was engaged in diverse activities, was to recondition insecticide bombs and deduct its costs from proceeds from sales, where evidence failed to establish overhead costs attributable to venture, court properly fixed such expenses at sum which appeared reasonable in light of all evidence.

6. Joint Ventures ⇨5(2)

In action for accounting under joint venture agreement whereby corporation was to recondition insecticide bombs and deduct its costs from sales proceeds, evidence was insufficient to establish with reasonable certainty overhead costs claimed by corporation to be attributable to venture.

7. Joint Adventures ⇨4(4)

Where defendant, a corporation engaged in various activities, entered into joint venture agreement whereby corporation was to recondition insecticide bombs and deduct its costs from sales, corporation occupied fiduciary position and court in accounting proceeding was justified in carefully scrutinizing large, arbitrary sum claimed by corporation for general overhead expenses.

8. Joint Adventures ⇨5(2)

In action for accounting under joint venture agreement whereby defendant corporation was to recondition insecticide bombs and deduct its costs from proceeds from sales, evidence supported finding that \$27,000 was reasonable and proper amount to be allowed for general overhead expenses.

9. Appeal and Error ⇨1048(1)

In action, tried to court, for accounting under joint venture agreement whereby defendant corporation was to deduct its costs from sales, court's overruling of objection to question to plaintiffs' witness as to whether in his opinion general and administrative overhead expense should be charged to joint venture, if erroneous, was not prejudicial, in view of fact that opinion did not influence decision.

10. Joint Adventures ⇨5(3)

In action, tried to court, for accounting under joint venture agreement whereby defendant corporation was to recondition certain products and deduct its costs from sales, cost of overhead was not a mere matter of opinion, but was a precise fact in issue for court to determine.

11. Trial ⇨412

In action for accounting under joint venture agreement whereby corporation with diverse activities was to recondition insecticide bombs and deduct its costs from proceeds from sales, where court overruled objections to testimony of plaintiffs' witness that he would use as base in determining overhead expenses the figure of \$1,500 per month which corporation had charged to own insecticide branch, and witness was then asked what portion of base figure he would have charged, in keeping with sound

accounting practices, to joint venture, latter question had effect of curing any error in court's overruling objection to previous question.

12. Trial ⇨84(2)

In action for accounting of joint venture, where witness for plaintiffs testified as to how he would ascertain general overhead costs, objection that witness did not have sufficient information concerning operation of venture to express opinion went to weight of testimony rather than its admissibility.

Dryer, Stephens & Lagerlof, Stanley C. Lagerlof and H. Melvin Swift, Jr., Los Angeles, for appellant.

Ralph B. Herzog, Beverly Hills, Benjamin D. Mathon, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

This is an action for an accounting arising out of a joint venture between the parties. From a judgment in favor of the plaintiff in the sum of \$23,384.56 defendant appeals.

On March 6, 1947, respondents, having previously purchased a large quantity of insecticide bombs from the U. S. Government, entered into a written joint venture agreement with the appellant for the sale and disposition thereof. After providing that appellant should pay respondents one-half of the cost of such bombs, the agreement which is in the form of a letter addressed by respondents to appellant, insofar as material here, reads as follows:

"4. You (appellant) are to take delivery of all bombs from the Government, and upon the receiving of said bombs, you are to recondition the same to such extent as in your opinion seems necessary in order to make them saleable, which reconditioning may include painting, labeling, and substitution of the release mechanism, and such other items as you deem necessary, the total cost of which reconditioning you estimate should not exceed 20¢ per unit. Out of the gross receipts from the sales of said bombs, you are first to be reim-

bursed for your entire costs expended for the purposes set forth in this numbered paragraph.

"5. You are also to have full charge of selling, billing, warehousing, shipping and general handling of said bombs, and out of the gross receipts from sales of said bombs you are next to be reimbursed for such services and expenses at cost. In this connection the matter of sales price, terms and conditions, and territories in which sales shall be made shall be left entirely in your discretion."

At the time of the execution of the agreement appellant was engaged in various diverse activities and business operations which it conducted through three wholly owned corporate subsidiaries and two operating divisions. The corporate subsidiaries were Roadmaster Products Co. which was engaged in the assembly and sale of power brake and butane equipment for trucks; Gross, Rogers & Co., which was engaged in a securities, investment and financing business; and the Tetco Co. which held title to certain patents from which it received rents and royalties. The two divisions were Tetco Division which was engaged in the business of assembling and selling small fire extinguishers, and Insecticide Division, which was engaged in selling an aerosol bomb similar to that of the joint venture. Appellant at the time of the execution of the agreement had ceased manufacturing its own bomb and was engaged in disposing of its accumulated inventory. However, it was doing and continuing to do some considerable development work on new aerosol products at its plant in Valparaiso, Indiana, which it intended to and did market following the completion of the venture.

Following the execution of the agreement between the parties, appellant took possession of the bombs, proceeded to recondition and prepare the same for sale and to market them. Books of account reflecting the venture's activities were kept by and were at all times within the possession and under the control of the appellant. In these were entered all receipts of the venture and all direct costs incurred in the reconditioning

and sale of the bombs such as advertising, freight, personal property taxes, liability insurance, storage of the bombs, and salaries and wages of personnel whose services were rendered exclusively to the venture. Until March, 1948, no charges were entered in the books of the venture reflecting any portion of the general administrative overhead of the appellant. On or about that time, however, there was caused to be entered upon the books of the venture a charge on account of such general administrative overhead for each of the months from and after March, 1947, in the amount representing the difference between appellant's total general administrative overhead for the month and the sum of \$4,500. This sum of \$4,500, which was less than appellant's total monthly overhead, represented the aggregate amount which appellant had prior to the execution of the joint venture agreement customarily allocated to all of its subsidiaries and divisions and included the sum of \$1,500 per month allocated to its insecticide division.

Although delayed in transmission, from the beginning of the venture appellant rendered monthly statements of its operations of the venture to respondents. In none of these, prior to the statement for the month of March, 1948, which was not received by the respondents until the following June, did there appear any charge for appellant's overhead. On this last-mentioned statement, however, there appeared a notation to the effect that it did not "reflect or include general and administrative expenses of \$19,500.00 due Industrial Management Corporation at the rate of \$1,500.00 per month from March 1, 1947." Promptly upon receipt of this statement, respondents made protest that the charge was improper and unauthorized. However, a charge therefor continued to be entered upon the books of the venture by the appellant for each of the succeeding months, not for the sum of \$1,500 per month, but in varying amounts representing the difference between appellant's total overhead for the month and the sum of \$4,500, as previously stated, until the close of the venture at which time the charges so made aggregated the sum of \$56,138.99. The propriety of

this charge is the sole question presented here.

Upon the trial respondents contended (a) that under the terms of the venture agreement appellant was not entitled to charge against the venture any portion of its general overhead and administrative expense, and (b) that if so entitled the charge made therefor by appellant was excessive and unreasonable. Both of these contentions were controverted by appellant. However, inasmuch as the trial court so found, and plaintiff has not appealed from the judgment, we shall assume without deciding that under the terms of the venture-agreement appellant was entitled to charge as part of its "cost" the portion of its general overhead and administrative expense properly applicable to the venture. As to this, however, see: *Elliott v. Murphy Timber Co.*, 117 Or. 387, 244 P. 91, 48 A.L.R. 1043, 1047; *Zech v. Bell*, 94 Wash. 344, 162 P. 363, 365; 33 C.J. 864; 48 C.J.S., Joint Adventures, § 11, page 846; *McDermott v. Rossney Contracting Corp.*, 131 Misc. 759, 228 N.Y.S. 1, modified on other grounds, 225 App.Div. 784, 232 N.Y.S. 804; and compare *Meyers v. Texas Co.*, 6 Cal.2d 610, 619, 59 P.2d 132; *Vernon Metal & Produce Co. v. Joseph Joseph & Bros. Co.*, 241 N.Y. 544, 150 N.E. 547, 548, modifying, 212 App. Div. 358, 209 N.Y.S. 6.

The trial court found that a reasonable amount to be allowed appellant on account of this item was the sum of \$27,000 instead of the sum of \$56,138.11 claimed by it. Appellant's complaint with respect thereto is twofold: (1) That the court thereby, in effect, undertook to rewrite the contract of the parties by limiting appellant's right to recover overhead to a *reasonable amount* rather than the *cost* thereof to appellant, and (2) that the finding that the sum allowed was reasonable is unsupported by the evidence.

[1] Appellant throughout its briefs asserts that "cost means cost" and that it was entitled to be reimbursed for the cost to it of its general overhead and administrative expense applicable to the venture whether the same was reasonable or unreasonable. While not prepared to accept

this contention to its full extent, and although, contrary to the assumption of counsel, the word "cost" is one of equivocal and variable meaning, *Meyers v. Texas Co.*, supra; 20 C.J.S., page 241, we may assume for the purposes of the present discussion that by "cost" was meant actual cost, in the sense of the amount expended for the items falling within the designation of overhead rather than the reasonable value thereof, and hence if appellant produced proof which compels the conclusion that, in the operation of the venture, it incurred overhead in a determinable amount in excess of that allowed by the trial court, the judgment must be reversed. However, before undertaking to review the evidence with this objective in view, it is pertinent to observe that the burden rested upon appellant to establish by competent evidence (1) that such overhead was incurred in the operation of the venture, and (2) the cost thereof. *Vernon Metal & Produce Co. v. Joseph Joseph & Bros. Co.*, supra, 241 N.Y. 544, 150 N.E. 547, 548; *Zech v. Bell*, supra, 94 Wash. 344, 162 P. 363, 365.

It may be noted at the outset that the expert accountant who testified upon behalf of the appellant admitted that the *method* (previously described) employed by appellant in allocating to the venture overhead in the claimed sum of \$56,138.11 was erroneous and unjustified, although appellant contends that, by using a proper method, an amount as great or greater than this is warranted.

It should also perhaps be pointed out here that the items included within the designation of general and administrative overhead, totaling \$218,344.84 were the following: the salaries of appellant's executive officers and other employees, both in Los Angeles and Valparaiso, who devoted a portion, but not all, of their time to the venture aggregating the sum of \$104,859.10, legal and auditing, office supplies and expenses, postage, telephone and telegraph, taxes, licenses, rents, auto and travel, light and power, directors' fees and expenses, dues and subscriptions, donations and depreciation.

The undisputed testimony is to the effect that no additional employees were engaged

by the appellant in connection with the operation of the venture other than those whose compensation was charged directly to the venture, and whose salaries and wages therefore are not reflected in appellant's overhead. No attempt was made upon the trial by the appellant to identify any specific sum for any particular item included in the total overhead as having been incurred directly for or in the prosecution of the business of the venture. The evidence produced by the appellant in support of its claim falls into two categories: (1) testimony by certain of its officers wherein they undertook to estimate, in terms of percentages, the proportion of the total time of themselves and their assistants which was devoted to the business of the venture, and (2) testimony of an expert accountant as to various methods or formulae which he considered "acceptable" or "proper" to be used in computing the amount of appellant's total overhead chargeable to the venture.

[2] As to the first, no records were kept by the appellant as to the amount of time devoted by any of its executives or other employees whose compensation was not charged directly to the venture in the prosecution of the business of the venture either before or after the controversy arose in June, 1948 (the venture did not terminate until a year later) as to appellant's right to make a charge therefor. In view of this as well as of the diversity and dissimilar character of the operations conducted by appellant through its various subsidiaries and divisions, the trial court was not obliged to (and, as indicated by the trial judge's opinion, it did not) accept the testimony given by appellant's witnesses in this regard.

[3] As to the items other than salaries, likewise no records were kept with the view of distinguishing between those incurred for the venture from such as were incurred in connection with appellant's other activities. No reason appears why, if proper records had been kept by the appellant, it would have been particularly difficult to ascertain with reasonable accuracy the amount of each of these items incurred

in the prosecution of the venture's business. For example, it would have been relatively easy to keep an account of the cost of postage, telegrams, taxes and licenses, insurance, travel, subscriptions and donations incurred on behalf of the venture. Indeed, even without such entries the expert accountant who testified upon behalf of the appellant stated that it would be possible by examining invoices and other evidence in the possession of the appellant, to ascertain with some degree of accuracy the amount properly chargeable to the venture for many of these items. The only excuse assigned for not doing so is that this would take time and involve expense. This, however, is an insufficient reason for appellant's failure to supply this available proof. If, as it so strenuously insists, appellant was entitled to reimbursement for the "cost" of overhead attributable to the venture, the burden rested upon it to establish the actual cost thereof, not merely the estimated or theoretical cost. A somewhat similar problem was presented in *Zech v. Bell*, supra, 94 Wash. 344, 162 P. 363, 365, where the court said: "The evidence in fact is, as shown by the record, that the overhead expense varies and appellants kept no account of what particular expenses, which are commonly included in and designated as overhead expenses, occurred in the carrying on of this particular contract. If appellants should now be permitted to charge against this joint adventure a proportionate share of such expenses in doing their entire general business, they could charge respondent with much more than his proportionate share on this particular transaction. *Bane v. Dow*, 80 Wash. 631, 142 P. 23.

"Manifestly they should have shown exactly what that proportionate share was, or the particular items of business expense, which entered into and became a part of this particular contract. 30 Cyc. 742. This they failed to do."

Nor was the other evidence adduced by appellant in support of its claim any more satisfactory or convincing. As previously indicated, this consisted of the testimony of an expert accountant as to various methods or formulae which he considered might

properly be resorted to in determining the proportion of appellant's total general and administrative overhead properly chargeable to the venture. He testified to six different such methods with variations of three of them. Without undertaking to discuss each in detail it may be said generally that (to mention but three) the results obtained were derived from the application to the total amount of appellant's overhead of the percentage that the total income of the venture bore to that of appellant's insecticide division or to the total income of appellant from all its various operations or a variation which involved charging the venture with the same percentage of the total salaries of the appellant's officers and other employees as that which the appellant's witnesses testified these officers and employees devoted of their entire time to the venture, plus a charge in a sum representing the percentage of appellant's total overhead minus salaries that the total of the receipts of the venture bore to appellant's total gross receipts from all sources. Although this witness testified that each of the methods was "proper" or "acceptable", the result varied more than \$23,000 between the highest and lowest figure derived by the application of the several methods. Moreover, the witness testified that each of these had its "advantages and disadvantages" and that there were "a million variations of each".

[4] We shall not attempt to analyze these various so-called methods in detail other than to observe that they all rest upon certain assumptions more or less arbitrary, e. g., that given the total amount of the general and administrative overhead of an organization engaged in various and diverse activities the portion thereof incurred in the prosecution of a particular activity conducted by it and another as a joint venture may be accurately determined in every instance by applying the percentage which the income produced by the latter bears to the total income derived from all such activities or a portion thereof. Neither our judicial knowledge nor the evidence compels the conclusion that this assumption is necessarily true. Certain it is that the result derived thereby does not establish

with any great degree of certainty the actual cost of the overhead incurred by or for the venture, which appellant insists was the precise issue which the trial court was called upon to determine, and which, as previously noted, it had the burden of proving.

[5,6] Under the circumstances here the trial court in reaching its decision was confronted with two alternatives: It might either conclude that the appellant, having failed to establish by convincing evidence the cost of the overhead incurred by appellant in the business of the venture, did not sustain the burden resting upon it, and hence was not entitled to any credit therefor, or, as it did, undertake to fix a sum on account therefor which appeared reasonable in the light of all of the evidence. In adopting the latter course, the trial court is not subject to the charge leveled against it that thereby it departed from the terms of the contract by awarding overhead in a reasonable amount rather than the cost thereof to appellant. It was merely a means of arriving at the amount to be allowed appellant for overhead incurred by it for the venture in a situation where the evidence failed to establish the cost thereof with reasonable certainty.

[7] While it is true, as suggested by counsel for appellant, that the court might not abdicate its duty of determining cost because of the difficulty involved in the ascertainment thereof, it is equally true that the difficulty of making satisfactory proof of such cost by the appellant did not relieve it from the burden of establishing the same in a definite sum with reasonable certainty. If the appellant has been denied recovery of some portion of its general overhead properly chargeable to the venture, it is only because of its failure to keep proper records by which the cost thereof could be determined, as was its duty to do. Occupying a fiduciary relation to the respondents, and, inasmuch as every cent of its overhead charged to the venture would inure to its own advantage, the trial court was warranted in carefully scrutinizing the claim for the large amount sought to be charged therefor against the venture, particularly when, in the first instance, it advised respondent of its intention to make

a charge in an arbitrary sum (\$1,500 per month), and subsequently demanded an amount which was arrived at by what counsel for appellant themselves are forced to admit was a "rough and ready" method. We believe that the methods suggested by the expert who testified on behalf of the appellant may also be said to be "rough and ready" when offered as proof of cost of overhead. At least it cannot be said that they established the cost of the overhead incurred in the operation of the venture with such a degree of certainty that the trial judge was bound to resort to any one of them in arriving at the amount which appellant was entitled to recover therefor.

From what has been said we do not desire to be understood as accepting the premise upon which appellant's argument largely rests, namely, that "cost" is a word of such definite and certain meaning that, as used in the agreement here, it is necessarily to be construed as excluding, in determining the cost of overhead properly chargeable to respondent, any consideration of the reasonableness of the amount thereof. As indicated in an earlier portion of this opinion, the word is one of variable meaning "capable of a larger or narrower construction according to the subject matter and the circumstances of the particular case. It is sometimes used to express the value of a thing and sometimes the price paid for it." 14-A C.J. 1433; and see 20 C.J.S., page 241. Indeed, it has been said: "Even in the simpler application to mere bargain and sale of a thing already in existence, and not to be manufactured, the term ('cost') is ambiguous, and so much so that it is not impossible that often it will be found to avoid the contract for incurable uncertainty * * *." *Hazleton Tripod-Boiler Co. v. Citizens' St. R. Co.*, C.C., 72 F. 317, 321. Here, there is no evidence other than that afforded by a reading of the agreement itself as to the sense in which the parties understood and used the term. If it were to be conceded therefore, as appellant contends, that the trial court construed the same as comprehending a charge for overhead in a reasonable amount having regard to all circumstances of the case, we would not undertake to disturb its conclusion.

[8] We therefore conclude that the finding of the trial court that \$27,000 was a proper amount to be allowed appellant on account of overhead is supported by the evidence.

[9, 10] Appellant also complains of the action of the trial court in overruling its objection to the question propounded to the respondents' witness, Lobe (Treasurer of Singer Metals) as to whether in his opinion the general and administrative overhead expense sought to be charged to the joint venture by the appellant was proper. Conceding that the ruling was erroneous, we do not believe that the error was prejudicial. The cause was tried without a jury and it is reasonably apparent that the witness' expressed opinion that the charge was improper did not influence the final decision of the trial court. The cost of overhead was not a mere matter of opinion. It was the precise fact in issue which it was for the court to determine. Moreover, as previously noted, the appellant's own witness, Mr. Hubbs, stated that the method pursued by appellant in allocating a portion of its administrative overhead to the venture was improper. While counsel for appellant undertake to distinguish between testimony as to method and result, asserting that the former is admissible but the latter is not, if it be conceded that it is permissible for a witness to testify that the method employed in reaching a given result is erroneous or improper we find it difficult to conclude that it is inadmissible for a witness to testify that the result so obtained is erroneous or improper.

After the witness Lobe had testified, in effect, that, in undertaking to determine the amount of the general and administrative overhead chargeable to the venture, he would use as a base the figure of \$1,500 per month which the appellant, prior to the venture, had charged to its own insecticide division on account thereof, counsel for respondents propounded the following question to him: "And what portion would you have charged as a reasonable proportion which would have been in keeping with sound accounting practices? What portion of the \$1,500.00, if you can so state?"

[11, 12] Objection was made by counsel for appellant "to any statement as to what

he would have done". The objection was overruled and the witness answered that he would allocate one-half of this sum or \$750 to the venture. Appellant then moved to strike the answer without assigning any ground therefor, and the motion was denied. Appellant assigns these rulings as error. While the question was duplicitous and objectionable as calling for an answer as to what the witness himself would have done rather than what would have been in accordance with sound accounting practice, after the witness had answered as previously indicated he was asked if the conclusion expressed by him was "in accordance with sound accounting practice" to which he replied in the affirmative. This had the effect of curing any error in the previous ruling, assuming, as do counsel, that expert testimony of this character was otherwise admissible to establish the fact in issue. In its brief, however, appellant contends that the rulings in question were erroneous for a different reason, namely, that the witness did not have sufficient information concerning the operation of the venture and the business of the appellant generally to express an opinion. Aside from the fact that this was not assigned as a ground of the objection or the motion to strike in the trial court and hence might be considered as having been waived, the lack of information possessed by the witness went rather to the weight of his testimony than to its admissibility. While we perceive no error in the court's ruling, if it were to be considered otherwise, it was not prejudicial.

Upon examination of the entire record we are satisfied that the case was fairly tried and received careful consideration at the hands of the trial judge who was confronted with a most difficult problem in the solution of which but little assistance was afforded by the evidence, introduced upon behalf of the appellant. Despite this he undertook to, and we believe did, reach an equitable and just result.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

PEOPLE v. KENNEDY.

Cr. 4533.

District Court of Appeal, Second District,
Division 1, California.

Feb. 26, 1953.

Petition for writ of error coram nobis, by petitioner convicted of kidnapping for purpose of robbery. The District Court of Appeals, White, P. J., held that where petitioner was charged as a principal in the crime, it was not necessary that he be charged with aiding or abetting in said kidnapping as a prerequisite to the introduction of evidence that he did so, or to warrant decision by trial judge, if such aiding and abetting were proved beyond a reasonable doubt, that petitioner was guilty as a principal in the commission of the offense.

Petition denied.

1. Criminal Law ⇨80

Where accused was charged as principal in crime of kidnapping for purpose of robbery, it was not necessary that he be charged with aiding or abetting in such kidnapping as prerequisite to introduction of evidence that he did so, or to warrant a decision by trial judge, if such aiding and abetting was proved beyond reasonable doubt, that accused was guilty as a principal in commission of offense. Pen. Code, § 971.

2. Indictment and Information ⇨110(42)

Information charging, in language of statute, that accused kidnapped his victim for purpose of robbery sufficiently alleged the acts constituting alleged kidnapping and apprised accused of what he would be expected to meet on trial. Pen.Code, §§ 209, 952.

3. Indictment and Information ⇨95

Indictment or information need not allege particular mode or means employed in commission of offense, except when of the essence thereof. Pen.Code, § 952.

4. Criminal Law ⇨997

Where all matters with regard to insufficiency of evidence were or could have been raised on appeal from conviction, a second review could not be obtained through writ of error coram nobis.

5. Criminal Law Ⓒ997

Neither sufficiency of evidence, nor errors in admission of evidence, nor claim that accused was committed on uncorroborated testimony of an accomplice, can be considered on an application for a writ of error coram nobis.

6. Criminal Law Ⓒ662(8)

Defendant was not deprived of his right to confront witnesses at his trial, where prosecution's witnesses at preliminary examination were cross-examined by defendant's attorney in his presence, and thereafter defendant waived his right of confronting witnesses during trial by stipulating that the People's case might be submitted on transcript of preliminary examination.

7. Criminal Law Ⓒ662(8)

A right of an accused to confront witnesses at his trial, whether reserved in constitution or in statutes, may be waived.

8. Criminal Law Ⓒ997

Contention that accused was improperly tried on record of preliminary hearing with some additional evidence heard by trial judge, was a point that could have been urged on accused's appeal, and was not available to him on petition for writ of error coram nobis.

Melvin C. Kennedy, in pro. per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Judge.

By information filed in the Superior Court of Los Angeles County, petitioner was charged in Count I with the crime of robbery, and in Count II with the offense of kidnapping for the purpose of robbery. He was convicted on both counts and from such judgments of conviction he appealed.

This court affirmed the judgment of conviction of kidnapping for the purpose of robbery and reversed the judgment of conviction of armed robbery, *People v. Kennedy*, 101 Cal.App.2d 709, 226 P.2d 359.

Thereafter, petitioner filed a petition for a writ of error coram nobis in the Superior Court of the County in which he had been tried, and the court there denied the petition on the ground that the Superior Court had no jurisdiction to hear the matter, as the judgment had been affirmed on appeal. The petitioner filed an appeal from the order denying his petition, and the appeal was dismissed. On September 24, 1952, this court issued an order stating that the petition for writ of error coram nobis which was filed in the Superior Court, and which was contained in the clerk's transcript on the appeal which had been dismissed, would be considered as a petition for writ of coram nobis made directly to the District Court of Appeal.

As his first ground for the issuance of the writ herein prayed for, petitioner alleges that the information filed against him did not accuse him of aiding and abetting in the kidnapping, which was all that the evidence adduced at his trial proved that he did. That the information was therefore void for uncertainty and that the pleading failed to allege facts constituting the crime of kidnapping for the purpose of robbery.

In this contention petitioner cannot be sustained. Penal Code, section 971, as it read in 1950, when the information was filed, provided, insofar as here pertinent: " * * * and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal."

[1] From a reading of this section it is manifest that the information having charged petitioner as a principal, it was open to the district attorney to prove that the former actually committed the offense or that he aided and abetted in its commission, or advised and encouraged its commission. Petitioner having been charged as a principal in the crime of kidnapp-

ping for the purpose of robbery, it was not necessary that he be charged with aiding or abetting in said kidnapping as a prerequisite to the introduction of evidence that he did so, or to warrant a decision by the trial judge, if such aiding and abetting was proved beyond a reasonable doubt, that petitioner was guilty as a principal in the commission of the offense.

Petitioner's attack upon the sufficiency of the information is unavailing. Penal Code, section 952, reads as follows: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused."

[2,3] The information herein, charging as it did, that the accused had kidnapped his victim for the purpose of robbery in violation of the statute, Penal Code, section 209, apprised the former of what he would be expected to meet on the trial. Under the system of pleading in criminal cases prevailing in this state it is not necessary to allege the particular mode or means employed in the commission of an offense, except when of the essence thereof. The information having followed the language of the statute, the acts constituting the alleged kidnapping were sufficiently alleged, *People v. Britton*, 6 Cal.2d 1, 5, 56 P.2d 494. The foregoing also disposes of petitioner's claim that he was in fact accused of the crime of grand theft.

[4,5] Petitioner next complains that the evidence was insufficient to support the judgment of conviction of the crime of kidnapping for the purpose of robbery, and that at most if it proved the commission of any offense, that offense was grand theft. All of the matters now urged with regard to the insufficiency of the evidence could have been raised on the appeal from

the judgment, and practically all, if not all, were so raised, *People v. Kennedy*, supra. Under such circumstances it is well settled and definitely established that a second review cannot be obtained through the writ here relied upon, *People v. Mooney*, 178 Cal. 525, 174 P. 325; *People v. Egan*, 73 Cal.App.2d 894, 167 P.2d 766. Neither the sufficiency of the evidence, *People v. Martinez*, 88 Cal.2d 767, 771, 199 P.2d 375; nor errors in the admission of evidence, *People v. Hightower*, 75 Cal.App.2d 298, 299, 170 P.2d 490; *People v. Coyle*, 88 Cal. App.2d 967, 971, 200 P.2d 546; *People v. Lawyer*, 11 Cal.App.2d 718, 719, 54 P.2d 747; nor the claim of the accused that he was committed on the uncorroborated testimony of an accomplice, *People v. Krout*, 90 Cal.App.2d 205, 209, 202 P.2d 635, can be considered on an application for a writ of error coram nobis.

Nothing appears in the petition filed herein to indicate that the petitioner did not have a fair and impartial trial and, as this court said in deciding the appeal from the judgment, *People v. Kennedy*, supra, 101 Cal.App.2d at page 715, 226 P.2d at page 363, "From the foregoing, we are satisfied that the court was warranted in finding that appellant was actively engaged in advising and encouraging the commission of the crime, Penal Code, secs. 31, 971, for the profit of himself and his companions, or at least one of them, to whom part of the fruits of the robbery were given. That the crime was committed in furtherance of a conspiracy in which appellant was actively engaged by way of advice and encouragement, though possibly not actively present when the victim was abducted and robbed.

"Conceding, as contended by appellant, that his co-defendants were accomplices, we are satisfied that the evidence in the case at bar meets fully the requirements of section 1111 of the Penal Code with reference to corroboration."

Other claims of petitioner in support of his contentions as to the insufficiency of the evidence could have been raised on the appeal from the judgment of conviction. And if they were not, petitioner, under well established rules of law, cannot now base

upon them his application for the writ he seeks.

[6, 7] Finally, petitioner urges that he is entitled to the writ for the reason that he "was tried on the record of the preliminary hearing with some additional evidence heard by the trial judge". At the trial of petitioner it was stipulated that the People's case might be submitted on the transcript of the testimony adduced at the preliminary examination with a reservation by both prosecution and defense that either might introduce additional evidence. It is now firmly established that the right of an accused to confront witnesses at his trial, whether reserved in the constitution or in the statutes, may be waived, and that there is no deprivation of constitutional rights, or violation of due process, whereas here, the waiver of confrontation is made after cross-examination of the prosecution's witnesses at the preliminary examination, in the presence of the accused, *People v. Wallin*, 34 Cal.2d 777, 780, 781, 782, 215 P.2d 1.

[8] Furthermore, the point is one that could have been urged on petitioner's appeal, and is, therefore, not available to him on a petition for the issuance of a writ of error coram nobis, *People v. Hoshor*, 96 Cal.App.2d 40, 42, 214 P.2d 36.

For the foregoing reasons, the petition for a writ of error coram nobis is denied.

DORAN and DRAPEAU, JJ., concur.



116 Cal.App.2d 75

BASS v. HELSETH et al.

Civ. No. 15172.

District Court of Appeal, First District,
Division 2, California.

Feb. 16, 1953.

Rehearing Denied March 18, 1953.

Hearing Denied April 15, 1953.

Action by lot owner to require defendants to comply with uniform building restrictions of subdivision in building house on

their irregularly situated lot, wherein other lot owners intervened. The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., entered permanent injunction to enforce compliance with prescribed setbacks from lot side lines, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that under such literal interpretation of the restriction as would place least burden on defendants' lot, building setbacks proposed to be followed by defendants were proper.

Judgment reversed with directions.

1. Injunction ⇐130

In suit to enforce residence lot setback covenants, where it appeared that line between defendants' lot and lot generally to west, ran from front of said lots, north 35 degrees 15' 48" each, and between defendants' lot and adjoining opposite lot, ran 47 degrees 23' 01" east, finding that, for purposes of applying covenants, one side line of defendants' lot was its westerly line and the other was its southerly line was not arbitrary.

2. Covenants ⇐49

In construing restrictive covenants, intention of parties and object of restriction should govern, but where parties have failed to express their intention with sufficient clarity, covenants are to be construed most strictly against grantor and person seeking to enforce them.

3. Covenants ⇐49

In view of facts that restrictive covenants running with all deeds were in general intended to apply to all residence lots in subdivision and that there was hardly a lot in subdivision with side lines running due north or due east, restrictions which varied according to whether side lines ran northerly, easterly, etc., were not limited to those lots only which had side line running due north or due east. Government Code, § 23072; Civ.Code, § 1645.

4. Covenants ⇐51(2)

Under restriction requiring setback of four feet at northerly side line of any lot; ten feet at southerly side line; four feet at easterly side line and ten feet at westerly side line on lots having easterly and westerly side lines, but apparently intending that

no lot owner should suffer more than total of fourteen feet in side line setbacks, defendants, whose lot had westerly side line running north 35 degrees 15' 48" east but had opposite side line running north 47 degrees 23' 01" east, or, as was found, southerly, were entitled to build within four feet of westerly line and ten feet of southerly line.

5. Covenants ☞51(2)

Provision of restrictive covenant requiring subdivision developer's approval of architectural plans, could not operate to place restrictions on lot as to side line setback more burdensome than specific provision elsewhere in covenant.

Alan W. Davidson and Louis B. De-Avila, Oakland, for appellants.

John A. Gorfinkel and Julian W. Mack II, San Francisco, Arthur D. Nearon, Laurence D. Benamati, San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an action between several lot owners in a subdivision concerning the application of the uniform building restrictions of the subdivision to the irregularly situated lot of defendants and appellants Helseth.

All parties to the action own lots in Ingleside Terraces in San Francisco, the map of which subdivision, then owned by the Urban Realty Improvement Company, was filed in 1913. All deeds from said company to original grantees of lots contained the uniform restrictions appended as Exhibit "A" to the findings. All said deeds were recorded. It was provided that the restrictions were covenants running with the land and each part thereof and also constituted easements appurtenant to each portion of said Ingleside Terrace, that each future owner of a lot would have the right of enforcement in equity and that said restrictions were reserved as to all residence lots in the tract.

The parts of the restriction mainly involved are parts third and sixth which read in part: "Third: That no main wall

of any house or building to be erected or maintained on the above described real property shall be nearer to the street line of said property than the building line (which is 12 to 25 feet from the front or side front of the property line) indicated upon the official plat of said property; and no wall of any house or building on said real property shall be nearer than four (4) feet distant from the exterior side, or rear end lines of any lot; * * * provided, further that no dwelling house or appurtenance or outbuilding shall at any time be erected or stand within less than four (4) feet of the Northerly exterior side line of any lot; nor less than ten (10) feet from the exterior Southerly line of any lot herein agreed to be sold; provided, further, however, that on lots having Easterly and Westerly side lines, no such improvements shall be erected or stand within less than four (4) feet of such exterior Easterly side line nor within less than ten (10) feet of the said exterior Westerly side lines of said lots; provided, further that wherever side building lines are indicated on any lot on the said plat thereof, such said building lines shall control; * * *." (No such side building lines were indicated on the plat as to the lots here involved.) "Sixth: That no dwelling house, together with other improvements, shall be erected or placed upon the above described real property which shall cost less than Thirty-Five Hundred and No/100 (\$3500.00) Dollars. This value shall include the entire cost of the improvements with a builder's profit of not to exceed ten (10) per cent. The plan of such building and other improvements proposed to be erected or maintained upon the above described real property shall be submitted to the manager of the grantor company herein for his approval, and said dwelling house or other improvements shall not be erected nor shall any portion thereof be erected or maintained without the approval of said manager or of the Board of Directors of said Grantor Company. The decision of the Board of Directors of the Grantor Company herein as to the suitability or sufficiency of the architectural plans of any building to be erected or maintained upon

the said premises as to its beauty, utility and safety, and also to the minimum cost or value thereof, shall be conclusive and final."

The problem presented is in how far under these provisions defendants Helseth were restricted from building near to the side lines of their lot 21, block 2 in Ingle-side Terraces, which defendants Helseth acquired in 1948. Although the simple grant deed by which they acquired it (not directly from the original grantor company) does not contain the uniform restrictions it is no longer denied on appeal that said uniform restrictions are in general binding on said defendants.

The Helseth lot faces on Moncada Way. For one facing said lot there is to the left of it on Moncada Way lot 22, block 2, owned by plaintiff Bass and to the right lot 20, block 2, owned by intervenors Baldwinson. At these lots Moncada Way curves strongly; the side lines of the lots are not parallel but run from the front on Moncada Way in a somewhat northerly direction but with a declination to the east increasing from the left to the right. According to the directions inscribed on the map, defendants' Exhibit "B", the correctness of which is not disputed, this declination from the true northerly direction is approximately 27 degrees for the left side line of lot 22 (Bass) 35 degrees for the side line between the Bass lot and lot 21 (Helseth), 47 degrees for the side line between the Helseth lot and lot 20 (Baldwinson) and 50 degrees for the right side line of the Baldwinson lot. The court found on evidence without conflict that the Bass-Helseth dividing line runs north $35^{\circ} 15' 48''$ east and the Helseth-Baldwinson dividing line north $47^{\circ} 23' 01''$ east. The Bass and Baldwinson dwellings had both been built when the Helseths acquired lot 21. There was evidence from a former manager of the grantor company, the witness Leonard, indicating that with respect to the side line setback of the third restriction the side lines as a rule were considered easterly or westerly ones when the declination from the due south-north direction was less than 45 degrees, but northerly or southerly ones when said declination was more than 45

degrees. Accordingly when in 1914 Mrs. Bass acquired lot 22, the grantor company, who built her house on it, considered the side lines as easterly and westerly and only a setback of four feet due at the easterly side line, the dividing line with the Helseth lot, although the Bass building at that side actually does not run parallel with the side line and nowhere reaches quite up to the four foot building line. When in 1945 intervenors Baldwinson bought lot 20, they considered their side lines which both declined more than 45 degrees from the due north-south direction as northerly and southerly side lines with respect to the restriction and accordingly left only a four foot setback at the northerly side line, the one with lot 21. The plans could not be submitted for the approval of the company because it was dissolved prior to 1940 after having sold all lots in the subdivision, but the correctness of the location of the Baldwinson home is not attacked in these proceedings.

When in 1949 defendants Helseth wished to build on lot 21 they encountered the difficulty that both neighbors had taken only a four foot setback at their side line with said lot and both expected defendants to take the ten foot setback so that a fourteen foot distance between building lines would be maintained. However defendants did not wish to lose more than fourteen feet of the width of their lot. They planned to take the ten foot setback at the Baldwinson side and the four foot setback at the side of Mrs. Bass, but when Mr. Helseth showed her the plan she objected. The Helseths then decided to move their house over two feet. It was disputed whether Mrs. Bass had assented to this compromise (the Baldwinsons had no objections) but the court found on conflicting evidence that she did not agree. When the Helseths put in forms for the concrete foundation of their house and began to pour concrete Mrs. Bass brought this action for an injunction, mainly to enjoin building less than ten feet from the side line with her lot. The Baldwinsons intervened to prevent the contingency that, if plaintiff Bass would succeed in enforcing a ten foot setback at her side, it would

follow that the setback at their side would be only four feet. Several lot owners in Ingleside Terraces intervened on the side of plaintiff Bass to uphold the restriction.

From the evidence at the trial we note that the witness Leonard also testified that when change in the direction of the side lines caused complications in the application of the side line setback restrictions, the grantor company made adjustments when the plans for building on the lots involved in the change of direction were submitted. In one such case, relating to an exceptionally wide lot, a ten foot setback was taken at both sides. The witness Waite, civil engineer and surveyor, testified among other things that from an engineering standpoint when for some reason a northerly line does not mean a true north line, it means a line which does not vary so much from true north as to become east or west, and that on that basis the dividing line between the Helseth and Baldwinson lots was the northerly line of the Baldwinson lot and the southerly line of the Helseth lot. He had made an inspection of a large part of the subdivision and had found a few instances of residences which were less than fourteen feet apart, among which one where the adjoining buildings were only eight feet apart. At the trial the attorney of intervenors Baldwinson declared that his clients were willing to equalize the setbacks and restrict the setback at their side to seven feet if the parties at the other side were willing to do the same. The attorney for the plaintiff Bass declared that his side was willing to accept a setback of eight feet by way of compromise.

The court, after having made a personal inspection of the premises, found among other things in substance that the restrictions, including those concerning the side line setbacks, constitute a general and common plan covering the whole area to which the Helseth lot belongs, that the Bass-Helseth dividing line is the westerly side line of the Helseth lot, the Baldwinson-Helseth dividing line the southerly side line of the Helseth lot, and concluded that the restrictions require defendants Helseth to maintain a ten foot setback at both side

lines of their lot, but that it would be inequitable to require them to leave a ten foot distance at both sides but not to leave eight feet distance at both sides and that plaintiff and intervenors were entitled to enforce the restrictions. A permanent injunction to enforce an eight foot setback at both sides issued in their behalf and defendants Helseth appeal.

[1] Their contentions are of two kinds. The one which attacks the finding that the Bass side line is the westerly side line and the Baldwinson side line the southerly side line of their lot is clearly without merit. It is said that said finding is arbitrary, contradictory, unreasonable and contrary to common knowledge because west and south cannot be opposite each other. However, side lines of a lot need not be parallel and they are not parallel in this case. One side line can then be more westerly, the other more southerly. Equally erroneous is the contention that said finding is not supported by the evidence. The testimony of both the former manager of the company, Leonard, and the surveyor Waite supports the finding, and the 45 degree declination rule mentioned above gives a logical basis for the result. Against it appellants urge only that the side lines of defendants' lot are parallel with a side of Paloma Avenue where it intersects Ocean Avenue and that said side somewhere in the uniform restrictions is called the northerly side; therefore both side lines of the lot must be northerly and southerly side lines. There is no finding or evidence that said side lines and said side of Paloma Avenue are parallel; they cannot be because the side lines themselves are not parallel. Neither is there evidence as to the exact direction of said side of Paloma Avenue or a showing that said side is not actually the northerly side under the 45 degree declination rule, *supra*.

Appellants' main argument is that even if the finding as to the side lines were correct the restrictions cannot constitute a basis for the result reached. It is first pointed out that as to the question whether a restriction on certain land is created the deed is the exclusive memorial of the intention and rights of the parties, that re-

strictions are strictly interpreted in favor of the free use of the property and all doubts must be resolved in favor of such free use. It is argued that under such interpretation the restriction quoted, requiring a ten foot setback at one side, applies only to lots which have side lines that are either a northerly *and* a southerly or an easterly *and* a westerly one and that the restriction has no application to a lot that, as here found, has one side line considered westerly, the other southerly. No side line setback, except the general setback of four feet contained in the first part of restriction third is provided for such a lot. It is also contended that in legal language northerly, southerly, easterly, westerly mean due north, south, east and west, so that the fact that the lines of the Helseth lot do not follow such due directions causes a doubt to be resolved in favor of free use. It is further argued that the restriction only provides for a setback of ten feet at one side line, and four feet at the other, fourteen feet in total and that to require from defendants a total setback of sixteen feet, equally divided over both sides finds no support in the restriction as written, is arbitrary and is taking of property without due process. It is said that no authority for such setback can be found in the sixth restriction quoted because it must be held to relate to minimum costs and suitability of architectural plans as to beauty, utility and safety of the building, as to which qualities the decision of the corporation is made final in said restriction.

[2] In support of the rule of strict interpretation of restrictions on real property appellants cite mainly *Wing v. Forest Lawn Cemetery Ass'n*, 15 Cal.2d 472, 479, 101 P.2d 1099, 130 A.L.R. 120 and quote from 26 C.J.S., Deeds, § 163, p. 515 as follows: "Restrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of property and against restrictions." There is no doubt that these rules are correct so far as they go, but they give only part of the picture. The quotation selects one part of the general rules of construction

stated in said section of C.J.S. The section begins as follows: "In construing covenants or restrictions as to the use of property, the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. So, the intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation. In other words, effect is to be given to the intention of the parties, as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction, and the object had in view by the parties." After the rule as to strict interpretation quoted by appellants there follows: "This rule, however, obtains only where the parties have failed to express their meaning with sufficient clarity to enable the court to say that its construction is plain and admits of no doubt; the rule will not be applied to defeat the obvious purpose of the restriction * * *." See to the same general effect, 7 *Thompson on Real Property*, Permanent Edition, § 3569 (Interpretation of restrictions according to apparent purpose) and 14 *Am.Jur.* 620 et seq. §§ 211-212; *Walker v. Haslett*, 44 Cal.App. 394, 398, 186 P. 622.

[3] When we apply these rules of construction as a whole to the question before us it is obvious that northerly, easterly, etc., in the third restriction cannot be intended and should not be interpreted to make said restriction applicable to those lots only which have side lines due north or due east. The restrictions are in general intended to apply to all residence lots in the subdivision and the third restriction is evidently intended to provide sufficient light and air all over said subdivision. As the map shows that there is hardly a lot in the subdivision with side lines due north or due east the proposed interpretation would clearly destroy the intended effect of the restriction (Compare § 23072, Government Code for the possibility of a wider meaning of northerly, etc., when controlled by other words, lines or monuments and § 1645, Civil Code, which for the interpretation of contracts permits devia-

tion from the technical meaning of words when they are clearly used in a different sense.)

[4] However the third paragraph of the restriction does not provide, as contended by respondents, that there must be a ten foot setback at any westerly side line. The third paragraph contains the following provisions with respect to side line setbacks if its language is taken literally: A minimum setback of four feet for any side line; a setback of four feet at the northerly side line of any lot; a setback of ten feet at the southerly side line of any lot; *on lots having easterly and westerly side lines* a setback of four feet at the easterly side line and ten feet at the westerly side line. There is a clear difference in formulation between the provision regarding northerly and southerly side lines and the one regarding easterly and westerly side lines. The former relates to any northerly or any southerly side line, the latter is expressly restricted to lots having easterly *and* westerly side lines. The result of a literal application of the restriction to appellants' lot would be a ten foot setback at the Baldwinson side, as a southerly side line, and a four foot setback at the Bass side, under the general minimum provision, the side line being westerly but there being no easterly side line. This is exactly what appellants originally planned.

Respondent Bass in claiming a ten foot setback at her side of the Helseth lot does not give any argument to refute the above literal construction. The only possible ground for ignoring the express restriction of the ten foot westerly setbacks to lots with easterly *and* westerly side lines would be an apparent intention and purpose that the side building lines of adjacent lots should always be fourteen feet apart. But such intention is not expressed and there was evidence, as stated before, that there were other residence buildings in the subdivision that were less than fourteen feet apart. Moreover the ignoring of said clause would lead in this case to ten foot side line setbacks at both sides of the Helseth lot, a restriction more burdensome than is indicated in any manner in the deed.

The intention apparent from the third paragraph of the restrictions is at least as clear that no lot owner should suffer more than a total of fourteen feet in side line setbacks as that the distance between adjacent lateral building lines should be at least fourteen feet. Under these circumstances the literal reading of the restriction which gives the lesser burden on the lot must prevail. It cannot be said that the literal meaning is so devoid of sense that it cannot have been intended. The preference given to a setback of ten feet at any southerly side line is understandable from the point of view that the southerly is the most desirable exposure whereas the westerly is the next best.

[5] Appellants' position that the sixth section cannot justify restrictions as to side line setbacks more burdensome than those contained in the third section seems correct. In *Hannula v. Hacienda Homes, Inc.*, 34 Cal.2d 442, 447, 211 P.2d 302, 19 A.L.R.2d 1268, it was held that when a restriction prohibits building without approval of plans and issuing of permits by the subdivider, said subdivider can deny permission on any reasonable ground where the provision in question was a separately numbered paragraph which did not contain any other specific restriction and there were no other specific restrictions which could provide a frame work within which the right to approve plans could be said to be confined. Here the opposite is true. The sixth paragraph contains specific matter to which the free right of approval applies and the third paragraph contains specific provisions as to location of the buildings on the lots which confine the right of approval in that respect. The fact that the owner of one exceptionally wide lot did not object to ten foot setbacks at both side lines cannot be decisive to extend defendants' burden.

It follows that there is no ground for an injunction and that the judgment must be reversed. The manner in which appellants wished to build at the Bass side did not violate any restriction, and the intended manner of building at the Baldwinson side was not objected to. Possibly an equalization of the fourteen feet available for the

side line setbacks on the Helseth lot as proposed by respondents Baldwinson might have had some advantage, but we do not find in the restrictions a sufficient basis for enforcement of that proposal by injunction. At any rate the equal setbacks totaling sixteen feet could not be upheld. As intervenors Baldwinson did not claim anything they were not entitled to and did not on appeal defend the judgment appealed from there should be no award of costs against them.

The judgment is reversed with directions to the trial court to deny the permanent injunction, respondents with the exception of respondents Baldwinson to bear appellants' costs.

GOODELL and DOOLING, JJ., concur.



116 Cal.App.2d 187

KOSTICK v. SWAIN et al.
Civ. 19067.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1953.

Rehearing Denied March 6, 1953.

Hearing Denied April 15, 1953.

Action was brought for injuries sustained in automobile accident, and defendants interposed as a defense a release which plaintiff had signed. The Superior Court of Los Angeles County, Vernon W. Hunt, Judge of the Municipal Court, assigned, entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the release was binding on plaintiff.

Judgment affirmed.

1. Release ⇐16, 34

Where one who was injured in automobile accident was found by family physician to be suffering from slight injuries with no complications and no physical impairments, and signed release, submitted by insurer, for \$250, in full settlement, and there was no fraud, menace, threats overreaching, or chicanery on part of insurer, injured person would be deemed to have

waived right to recover from insurer for subsequently discovered spine injuries and was not entitled to have release set aside on ground of mutual mistake. Civ.Code, § 1542.

2. Release ⇐31

Release stating that it was in full settlement for injuries sustained by injured person, and that nature, extent and results of injuries were not all known or anticipated by injured person, but that he nevertheless desired to settle and compromise his claim in full, and no consideration in addition to that referred to in release should be considered, was not a "general release" within statute limiting scope of a "general release". Civ.Code, § 1542.

See publication Words and Phrases, for other judicial constructions and definitions of "General Release".

3. Release ⇐31

Mere fact that in light of subsequent events, it developed that release was unfortunate for injured person who signed it, would not justify court in rewriting the contract of settlement to increase compensation for injuries.

4. Release ⇐15

Where parties involved in action for negligence expressly and intentionally settle for unknown injuries, release is incontestible. Civ.Code, § 1542.

5. Release ⇐56

Where injured person brought action against insurer to recover for injuries, and insurer interposed as affirmative defense a release executed by injured person, and trial court granted insurer's motion for separate trial of the affirmative defense, and no facts were pertinent at hearing except such as showed a mutual mistake in execution of the release or the converse, trial court properly excluded a report of loss which injured person had made to insurer. Code Civ.Proc. § 597.

6. Release ⇐56

Where injured person had testified in personal injury action against insurer that he would not have signed release of his claim if he had known that he had a spine injury, it was not error to exclude injured

person's testimony as to whether at time of release he intended to settle or waive any claims he had as to unknown injuries.

7. Evidence ⇨377

Merely because a doctor, who is not present at personal injury action, may repeat injured person's history of his injury and refer to cases of record in support of doctor's medical opinion, does not authorize introduction of the medical report without statutory foundation for its admission. Code Civ.Proc., § 1953f.

8. Release ⇨56

In action for injuries, wherein plaintiff sought to avoid effect of release on ground that it was result of mutual mistake, neurological report of physician was irrelevant to issue whether there was mutual mistake in execution of release.

Kenneth Sperry, Long Beach, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondents Roy E. Swain and Leslie Moody.

Spray, Gould & Bowers and Malcolm Archbald, Los Angeles, for respondent Cambridge Wire Cloth Co.

MOORE, Presiding Justice.

Pursuant to respondents' motion and the ensuing instruction of the court, a verdict was returned against appellant and judgment was entered accordingly. The issue tried was raised by appellant's complaint for damages in the sum of about \$37,000 resulting from an automobile collision which allegedly caused appellant serious injuries, and a separate affirmative defense that appellant had released Mr. Swain from all liability for damages arising out of the accident in consideration of the payment of \$215. The court having granted respondents' motion for a separate trial of the affirmative defense, sec. 597, Code Civ. Proc., no question was raised as to the due execution of the release.

Appellant demands a reversal upon two grounds, namely, (1) the evidence proved a mutual mistake of fact on the part of the parties at the time appellant released

for a consideration such claims as he had or might have for injuries suffered in a collision with respondent company's automobile driven by its agent, respondent Swain; (2) the court's rulings in rejecting a number of offers of proof of "material facts and circumstances surrounding the parties at the time the release was negotiated."

The evidence discloses that on December 14, 1948, while appellant sat in his automobile it was struck in the rear with such violence that it was driven forward 40 to 60 feet. No serious injury was at the time observable. He was dazed and had a slight scratch and a bump on his forehead suffered as he was thrown forward against the steering wheel. He reported the incident to the insurance carrier of Swain on the same day. He was by that party directed to consult a physician and when ready to settle, he should return and receive payment for damages to himself and his automobile. He was promptly examined by his family physician who determined there were no broken bones but advised rest at home for a few days to be relieved of the shock. His only complaint at the time was a stiff neck which was well again at the end of ten days when appellant resumed work as salesman for a surgical supply company.

When the insurer's adjuster next called appellant, the latter declared his readiness to settle for his damages. But before the insurer would pay, he required a medical report from appellant's physician, Dr. Caraco. The latter's medical finding was that appellant had suffered a "mild degree cerebral concussion, contusions and abrasions of the chest and shock with no complications, and no physical impairments." The advice of the physician was to rest. This he did until December 28, 1948, when he was able to return to work. He was "discharged as cured" on that day—just two weeks after the accident.

During the negotiations the possibility that appellant had sustained an unknown injury was not suggested. Both appellant and the insurance carrier assumed his recovery complete. On February 1, 1949, appellant concluded to accept \$100 for loss

of earnings, \$50 damage to his automobile, \$50 for pain and suffering and \$15 for medical expense, a total of \$215 which was paid upon his executing the following:

"Release in Full Settlement
and Compromise

"I, the undersigned, claim to have sustained injury to my person and/or damage to my property by accident on or about Dec. 1st, 1948, and that Roy E. Swain, hereinafter called 'Releasee' is legally liable therefor, which liability is denied by Releasee.

"The nature, extent and results of the injuries and/or damage sustained by me are not now all known or anticipated, but I nevertheless desire to settle and compromise said claim in full.

"Therefore, in consideration of the payment to me of Two Hundred Fifteen Dollars (\$215.00), receipt of which is hereby acknowledged, I Hereby Release, Discharge and Acknowledge as Fully Paid and Compromised, All Claims, Demands and Causes of Action which I may now have or may hereafter have to recover damages against Releasee, his legal representatives or successors, for injuries to my person received by me in said accident, Including Damage, Injuries or the Results of Injuries Which are Unknown to Me and Unanticipated by Me, and for damage, including total loss to and the loss of use of my property. I Understand That No Payment or Consideration Other Than the Above Has Been Promised Me or Will Be Paid to Me.

"Signed and sealed this 1st day of Feb., 1949, at Long Beach. I have read the above full release. (Claimant to write, 'I have read the above full release.')

Jack Kostick
(Claimant's Signature)

1623 E. 64th St. Long Beach
(Address)"

Appellant certified with his own hand that he had read the "above full release" and affixed his signature.

But the worst had not been told. Within less than a month, severe pain invaded ap-

pellant's lower back and left arm. Dr. Caraco advised the use of sedatives and sent him to Dr. Alban, an orthopedist. By use of X-rays it was determined that appellant had sustained a slight compression fracture of his fifth cervical vertebra and an injury to the intervertebral disc between the fifth and sixth vertebrae. He was hospitalized and placed in traction where for several weeks he suffered intense pain except when relieved by sedatives. Inasmuch as the sole issue at the trial was the validity of the release, the extent of his suffering and the expense of hospital and surgeons were not then material. However, after leaving the hospital he wore a brace for six months and could not resume his occupation for a year. It was established by the orthopedist that appellant's suffering was the result of injuries sustained in the automobile collision with Mr. Swain in December 1948. He gave prompt notice of rescission and offered to restore the \$215.

At the trial it was stipulated that appellant had been thoroughly examined by a reputable physician at the request of respondents on December 9, 1949. The only evidence they offered was that of a radiologist who disputed some of the testimony of the orthopedist concerning the latter's interpretation of some shadow-graphs of the compression fracture. Appellant testified that at the time he executed the release he thought he had fully recovered from his injuries; did not even suspect he had sustained an unknown injury; nothing was said about the possibility of an unknown injury or about paying him anything for an unknown injury. He believed he had fully recovered from the effects of the accident. He would not have signed the release and accepted the \$215 had he known of the injuries to his spine. He admitted having read the release prior to signing it and taking notice of the all-encompassing language: "the nature and extent and results of the injuries sustained by me are not now all known or anticipated, but I nevertheless desire to settle and compromise said claim in full."

Appellant contends that the release was executed by both parties as the result of

a mutual mistake of a material fact; that both believed the only injuries sustained by appellant were purely superficial and that he had completely recovered. However, the trial court was impressed by the decision in *Berry v. Struble*, 20 Cal.App.2d 299, 66 P.2d 746, and basing its conclusion upon the doctrines there announced denied relief. Respondents are now sanguine that the *Struble* case is a complete answer to the complaint and distinguish all the decisions cited by appellant. Mr. Kostick distinguishes the cited opinion and fervently argues the superiority of the legal wisdom and soundness of his own authorities.

[1] It will be borne in mind that the only basis for rescission herein is mutual mistake. Neither fraud, menace, threats, overreaching nor chicanery in any respect is suggested. No proof was offered of what was said in the negotiations other than that given by appellant. The only medical report used in effecting a settlement was that of appellant's physician. No oral promises were made by the adjuster. No suggestion was made as to what would happen in the event the injury should prove to be more far-reaching than it appeared to be. By their agreement they both negatived all thought of a temporary or conditional settlement, whatever might be unfolded out of the unknown. No argument was made to induce appellant to sign the release, nor any suggestion that it was better than the facts justified. Appellant was in the enjoyment of all his faculties and had experienced a long and varied career in the business world. He read the release with an apparently clear understanding that he thereby waived damages for all injuries of whatever nature or extent or results, whether known or anticipated. See Civ. Code. sec. 1542.

In the *Struble* case the injured party receipted for and accepted \$181.47 "in full compromise settlement and satisfaction of and as a sole consideration for the final release and discharge of all actions, claims and demands whatsoever that now exist or may hereafter accrue against Dr. H. P. Struble * * * for injuries to the person and property of the undersigned and the treatment thereof, and the consequenc-

es flowing therefrom, as a result of the accident * * * and for which the undersigned claims the above-named persons * * * are legally liable in damages * * * and the undersigned warrants that no promise or inducement has been offered except as herein set forth * * *. "The Undersigned Agrees, as a further consideration and inducement for this compromise settlement, that it shall apply to all unknown and unanticipated injuries and damages resulting from said accident * * * as well as to those now disclosed. * * *"

Not only is the above quoted language less emphatic with reference to the inclusion of the unknown and nonanticipated injuries than the release signed by appellant herein, but the latter went further and released and discharged "as fully paid and compromised all claims, demands and causes of action which I may now have or may hereafter have * * * including damage, injuries or the results of injuries which are unknown to me and unanticipated by me." After reviewing the decisions of *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, and *Gambrel v. Duen-sing*, 127 Cal.App. 593, 16 P.2d 284, the court concluded: "There does not appear to be any principle of public policy which, in the absence of fraud or duress, would forbid parties who are laboring under no disability from releasing for a consideration all claims arising from a particular accident, whether the injuries be known or unknown [authorities]. Other things being equal, it would seem to be merely a question of intent, and this, if sufficiently expressed, should be conclusive. * * * While there is evidence in the record which, as the defendant claims, tends to show that plaintiff was not suffering from an unknown injury when the release was executed, we prefer to place our decision on the ground that *the clear intention of the parties was to compromise and release all claims, known or unknown, growing out of the accident*; and this being true, no ground for rescission was shown." (Emphasis added.)

Matthews v. Atchison, Topeka & Santa Fe R. Co., 54 Cal.App.2d 549, 129 P.2d 435,

tends no support to appellant. The court there found the facts justified the avoidance of the release. The representations with reference to the plaintiff's medical condition were made by the defendant's doctor. Also, it was shown that the plaintiff was required by the employer to sign the release as a condition of his returning to work. He was under the impression that he was fully cured and could continue his work as a switchman. Because of such proof it was held that *Berry v. Struble* did not apply.

Megee v. Fasulis, 57 Cal.App.2d 275, 134 P.2d 815, 816, does not support appellant. It reversed a judgment in favor of the defendant. As invitee on defendant's premises Megee was injured on January 13, 1940, for which he made claim for damages. On February 9 they compromised by the payment to Megee of the sum of \$300 for which he executed a "Release of all Claims" resulting from the accident. At the trial the validity of the release was an issue and under the instructions "to determine from all the evidence and circumstances of this case, whether plaintiff fully understood the contents of the release" the jury by its verdict found that he did not. The proof was that after Megee had been confined in the hospital ten days, its manager demanded payment of the bill. He was told by Megee that the latter was not in a position to pay either the hospital or the doctor. Thereupon, the manager contacted Fasulis' insurance carrier. Both the hospital and the doctor agreed with the adjuster to accept \$300 for their combined claims. The manager then told Megee the hospital "couldn't care for him indefinitely without any assurance of funds coming." On February 9, 1940, pursuant to the adjuster's declaration that he would not pay more than \$300, the latter with the manager visited Megee in his room where the adjuster told Megee that if he would sign the paper, his bills would both be paid, the doctor would have him out in ten days and that he had no claim. Megee did not read the paper; did not know its contents, re-

ceived no money but endorsed the check to the manager. The adjuster testified he was at Megee's bedside not to exceed ten minutes. Although both the hospital's manager and the adjuster contradicted Megee's testimony as to the occurrences, the jury found the facts as detailed by Megee. When he signed the release he was suffering from an infected, fractured jaw, had no funds and the manager had told him the hospital could not continue the care of him without a guaranty of payment for his keep. Megee had no independent legal advice but acted on the suggestions of the doctor, the hospital manager and the adjuster.

The foregoing is sufficient to distinguish the evidence in the case of Megee from that of *Kostick*. Appellant was, so far as he knew, a well man when he released respondents, up and doing with a clear mind. He was not under the influence of any narcotic, nor was he overpersuaded by promises of what he would get if complications should arise. On the contrary, he settled his claim with the printed declaration before him that "the nature, extent and result" of his injuries, "are not now all known or anticipated." In view of the words he read and which he certified with his own hand that he had read, it is not reasonable to say that he made a mistake of fact. He assumed the risk of discovering subsequently a fractured vertebra, a compressed disc, an impinged nerve, an infection, a tenseness of the nervous system or a mental unbalance to have resulted from his injury. Having made such assumption and accepted a sum of money from respondents, his controversy was at an end.

[2-4] Section 1542¹ of the Civil Code has no content that can aid appellant. He did not give a "general release" for the settlement, but specific words were used with reference to unknown or unanticipated results of his injury. "An agreement for the assumption of the risk of a mistake may be by specific terms, or it may be the result of custom or statute. To the extent that it is found that there is a term in a

1. "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the

time of executing the release, which if known by him must have materially affected his settlement with the debtor."

valid agreement that the risk as to the existence of an assumed statement of facts is to be upon the transferor, there can be no rescission of the transaction for mistake as to such facts." (Rest.Law on Restitution, § 11, comment c.) When appellant accepted the \$215 he knew exactly what he was giving for it. Therefore he made no mistake. (See illustration 9 under comment c, supra.) Because, in the light of subsequent events, the release was unfortunate for appellant, the courts cannot rewrite the contract of settlement to increase the compensation for the injury caused by respondents' negligence. It appears to be the rule that where the parties involved in an action for negligence expressly and intentionally settle for unknown injuries the release given by the claimant is incontestible. *Berry v. Struble*, supra; *Hanson v. Northern States Power Co.*, 198 Minn. 24, 268 N.W. 642; Note, 117 A.L.R. page 1043.

Appellant has cited a number of decisions which are factually distinguishable. He has invoked the support of (1) *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381; (2) *Loaiza v. Superior Court*, 24 P. 707, 85 Cal. 11, 9 L.R.A. 376; (3) *Hudgins v. Standard Oil Co. of California*, 136 Cal.App. 44, 28 P.2d 433; (4) *Touhy v. Owl Drug Co.*, 6 Cal.App.2d 64, 44 P.2d 405; (5) *Union Pacific R. Co. v. Zimmer*, 87 Cal. App.2d 524, 197 P.2d 363; (6) *Gambrel v. Duensing*, 127 Cal.App. 593, 16 P.2d 284; (7) *Backus v. Sessions*, 17 Cal.2d 380, 110 P.2d 51; (8) *Wetzstein v. Thomasson*, 34 Cal.App.2d 554, 93 P.2d 1028; (9) *Jordan v. Guerra*, 23 Cal.2d 469, 144 P.2d 349. The first (1) and second (2) involved only "general" releases. (See Note, 117 A.L.R. page 1043.) In the third (3) only some of the many injuries sustained by Hudgins were considered at the time of the release. He was in such pain at the time he did not read the release. In the fourth (4) Touhy was suffering from mental weakness when he signed the release. In the fifth (5) the representations as to the defendant's condition were made by the doctors of the railroad company.² In the sixth the plain-

tiff received a severe blow on her forehead. On the second day thereafter while the lady was "nervous and all to pieces" and suffering pain in her head and nose and before she had consulted a lawyer, two agents of the defendant's insurer called on Mrs. Gambrel and obtained the release. She did not understand it. Upon the evidence the jury determined that the rescission of the plaintiff's release should be enforced for mutual mistake. The release was general in nature and the plaintiff had no knowledge at the time of signing the release that her eyesight had been impaired. In the seventh the injured man was not able mentally or physically to consider and know the significance of the release, which fact was known to the defendant. On the day after the accident the adjuster for Mr. Sessions' insurance carrier, accompanied by its physician, called on the plaintiff at the hospital. They discussed a settlement following which Backus agreed to accept \$800 for a general release of all damages. The court found that plaintiff was "dazed and in a semi-conscious condition and was without capacity to contract and was unaware of his rights and injuries. In the eighth the plaintiff suffered injuries received from an automobile accident on December 4. On the same day and on the fifth an adjuster for the insurance company called at her home and discussed a possible settlement. On the seventh he called and obtained her signature to a writing which "purported to be a release of all claims for damages" and paid her \$175. She was told that such money was to cover doctor bills and to pay the lady who would operate plaintiff's florist shop, and was assured that future developments in her condition "would be taken care of." Because of the fraud and "high pressure" of the adjuster and the physical and nervous condition of the lady the trial court found the release void. Such finding was warranted by the evidence. In the ninth (9) the court affirmed the order denying judgment notwithstanding the verdict. It is thus seen that none of the cited decisions is in the same class with the con-

2. Zimmer having made a settlement, rescinded it, whereupon the railway company sued for declaratory relief.

troverſy at bar or is remotely akin to Berry v. Struble, ſupra. Inasmuch as the ſubject of reſciſſion or releases has been diſcuſſed generously by the courts of this ſtate, it is deemed inadviſable to review the deciſions of ſiſter ſtates.

No Prejudice by Rulings Rejecting
Offers of Evidence

[5] Assignment is made of the court's excluſion of certain evidence. He ſays that after the "report of loſs" by appellant was ſhown to have been before the adjuſter at the time of ſettle- ment, he offered the docu- ment in evidence. Objection to it by re- ſpondents was ſuſtained on the grounds that it was irrelevant and referred to col- lateral matters. The ruling was correct. No facts were pertinent at the hearing ex- cept ſuch as ſhowed a mutual miſtake or the con- verſe. Thoſe were fully developed by appellant. The ground for a directed verdict was not a want of evidence of ap- pellant's miſtake, but the ſpecific release of reſpondents. Bills incurred by ap- pellant after the release were utterly imma- terial as to whether a verdict ſhould be directed.

[6] Neither was it error to exclude ap- pellant's teſtimony as to whether at the time of the release he "intended to ſettle or waive any claims" he had as to unknown injuries. He had already teſtified that he "would not have ſigned the release then and accepted the ſum of \$215 in ſettle- ment" of his claim if he had known he had an injury to his vertebra and the intervertebral diſc.

[7] No prejudice was ſuffered by rea- ſon of the excluſion of Dr. Weaver's neurological report. He had evidently made an examination of appellant while the latter was under Dr. Alban's care and no doubt the orthopediſt had been influenced by the report in ſhaping his teſtimony for the trial. However, there was no proof that it was prepared under the ſupervision of Dr. Alban. It is the work of an independent phy- ſician whoſe findings and ſuggeſtions might not have been wholly adopted by Dr. Alban. Also, neither Dr. Weaver nor "other qualified wiſneſs teſtified to its identity and mode of its preparation," and whether it was made in the regular courſe of buſineſs, at or near the time of its preparation and

whether the ſources of information, meth- od and time of preparation were ſuch as to juſtify its admission. Code Civ.Proc., ſec. 1953f. Merely becauſe a doctor, in ſup- port of his medical opinion, may repeat the patient's hiſtory of his injury and refer to caſes of record, authority is not thereby given to introduce the medical report of an abſent wiſneſs without the ſtatutory founda- tion for its admission. The authorities cited by appellant, Rohner v. Croſs, 121 Cal.App. 667, 9 P.2d 509; Healy v. Viſalia & T. R. Co., 101 Cal. 585, 36 P. 125, and Carney v. R K O Radio Pictures, Inc., 78 Cal.App.2d 659, 178 P.2d 482, are therefore not pertinent.

[8] Moreover, the report of Dr. Weaver was irrelevant to the iſſue of whether there was a mutual miſtake in the execution of the release and the payment of \$215.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, J., diſſent- ing.



116 Cal.App.2d Supp. 915

LIPSCHULTZ et al. v. GREGORY
ELECTRIC CO.

No. 177555.

Appellate Department, Superior Court,
San Diego County, California.

Jan. 25, 1953.

Action by junk dealers againſt corporate electrical equipment dealer for alleged breach of contract to purchase a transformer, which junk dealers were to purchase at auction ſale and which was to be reſold, with both parties ſplitting the profits. The Municipal Court, San Diego Judicial Diſtrict, Eugene Daney, Jr., J., entered judgment for corpo- ration, and junk dealers appealed. The Su- perior Court, Appellate Department, Burch, J., held that evidence was ſufficient to eſta- bliſh that corporation's agent did not agree to purchase the one phase transformer which junk dealers purchased at the auction ſale.

Judgment affirmed.

1. Sales ⇨52(5)

In action by junk dealers against corporate electrical equipment dealer for alleged breach of contract to purchase transformer, which junk dealers were to purchase at auction sale, evidence was sufficient to establish that corporation's agent had not agreed to purchase the one phase type of transformer which junk dealers purchased at the sale.

2. Appeal and Error ⇨989

Where a judgment is attacked on ground that it is not supported, the appellate court's power ends with determination that there is substantial evidence which will support the trial court's conclusions.

3. Contracts ⇨24

A proposal to accept, or an acceptance upon terms varying from those offered, constitutes a rejection of the offer.

4. Sales ⇨22(4)

Where seller was talking about a one phase transformer and buyer about a three phase transformer, and each expected other would contract on basis of type of unit of which other was unaware, a contract to purchase was not created.

Alfred Beck, Los Angeles, for appellants.

Oakes & Horton, San Diego, for respondent.

BURCH, Judge.

The defendant, Gregory Electric Company, was an Illinois corporation engaged in the business of buying and selling electrical equipment in Chicago, Illinois. The plaintiffs, a father and two sons, were engaged in a general brokerage business, buying and selling ferrous and non-ferrous scrap metal in the junk business. They were acquainted with Tom Pass, who was the defendant's general manager. They proposed to him on May 17, 1948, that they could procure at an auction sale to be conducted on May 21, 1948, by the War Assets Administration at Milwaukee, Wisconsin, certain electrical equipment known as an "Uptograff transformer," which was listed in a catalogue as "Lot 57," and which catalogue was in plaintiffs' possession at the conference on May 17, 1948.

The only witnesses at the trial were George and Sidney Lipschultz, plaintiffs, and Tom Pass, general manager of the defendant. They were acquainted with each other and seemed to have conducted this transaction on an informal basis without a writing to evidence their agreement, if any. As testified by George Lipschultz, he was told by Mr. Pass that if he could procure the transformer described in the catalogue at the contemplated sale for a price not to exceed \$2000, Pass' firm would take it off their hands. That is but to say a sale contract would be made if the plaintiffs could buy the unit for less than \$2000 at an auction sale yet to be held. The transformer was described in the catalogue as a one phase transformer. There is also a three phase transformer which is more costly and more marketable equipment. Mr. Lipschultz stated that he showed the catalogue to Mr. Pass at the conference preceding the sale. On the other hand, Mr. Pass testified that their conference had to do entirely with a three phase "Uptograff transformer"; that he did not see the catalogue; that he accepted Mr. Lipschultz's statement that Mr. Lipschultz would be able to buy the three phase transformer, and stated to him that should he be able to buy it that the Gregory Electric Company would advance the necessary funds and split the profits on a resale. Mr. Lipschultz purchased the one phase transformer at the sale for \$1566.66 and shipped it to defendant's place of business where it arrived on June 14, 1948. It was then that Mr. Pass discovered that the transformer received was not a three phase type and shortly thereafter telephoned to Mr. Sidney Lipschultz. In regard to the conversation he testified:

"I explained the transformer had come in and it was a single phase instead of a three phase and we couldn't possibly accept the unit or accept the agreement regarding the purchase."

On June 25, 1948, plaintiffs addressed a letter to the War Assets Administration asking for shipping instructions and saying they could not use the transformer shipped.

[1,2] We think this evidence is sufficient to support the finding that the de-

fendant did not agree to purchase the transformer of one phase type, upon which plaintiffs base their entire claim. It is, of course, true that other evidence in the record conflicts with the view taken by the court, but the evidence we have set out above is substantial, and evidence to the contrary at the trial did no more than create a conflict.

"It is fundamental that where a judgment is attacked on the ground that it is not supported, the power of the appellate court ends when it shall once have determined that there is substantial evidence which will support the conclusions of the trial court." *Viner v. Untrecht*, 26 Cal.2d 261, 267, 158 P.2d 3, 6.

Plaintiffs, notwithstanding, would have us reverse the judgment, and argue particularly what they assert is the probative value of a document introduced in evidence, which is a printed form of invoice with the billhead of the plaintiffs' firm name, Abel Iron and Metal Company. The document is dated May 20, 1948, and indicates a sale as of that date to the defendant of a one phase type transformer. It indicates that the unit was shipped on May 26, 1948, by the "West Shore." All parties agreed that the War Assets Administration held their sale at Milwaukee, Wisconsin, May 21, 1948, the day following the date of this so called invoice; that the unit was not shipped on May 26, 1948, but on June 14, 1948; that it was not shipped by the "West Shore" but by the Shea-Matson Trucking Company. Moreover, Mr. Pass testified that the date of receipt of the writing was after June 14, 1948. Upon this so-called invoice, there was written across the face in the handwriting of Mr. Pass the word "Hold."

It is the contention of plaintiffs that this document resolves the conflict in favor of their contention as a matter of law. To this end they cite *Herbert v. Lankershim*, 9 Cal.2d 409, 471, 472, 71 P.2d 220; *Duryea v. Zimmerman*, 143 App.Div. 60, 127 N.Y.S. 664, 666, 668, 669, 670, including a quotation from *Lumpkin, J., Miller v. Cotten*, 5 Ga. 341, 349, to the following effect:

"I would sooner trust the smallest slip of paper for truth than the strongest and most retentive memory ever bestowed on mortal man."

In *re Irvine's Estate*, 102 Cal. 606, 610, 36 P. 1013; *Keck v. Wingert*, 132 Cal.App. 475, 485, 23 P.2d 99.

The writing referred to by *Lumpkin, J.*, was a deed from a son to a father upon which, after the death of both grantee and grantor, the plaintiff sought to impose a trust and introduce parole evidence to that effect.

In *Herbert v. Lankershim*, *supra*, the trial court and the District Court of Appeal had accepted as true a writing which purported to be a promissory note for \$500,000. Upon appeal, the Supreme Court in a learned analysis repudiated this finding because of the untrustworthiness of the document. While it is true that on appeal the question as to whether or not there is substantial evidence is a question of law for the court, it follows from nothing said in *Herbert v. Lankershim*, *supra*, that a self-serving document has unusual probative value.

It was held in *In re Irvine*, *supra*, that the oral testimony of a party given six years after the transaction raises no substantial conflict with her clear and explicit writings to the contrary executed at the time of the transaction under circumstances usual and ordinary in such cases as to matters of which the parties were fully advised. Somewhat the same variance exists in *Keck v. Wingert*, *supra*, in that the party sought at a much later date to impeach her own written documents.

Duryea v. Zimmerman, *supra*, was an action for deceit caused by misrepresentation of facts in a prospectus whereby plaintiff alleged he was induced to buy stock in a foreign corporation. The Appellate Division of the Supreme Court reversed the decision of the trial court and granted a new trial, where the record clearly showed that plaintiff's purchase of stock predated the issuance of the prospectus, which was alleged as the ground of deception.

We think the contrasts in their facts of the cases cited with the present case is such as to establish no authority for reversing the

judgment here. The writing before us has not the probative force of a deed, or a bookkeeping entry, or a written acknowledgment of an obligation. On the contrary, it was but a memorandum looking to the occurrence of expected future events, unless perchance its date was likewise erroneous. As a matter of fact, this very memorandum was admitted to be false in more than one important recital. Plaintiffs' testimony, taken at its full face value, could only support a sale upon the uncertain event that he would be the successful bidder at the auction on May 21st. There was no testimony of a firm agreement. The evidence was that a contract would be entered upon should certain eventualities occur. Moreover, the parties, according to their testimony, respectively, were not in agreement as to the subject matter. That, at least, was what the court properly found.

[3, 4] The legal situation comes to this: Mr. Lipschultz was talking about a one phase transformer, Mr. Pass about a three phase transformer. Each expected the other would contract on the basis of a type of unit of which that other was unaware.

"A proposal to accept, or acceptance, upon terms varying from those offered, is a rejection of the offer." *Meux v. Hogue*, 91 Cal. 442, 448, 27 P. 744, 746.

"* * * the parties must have consented to the same subject-matter in the same sense; and the burden is upon the plaintiff to show that a contract, definite and certain in its terms, was entered into between the parties as a condition of obtaining any relief." *Breckinridge v. Crocker*, 78 Cal. 529, 21 P. 179.

The record here also discloses an advertisement by the defendant for the sale of the transformer in the August 1948 issue of "Surplus Record," which advertisement, however, did not result in a sale. It was explained in the testimony of Mr. Pass that his firm followed a common and usual practice in listing for sale items of equipment it knew it had a reasonable chance of being able to secure in the event of an offer to purchase. It was further testified that the Gregory Electric Company

had a general liquidation sale by auction and that the auctioneer at the sale offered the transformer in question for sale at the request of Mr. George Lipschultz. In view of the relation of the parties and the circumstances, we think the trial court may have been very correct in accepting the defendant's view of these advertisements and attempted sales.

Some months after the close of the trial and the pronouncement by the court of its judgment, plaintiff sought to reopen the case by introducing an affidavit of the plaintiff, Sidney Lipschultz, which narrated a conversation which the affiant had had with one Korner who was proprietor of the Ace Power and Equipment Company in Chicago where the transformer was in storage. The court refused to reopen the case because of the newly discovered evidence. There was no error in refusing the affidavit as newly discovered evidence.

The judgment is affirmed.

TURRENTINE, P. J., and GLEN, J.,
concur,



BERGER v. O'HEARN.*

Civ. 15260.

District Court of Appeal, First District,
Division 2, California.

Feb. 27, 1953.

Rehearing Denied March 28, 1953.

Hearing Granted April 27, 1953.

Action against administrator of an estate to recover an indebtedness allegedly due from decedent. The Superior Court, County of San Mateo, Murray Draper, J., sustained defendant's demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, Patterson, J., pro tem., held that action filed more than five years after indebtedness was incurred and 17 months after issuance of letters of administration, was barred by the general statute of limitation.

Judgment affirmed.

* Subsequent opinion 264 P.2d 10.

1. Limitation of Actions ⇨5(3)

The statute of limitation is a general statute and must be applied generally in all cases where exception to its operation is not specifically made.

2. Limitation of Actions ⇨80, 83(1), 132

Where the statute of limitation has commenced to run, the subsequent death of the parties does not toll the statute in the absence of an express provision to the contrary, nor does the failure of his administrator to act upon the claim extend the general statute of limitation except in accordance with statute that if person against whom action may be brought dies before time limited for its commencement, an action may be filed within one year after appointment of legal representative. Code Civ.Proc. § 353.

3. Limitation of Actions ⇨132

In view of provision of probate code that if a claim against estate is not acted upon within ten days after filing, the claimant at his option may deem it rejected, failure of administrator to act upon claim does not foreclose a claimant from filing action after the tenth day, and consequently does not toll the statute of limitations. Code Civ.Proc. § 353; Probate Code, § 712.

4. Limitation of Actions ⇨132

Probate code provision that where a claim is rejected by legal representative of decedent's estate the claimant must bring his action within three months after receipt of written notice of rejection, may shorten, but it cannot lengthen general statute of limitation. Probate Code, § 714.

5. Limitation of Actions ⇨83(2)

Action to recover an alleged indebtedness from estate of decedent which was filed more than five years after indebtedness was incurred and 17 months after issuance of letters of administration was barred by statute of limitation. Code Civ. Proc. § 353, Probate Code, § 712.

6. Pleading ⇨225(2)

Where record in action against estate to recover indebtedness due from decedent showed that action was barred by statute of limitations, sustaining of demurrer to

complaint without leave to amend was not abuse of discretion.

William Berger, in pro. per.

W. L. A. Calder and Abraham Glicksberg, San Francisco, of counsel for appellant.

Samuel L. Fendel, Sol Silverman and James A. Toner, San Francisco, for respondent.

PATTERSON, Justice pro tem.

Appeal from a judgment rendered after sustaining a demurrer without leave to amend.

The plaintiff filed an action to recover attorney's fees on December 6, 1945. The defendant died on July 20, 1947. Letters of Administration were issued on August 4, 1947, and the plaintiff by order of the court was permitted to continue the action against the administrator. Plaintiff filed a creditor's claim in the estate on February 3, 1948 attaching to the claim a copy of his complaint in the action. The administrator rejected the claim and the plaintiff received written notice of rejection on February 20, 1951. On April 18, 1951, on motion of the administrator, the court dismissed the action under the provisions of Code of Civil Procedure Section 583 upon the grounds that it had not been brought to trial within five years. See *Berger v. McMahan*, Cal.App., 253 P.2d 543. Plaintiff on the same day filed the present action on the same alleged indebtedness which purported to state a cause of action upon the rejected claim. The court sustained defendant's demurrer without leave to amend upon the grounds that the action was barred by the statute of limitations.

[1, 2] The present action was admittedly filed more than five years after the indebtedness is alleged to have been incurred. Plaintiff seeks to excuse this delay on the ground that the statute of limitations was tolled during the period between the filing of his creditor's claim on February 3, 1948, and notice of its rejection on February 20, 1951. The statute of limitations is a gen-

eral statute and must be applied generally and in all cases where exception to its operation is not specifically made. (11b Cal. Jur. 360.) Where the statute has commenced to run, the subsequent death of the party bound does not toll the statute in the absence of an express provision otherwise in the statute. *Davis v. Hart*, 123 Cal. 384, 55 P. 1060. Neither the death of the party bound nor the failure of the administrator of his estate to act upon the claim will extend the general statute of limitations. The only exception is that provided in Code of Civil Procedure, Section 353, which provides that if a person against whom an action may be brought dies before the time limited for its commencement an action may be filed within one year after the appointment of the legal representative. As stated in *McMillan v. Hayward*, 94 Cal. 357, 360, 29 P. 774, 775, "The statute had therefore commenced to run, and would continue to run, unless [the case] is brought within some express exceptions of the statute; and death is not made such, further than that the suitor may in such case commence his action within one year after letters are issued. This action was commenced neither within four years after the maturity of the note, nor within one year after letters were issued. * * * The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time."

[3] Probate Code Section 712 provides that if a claim is not acted upon within ten days after filing, the claimant at his option may deem it rejected. The failure to act upon a claim therefore does not foreclose a claimant from filing an action after the tenth day and thus tolling the statute of limitations.

Barclay v. Blackinton, 127 Cal. 189, 59 P. 834, is directly in point here. In that case the decedent had executed a promissory note in favor of plaintiff. Prior to the expiration of the statute of limitations the maker died. An administrator was appointed and a claim was duly presented against

the estate. The claim was not acted upon and more than one year after the appointment of the administrator and after the general statute of limitations had expired an action was filed upon the claim. In holding that the action was barred the court said, 127 Cal. at page 194, 59 P. at page 835 "It has been many times decided by this court that, when a claim is duly presented and allowed by the administrator and the judge, it stops the running of the statute. It has never been held that the mere presentation of it has the same effect." The court further cited, 127 Cal. at page 194, 59 P. at page 835 with approval the following language in *Reitzell v. Miller*, 25 Ill. 53, "It was not the design of the general assembly that the filing of the claim should arrest the general statute of limitations, which had previously begun to run, nor to prevent it from afterwards running upon a claim not due at the time of its presentation. The object of this section is to facilitate and produce speedy settlement of estates of deceased persons, and it could not have been the design to give creditors an unlimited period of time within which to establish the justice of their claims after they had been exhibited in the probate court. Such a construction would defeat the manifest intention of the enactment." This rule was followed in *Dodson v. Greuner*, 28 Cal.App.2d 418, 82 P.2d 741.

[4] Plaintiff next contends that the only limitation upon the filing of an action upon a claim which has been timely presented is that set forth in Probate Code Section 714. That section provides that where a claim is rejected the claimant must bring his action within three months after receipt of written notice of rejection. The same contention was made in *Barclay v. Blackinton*, supra, and the decision in that case in our opinion is controlling here. The provisions of Probate Code Section 714 were at that time found in Code of Civil Procedure Section 1498. In rejecting this contention the Supreme Court said, 127 Cal. at page 193, 59 P. at page 835, "It is said that under Code Civ.Proc. § 1498, the plaintiff had three months after the claim was formally and officially rejected by the administrator

BERGER v. McMAHAN.

Civ. 15259.

District Court of Appeal, First District,
Division 2, California.

Feb. 27, 1953.

in which to bring his action. We do not so construe the statute. *The section may shorten, but cannot be held to lengthen, the general statutes of limitations.* The special limitations of time within which suit must be brought against the estates of deceased persons are called in many states statutes of nonclaim, or of short or special limitation. These limitations exist independent of and collateral to the general law of limitations." (Emphasis added.) The plaintiff argues that the rule laid down in *Barclay v. Blackinton*, supra, no longer applies because of certain amendments to the code section. The amendments provide that when a claim is rejected notice of rejection must be given in writing and that in event suit is filed within ten days thereafter the plaintiff must give notice of the suit to the executor or administrator. The amendments would in no wise affect the ruling as announced by the court.

[5] Plaintiff has cited the following cases in which the action was filed either within the period of the general statute of limitations or the period as extended by Code Civ.Proc. Section 353: *Estate of Garnett*, 126 Cal.App. 344, 14 P.2d 572; *Smith v. County of San Mateo*, 57 Cal. App.2d 820, 135 P.2d 372; *Thayer v. Fish*, 49 Cal.App.2d 618, 122 P.2d 358; *Estate of Wilcox*, 68 Cal.App.2d 780, 158 P.2d 32; *Keeler v. Baird*, 48 Cal.App. 29, 191 P. 563. These cases are not in point. Here the action was filed more than five years after the indebtedness was incurred and seventeen months after the issuance of letters of administration.

[6] It is urged that the court erred in not permitting the plaintiff to amend the complaint. He does not point out in what respect it could be amended. It was not an abuse of the court's discretion to sustain the demurrer without leave to amend where the record disclosed that the action was barred by the statute of limitations, and therefore the objection to it could not be obviated.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Proceedings on motion to dismiss action for failure to bring it to trial within five years after filing of complaint. The Superior Court, County of San Mateo, Murray Draper, J., entered order of dismissal, and plaintiff appealed. The District Court of Appeal, Patterson, J., pro tem., held that exception to requirement of dismissal because of such lapse of time, provided for in case of written stipulation of counsel extending time for bringing cause to trial, is not complied with by an oral stipulation.

Judgment affirmed.

1. Dismissal and Nonsuit ⇨60(6)

Under statute providing for dismissal of action for failure to bring it to trial within five years after filing of complaint, with exception where stipulation of counsel extending time is made, a defendant cannot be prevented by oral stipulation from obtaining dismissal by passing of the five year period. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇨60(3)

Where defendant died during pendency of action against him, and court made order permitting action to be continued against his administrator and plaintiff filed supplemental complaint to which no responsive pleading was made, request of plaintiff more than five years after filing of action that default be entered against defendant did not preclude dismissal of action under statute requiring dismissal for failure to bring cause to trial within five years after filing of complaint. Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇨60(4)

Negotiations for settlement of a cause of action do not except the action from mandatory provisions of statute requiring dismissal for failure to bring cause to trial within five years from filing of complaint. Code Civ.Proc. § 583.

William Berger, in pro. per.

W. L. A. Calder and Abraham Glicksberg, San Francisco, for appellant.

Samuel L. Fendel, Sol Silverman and James A. Toner, San Francisco, for respondent.

PATTERSON, Justice pro tem.

This is an appeal from an order dismissing an action under the provisions of the Code of Civil Procedure Section 583 for failure to bring it to trial within five years after the filing of the complaint. The relevant dates are as follows:

December 6, 1945 — Original complaint filed and summons issued.

April 2, 1946 — Answer to complaint filed.

July 20, 1947 — Original defendant died.

August 4, 1947 — Defendant administrator was granted letters of administration.

March 6, 1951 — Memorandum of motion to set cause for trial filed.

March 7, 1951 — Notice of motion to dismiss action for failure to prosecute filed.

April 30, 1951 — Order of trial court and judgment of dismissal for failure to bring action to trial within five years filed.

[1] Plaintiff first raises the question, "Do oral stipulations have the effect of stopping the defendant from enforcing Section 583, C.C.P.?" The plaintiff has not pointed out the oral stipulations referred to and none are disclosed by the record. However, the code section itself provides for the mandatory dismissal of the action upon motion either of counsel or the court where such action has not been brought to trial within five years after the plaintiff has filed his action except upon the written stipulation of counsel extending the time or where the defendant has been absent from the state or has been concealed within the state. In *Bank of America v. Moore and Harrah*, 54 Cal.App.2d 37, 43, 128 P.2d 623, 626, the court said: "The statute has the very salutary purpose of expediting trials. Its language is clear and definite and the integrity of its meaning has generally been upheld by the courts in a plenitude of decisions. In the several legislative

amendments to which it has been subjected the legislature has not seen fit to temper the rigor of the language or its forthright construction and support by the courts; the tendency, rather, has been to extend and make more certain its operation. With respect to the invoked doctrine of estoppel we observe that the Supreme Court in *Miller & Lux, Inc. v. Superior Court*, 1923, supra, 192 Cal. 333, at page 339, 219 P. 1006, at page 1008, said 'While there is language in several of the cases construing section 583 which seems to recognize the possibility of a waiver by estoppel, it is to be noted that without exception these cases hold that a written stipulation is required. * * * The statute provides that the time for trial may be extended by *written stipulation*. It does not provide that it may be extended by a written stipulation "or its equivalent." ' "

[2] The second question raised by the plaintiff is whether his request for the entry of a default prevented the dismissal of the action for lack of prosecution. The defendant died on July 20, 1947, and pursuant to stipulation the court made an order permitting the action to be continued against the administrator of the defendant. Following the order the plaintiff filed a supplemental complaint alleging the death of the defendant, the appointment of the administrator and the filing of a creditor's claim. No answer was filed to this pleading although an answer to the original complaint was on file. The record shows that on the day the order was made dismissing the action, which was more than five years after the action was filed, the plaintiff requested the default of the defendant to be entered. No claim is made that the defendant was absent from the state or concealed therein nor that it was impossible or futile to bring the action to trial within five years. Under these circumstances the dismissal was mandatory. *Rose v. Knapp*, 38 Cal.2d 114, 117, 237 P.2d 981; *Andersen v. Superior Court*, 187 Cal. 95, 97, 200 P. 963; *Boyd v. Southern Pacific R. Co.*, 185 Cal. 344, 346, 197 P. 58; *Douglas v. Superior Court*, 94 Cal.App.2d 395, 398, 210 P.2d 853; *Jones v. Superior Court*, 86 Cal.App.2d 542, 195 P.2d 451;

Favretto v. Favretto, 86 Cal.2d 299, 301, 194 P.2d 748. The court had no alternative but to dismiss. As stated in Andersen v. Superior Court, supra, 187 Cal. at page 97, 200 P. at page 964, "The trial court is without discretion to refuse an order of dismissal, where it is made to appear that the action has not been brought to trial within the prescribed period and that no stipulation in writing to extend the time has been made."

[3] Plaintiff filed a counter affidavit in connection with the motion to dismiss in which he states that there were numerous conferences in an effort to negotiate and settle the case. He further stated that he had been led to believe through the various conferences had with counsel for the defendant that the matter would be negotiated and settled. The last conference according to the affidavit occurred on December 15, 1950, at which time no settlement was reached. Plaintiff argues that under these circumstances the case should not have been dismissed. Negotiations for settlement do not except an action from the mandatory provisions of the statute. *Christin v. Superior Court*, 9 Cal.2d 526,

529, 530, 71 P.2d 205, 112 A.L.R. 1153; *City of Los Angeles v. Superior Court*, 185 Cal. 405, 414, 197 P. 79; *Elmhurst Packers, Inc. v. Superior Court*, 46 Cal.App.2d 648, 650, 651, 116 P.2d 487. Plaintiff relies upon a statement in *Cameron v. Cameron*, 110 Cal. App.2d 258, 242 P.2d 408, to the effect that where there have been mutual bona fide efforts to compromise and the plaintiff has delayed bringing the action to trial because of reasonable belief induced by the nature of the negotiations that a trial could probably be avoided, it would be an abuse of discretion to dismiss the action. The factual situation there, however, was entirely different. In that case there had been an appeal. After it was remanded to the trial court and within the three year period in which the plaintiff had to bring the matter to trial, it was dismissed for lack of prosecution. The court's order of dismissal was affirmed upon the grounds that it was a matter of discretion, and there was no abuse of discretion present. The case is not in point here.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



SUTTER BASIN CORP., Ltd., v.**BROWN et al.**

Sac. 6190.

Supreme Court of California, in Bank.

Feb. 17, 1953.

Rehearing Denied March 16, 1953.

Application for writ of mandate to compel treasurer of reclamation district bond fund to cancel an assessment call and to require treasurer to include in estimate which formed basis for making calls all funds in treasurer's hands derived from sale of delinquent lands or their redemption. The Supreme Court, Edmonds, J., held that where reclamation district bond fund from time of issuance of refunding bonds to time of statutory amendment consisted of all amounts collected by treasurer upon assessment calls and from sales of delinquent land, and such amounts were required to be used for landowner's obligations on outstanding bonds, retroactive application of amendment requiring treasurer to exclude from estimate funds gained from sales of delinquent land violated contract between landowners and bondholders, and hence landowners were entitled to writ of mandate.

Writ issued.

Gibson, C. J., and Carter, J., dissented.

Prior opinion, 226 P.2d 600.

1. Waters and Water Courses ⇨222

Reclamation district bonds constitute a contract between property owners and bondholders. Water Code, §§ 51420-51425.

2. Constitutional Law ⇨143

Laws in existence at time of issuance of reclamation district bonds, under authority of which such bonds are issued, enter into and become part of contract to such extent that obligation of contract cannot thereafter be impaired, or fulfillment of bond obligation hampered or obstructed by a change in such laws. Water Code, §§ 51420-51425.

3. Waters and Water Courses ⇨222

Legislation in regard to reclamation districts is within state's plenary power, except where such legislation tends to impair obligations of contracts. Water Code, §§ 51420-51425.

4. Waters and Water Courses ⇨222

Time and method of payment of reclamation district bonds as well as nature of

security given bondholders are integral parts of contract between property owners and bondholders. Water Code, §§ 51420-51425.

5. Constitutional Law ⇨143

Where reclamation bond fund from time of issuance of refunding bonds to time of statutory amendment consisted of amounts collected by treasurer on assessment calls and from sales of delinquent land, and such amounts were required to be used for landowner's obligations on such bonds, retroactive application of amendment requiring treasurer to exclude from estimate, which formed basis of making calls, funds gained from sales of delinquent land violated contract between landowners and bondholders. Water Code, §§ 51420-51425.

6. Waters and Water Courses ⇨222

All lands purchased by treasurer of reclamation district bond fund and deeded to himself as trustee either of bond fund or for benefit of district constitute a trust for benefit of bondholders and must be paid into treasury for benefit of bondholders. Water Code, §§ 51420-51425.

7. Taxation ⇨309

Nature of burden which levy of assessment places upon a landowner must be measured by terms of statute creating assessment.

8. Waters and Water Courses ⇨222

After reclamation district bonds are issued there is no right to call an assessment except to meet unpaid installments of principal and interest. Water Code, §§ 51420-51425.

9. Waters and Water Courses ⇨222

Money in reclamation district bond fund is not property of state or district but is part of trust fund held for benefit of bondholders. Water Code, §§ 51420-51425.

10. Gifts ⇨1**Waters and Water Courses** ⇨222

Payment of principal and interest on reclamation district bonds from monies in reclamation district bond fund is payment of landowners' legal obligation to bond-

holders and cannot be construed as a gift. Water Code, §§ 51420-51425.

11. Constitutional Law ⚖️209

Constitutional equality is equality of right and not of enjoyment and a law that confers equal rights on all citizens or subjects them to equal burdens is an equal law, and so long as a statute does not permit one to exercise a privilege while refusing it to another of like qualifications under like conditions and circumstances, statute is unobjectionable upon ground of inequality.

Wright & Garrett, Alfred Wright and David M. Harney, Los Angeles, for petitioner.

Lloyd E. Hewitt, Dist. Atty., Yuba City, Bruce F. Allen, San Jose, Stephen W. Downey and Downey, Brand, Seymour & Rohwer, Sacramento, for respondents.

EDMONDS, Justice.

The Treasurer of Sutter County has made a call upon the owners of lands in Reclamation District No. 1500 for the payment of certain sums estimated in accordance with section 3480 of the Political Code¹, as amended in 1949. His estimate includes the amounts of the installments of interest and of principal due January 1, 1950, upon a series of refunding bonds issued in 1930. The amendment of 1949 excludes from the estimate to be made by a county treasurer all amounts in a district's bond fund which were derived from the rentals or sales of lands sold to him to satisfy delinquencies in payment of calls. By writ of mandate, Sutter Basin Corporation, a landowner in the district, seeks to compel the treasurer to cancel his present call, and to estimate the funds available for payment of the bonds in the manner directed by section 3480 as it read when the

bonds were issued. The question for decision is whether the 1949 legislation applies to bonds issued prior to its effective date.

The facts have been presented by stipulation.

Reclamation District No. 1500 lies wholly within Sutter County. In 1919, Assessment No. 1, apportioned among the landowners in accordance with "special benefits", Political Code § 3456², was levied by the district upon all the lands within its boundaries. One year later, bonds were issued in the approximate amount unpaid upon the assessment. In 1930, these bonds were in default and refunding bonds were issued as provided by section 3480a of the Political Code.³ The new obligations, maturing serially between 1941 and 1962, were in the principal amount of about \$4,750,000.

Except for the amendment of 1949, since 1930 there has been no change in the statutory provisions governing the payment of bonds of reclamation districts insofar as the rights of the parties in the present proceeding are concerned. Such bonds are payable from a bond fund, of which the treasurer of the "main county" in which the district is located is the trustee. To the extent that the bond fund is insufficient to pay installments due upon the bonds, the treasurer is directed to make a call upon each landowner in proportion to the amount of his unpaid assessment. Political Code, § 3480.⁴ If a property owner becomes delinquent in the payment of a call, his land must be sold at public auction and the proceeds deposited in the bond fund. Political Code, § 3480.⁵ An upset price is fixed equal to the sum of the delinquency, plus a penalty and interest. If, at public auction, no bid equal to that sum is received, the treasurer, as trustee of the bond fund, is required to bid the amount of the upset price and the land is sold to him.

1. In 1951, the Legislature re-enacted the provisions of the Political Code governing Reclamation Districts as Division 15 of the Water Code. Stats.1951, c. 336, pp. 690-769. The requirements of former section 3480 of the Political Code, insofar as they apply to the present

proceeding, are now found in sections 51420 to 51425 of the Water Code.

2. Now Water Code, §§ 51231, 51236.

3. Now Water Code, §§ 52500-52602.

4. Water Code, §§ 51420-51425.

5. Water Code, §§ 51630-51651.

Prior to 1931, the treasurer could not resell such lands at less than the upset price. Due to the then existing depression in economic conditions, the upset price generally was more than the value of the land. For that reason, large areas of land sold to the treasurer to satisfy delinquencies could not be disposed of by him. To permit their restoration to private ownership, section 3466a of the Political Code,⁶ enacted in that year, authorized the sale of such lands at their fair market value, regardless of the statutory upset price. It also permitted the lands to be rented, the proceeds to be deposited in the bond fund. Despite the new provision, the lands to which the treasurer of Reclamation District No. 1500 held title remained unsold, placing added burdens on the remaining landowners of the district. No taxes were paid on delinquent lands, and calls to satisfy installments due upon the bonds were not met.

In 1949, section 3466a was amended to make mandatory the sale of such lands within prescribed time limits. Stats.1949, c. 719.⁷ The treasurer sold all of the lands in Reclamation District No. 1500 upon which there were delinquent assessments and deposited the proceeds in the bond fund. Including the proceeds from such sales and from crop rentals, there is now \$710,000 in that fund, and a resolution would be sufficient to transfer to it \$160,000 which the district has in its general fund. The outstanding bonds are in the principal sum of \$559,500. Interest computed to maturity amounts to \$263,745. If and when the cash in the general fund is transferred, there would be in the bond fund more than enough money to pay principal and interest of the bonds in full.

By the same statute, however, section 3480 of the Political Code⁸ was amended to read in part as follows:

"At least ninety days before any interest date of the bonds, including re-funding bonds, the county treasurer of the main county shall estimate the

amount of money necessary to pay interest and principal maturing on such interest date after crediting thereon the funds in the treasury applicable to the payment thereof, *excluding therefrom any funds in the treasury deposited therein pursuant to Section 3466a of this code or derived from the sale of lands by the county treasurer as trustee of the district under the provisions of this section or Sections 3466a and 3480a of this code and the expenses of the county treasurer hereinafter provided* and shall add thereto 15 percent of such aggregate sum to cover possible delinquencies. * * *." (Emphasis added to the amended portion.)

The treasurer estimated that on January 1, 1950, \$16,785 would be due on account of interest and \$8,000 on the principal of the outstanding bonds. Acting under the 1949 amendment, he issued a call for \$24,895, plus the statutory amount to cover possible delinquencies, to owners of land subject to the 1919 assessment. Sutter Basin Corporation was notified that it must pay, as its share of the call, \$13,757.

The position of the petitioner in justification of the present proceeding is that a retroactive application of the 1949 amendment, so as to exclude from the bond fund the proceeds from the resale of delinquent lands and crop rentals, will impair the obligation of the contract existing between the bondholders and the landowners of the district. So applied, it is argued, the amendment will change the time and method of payment and give the bondholders additional security.

The treasurer replies that the power of the Legislature over reclamation districts is plenary, and cannot be circumscribed. Furthermore, the amendment provides no benefit to the bondholders, and, without such benefit, there can be no impairment of contract. The funds derived from sales and rentals of delinquent lands result from section 3466a⁹ of the Political Code, which

6. Water Code, §§ 51680-51695, 51750-51757.

7. See Water Code, § 51680.

8. Now Water Code, § 51420.

9. Now Water Code, §§ 51680-51695, 51750-51757.

was enacted subsequent to the refunding bond issue. Nor is there a detriment to the landowners, for the amendment merely enforces their duty to pay their assessments, which has always existed. To hold otherwise would violate numerous provisions of the state and federal constitutions.

Another contention of the treasurer is that issuance of a writ of mandate would be inequitable. Finally, he asserts, Sutter Basin Corporation has consented to and acquiesced in the amendment by advocating the adoption of the 1949 statute in appearances before both houses of the Legislature, and, therefore, it has waived its right to object to the amendment.

[1,2] It cannot be questioned that, upon issuance of the bonds, a contract was created between the property owners and the bondholders. *Islais Co. v. Matheson*, 3 Cal.2d 657, 662, 45 P.2d 326; *County of Los Angeles v. Rockhold*, 3 Cal.2d 192, 200, 44 P.2d 340, 100 A.L.R. 149; *County of San Diego v. Childs*, 217 Cal. 109, 120, 17 P.2d 734; *Copeland v. Raub*, 36 Cal.App.2d 441, 447, 97 P.2d 859; *River Farms Co. v. Gibson*, 4 Cal.App.2d 731, 749, 42 P.2d 95; *Hershey v. Cole*, 130 Cal.App. 683, 695, 20 P.2d 972. The laws in existence at that time, under the authority of which the bonds were issued, “* * * enter into and become a part of the contract to such an extent that the obligation of the contract cannot thereafter be impaired or fulfillment of the bond obligation hampered or obstructed by a change in such laws.” *County of San Bernardino v. Way*, 18 Cal. 2d 647, 661, 117 P.2d 354, 363.

[3] The treasurer’s contention that legislation in regard to reclamation districts is within the plenary power of the state, and cannot be challenged by a landowner of the district, is answered in *Hershey v. Cole*, 130 Cal.App. 683, 20 P.2d 972. The court said: “The supervision, the regulation, and the controlling of the conduct of the affairs of irrigation, reclamation, and drainage districts is plenary as to all governmental affairs, including procedure and administration, limited only where it tends to impair the obligation of a contract or to increase the obligation of a contract. In

other words, the plenary power does not extend to and include the right of the Legislature to trench upon private rights arising out of or based upon contracts.” 130 Cal.App. at page 687, 20 P.2d at page 974.

[4] The time and method of payment, as well as the nature of the security given the bondholders, are integral parts of the landowner-bondholder contract. *Shouse v. Quinley*, 3 Cal.2d 357, 361, 45 P.2d 701; *County of Los Angeles v. Rockhold*, 3 Cal. 2d 192, 210, 44 P.2d 340, 100 A.L.R. 149; *Security Trust & Savings Bank v. City of Los Angeles*, 120 Cal.App. 518, 524, 7 P.2d 1061. Sutter Basin Corporation contends that the 1949 amendment impairs each of these aspects of its contract.

[5] As section 3480 of the Political Code read in 1930, when the refunding bonds were issued, the bond fund was to consist of all amounts collected by the treasurer upon assessment calls, and also from either the sale of delinquent lands or their redemption, as well as the proceeds of the resale of lands purchased by him at sales to satisfy delinquent calls. Such funds were to be used exclusively for the payment of principal and interest on outstanding bonds. Each year the treasurer was required to estimate the amount of money necessary to pay maturing interest and principal, “crediting thereon the funds in the treasury applicable to the payment thereof” and thereafter to issue a call to the owners of lands subject to the assessment for the balance, adding thereto 15 per cent to cover possible delinquencies. The obligation of each landowner was to pay the portion of the balance represented by his unpaid assessment, plus an additional amount to cover possible delinquencies.

According to the 1949 amendment, the treasurer must exclude from his estimate a portion of the moneys in the bond fund formerly available for bond payments. Necessarily, if the statute is to be applied as construed by him, an additional burden of payment is placed upon the landowners. Moreover, the time at which the landowner must make payment is accelerated. If the amounts sought to be excluded by the 1949

amendment may be used to pay the current installment due upon the bonds, there is no necessity for landowners to pay the present call. The amendment also changes the order of payment. By its terms, the treasurer must collect calls from landowners before certain money in the bond fund may be used. Formerly, he was to call upon all such funds first. These changes, if applied to bonds issued prior to the effective date of the amendment, are impairments of the contract of the landowners contrary to constitutional guarantees. Cf. *Shouse v. Quinley*, 3 Cal.2d 357, 360-361, 45 P.2d 701; *Mulcahy v. Baldwin*, 216 Cal. 517, 525, 15 P.2d 738; *Copeland v. Raub*, 36 Cal.App. 2d 441, 447, 97 P.2d 859; *Hershey v. Cole*, 130 Cal.App. 683, 701, 20 P.2d 972.

The retroactive application of the 1949 amendment would impair the obligations of the landowner-bondholder contract in still another manner. By sections 3480 and 3480a of the Political Code, the lien of the assessment is made security for the payment of the bonds.¹⁰ Through the trustee of the bond fund, the bondholders may enforce their right to payment by a sale of land upon which a call has become delinquent. Prior to the amendment, the proceeds from such sales, or from the resale or rentals of delinquent lands, were required to be immediately applied to bond payments. Section 3480 of the Political Code¹¹ provides that they may be used for no other purpose. By directing the county treasurer to exclude such funds from his estimate, the amendment forces him to keep them intact. The bondholders are thus given a fund which must be held in reserve for their benefit in addition to the security of the assessment, thereby increasing their security.

The treasurer, however, argues that the landowners have no rights in the excluded funds because the money was not paid to him pursuant to the statutory provisions which were a part of the 1930 contract. He correctly points out that the 1949 amendment excludes from credit in the computation of calls any amount in the treasury "deposited therein pursuant to Section 3466-

a of this code or derived from the sale of lands by the county treasurer as trustee of the district under the provisions of this section or sections 3466a and 3480a of this code * * *." Specifically, says the treasurer, the only money excluded by the challenged computation is either the purchase price of delinquent land or crop rental derived by virtue of Section 3466a, which was not enacted until 1931, a year after the bonds were issued.¹²

[6] This argument was conclusively answered by the decision in *River Farms Co. v. Gibson*, 4 Cal.App.2d 731, 42 P.2d 95. In speaking of section 3466a, it was there said: "That the lands purchased by the county treasurer, and deeded to himself as trustee either of the bond fund or for the benefit of the district, constitute a trust for the benefit of the bondholders, seems to us explicitly stated in the terms used in section 3480, supra, as it originally read and as it now stands amended. All moneys collected by the treasurer, whether on account of installments, penalties, interest or sale of lands, must be by him paid into the treasury for the benefit of the bondholders." 4 Cal. App.2d at page 744, 42 P.2d at page 100. In essence, the court held that section 3480 created a trust fund for the benefit of bondholders which consists of money received on installment calls, from the sale of land on account of delinquencies, or from the resale of land purchased by the treasurer, and also all unsold land bought by him to satisfy delinquencies.

Concerning the money derived from the lease or operation of unsold lands of the district, it was said: "That the rents, issues, and profits derived from trust properties follow the *corpus* and become a part of the trust funds is unquestioned, irrespective of the act of the Legislature adding section 3466a, supra, providing for the management of property, the title to which has become vested in the county treasurer for the benefit of the district, and the specifying therein of the application to be made of rents, issues, and profits." 4 Cal.App.2d at page 755, 42 P.2d at page 105.

10. See Water Code § 51257.

11. Cf. Water Code §§ 51238, 51643.

12. Stats.1931, c. 317, p. 773; now Water Code, §§ 51680-51695, 51750-51757.

The treasurer argues that there is no increased burden upon the landowner, because the amendment merely provides a method of discharging the obligation of the assessment. His position is that the assessment is a fixed liability.

[7] The nature of the burden which the levy of an assessment places upon the landowner must be measured by the terms of the statute creating the assessment. *Ryan v. Byram*, 4 Cal.2d 596, 606, 51 P.2d 872; *Flinn v. Zerbe*, 40 Cal.App. 294, 296, 180 P. 650; *Abrams v. San Francisco*, 48 Cal. App.2d 1, 6, 119 P.2d 197. In 1919, when Assessment No. 1 was levied, it was expressly made a lien upon the land against which it was levied. Political Code, § 3463.¹³ Such assessment was to be paid "in separate installments, of such amounts, and at such times, respectively, as the [board of trustees], from time to time, in its discretion by order entered in its minutes may direct." Political Code, § 3466.¹⁴ When bonds were issued, the assessment became security for their payment. Political Code, §§ 3480, 3480a.¹⁵ Thereafter, the obligation of the property owner was measured by the statutory provisions applicable to payment. "His obligations cannot be increased nor lessened. The portion of the assessment, or rather, the amount of the installment that is to be paid by the landowner at each annual period is fixed when the contract is completed, by the sale of the bonds." *Hershey v. Cole*, 130 Cal.App. 683, 689-700, 20 P.2d 972, 980.

The treasurer contends that if the "credit provisions" of section 3480, as it read when the bonds were issued, are "held to require the purchase price and rentals of the delinquent lands in the bond fund to be credited against the bond calls as contended for by petitioner then, under the facts of this case, and the law as so construed and applied there would be clear violation of numerous provisions of both the federal and state constitutions". This argument is based upon

the assumption that if all of the money in the bond fund is used to discharge the outstanding bonds, Sutter Basin Corporation and other landowners may never have to pay the assessment outstanding against their lands.

Bearing upon this issue is the paragraph entitled "Additional assessment", found in section 3480 of the Political Code.¹⁶ It reads: "The lien of any unpaid assessment upon which bonds shall have been issued shall continue until all said bonds, and any refunding bonds which may be issued, shall have been paid in full except as hereinafter provided in reference to the use of bonds as payment of assessments * * *." The section also authorizes supplemental assessments in the event any of the bonds remain unpaid after the enforcement of the assessment.

[8] These provisions do not necessarily imply that the assessment will be extinguished as the bonds are retired but make certain that it will continue until all outstanding bonds are paid. However, section 3456¹⁷ requires all money derived from calls on the assessment to be set "apart as a separate fund for the purpose of paying the principal and interest of such bonds," and that no part of such money shall be used for any other purpose. There is no provision for making a call upon the assessment after all bonds have been retired; the only statutory authority for a call is to "pay interest and principal maturing on such interest date". Political Code, § 3480.¹⁸ In *Bekins v. Raub*, 40 Cal.App.2d 709, 105 P. 2d 625, it was held that, after bonds are issued, there is no right to call the assessment except to meet unpaid installments of principal and interest. Under no statute is the assessment lien extinguished by discharge of the outstanding bonds, neither is there any provision by which a landowner may be compelled to pay the assessment. However, section 3480 of the Political Code¹⁹ reads: "Any landowner of the district who shall

13. Now Water Code, § 51256.

14. Now Water Code, § 51517.

15. Now Water Code, § 51257.

16. Now Water Code, §§ 51300-51302.

17. Now Water Code, § 51238.

18. Now Water Code, § 51420, *supra*.

19. Water Code, § 51651.

desire at any time to lessen or remove the lien upon his land of any assessment on which bonds have been or hereafter may be issued may deliver to the county treasurer for cancellation any bonds payable out of said assessment, and the treasurer shall credit against the assessment on his land the principal and accrued interest”.

The purpose of the 1919 assessment was to provide for the cost of a specific improvement. The integral relationship between the assessment, the bonds issued to pay for that improvement, and the improvement itself was clearly recognized in *Rohwer v. Gibson*, 126 Cal.App. 707, 14 P.2d 1051. In that case, the court denied a petition for a writ of mandate to compel the levy of an additional assessment for the purpose of paying delinquent installments upon outstanding bonds. It was held that the statutory provisions specifying the procedure for payment of the bonds were a limitation upon the taxing power of the district. “When the collection of taxes has reached the value of the benefits conferred upon the lands within the district, there is then no legal provision for placing any additional burdens. In other words, if under such conditions the bonded indebtedness has not all been paid, there exists no legal provision by means of which the holders thereof may receive payment.” 126 Cal.App. at pages 713-714, 14 P.2d at page 1054.

In the present situation, the taxing power will have been fully exercised when the improvement, to finance which the bonds were issued, has been paid for by the exaction of taxes in the form of calls for bond payments. This conclusion is strengthened by the language of those sections permitting the discharge of the lien of the assessment when outstanding bonds are surrendered. These sections clearly indicate a legislative intent to make the assessment co-extensive only with the collection of funds necessary to finance the improvement for which the assessment was levied. Presumably, the bond issue of Reclamation District No. 1500 was sufficient in amount to pay for the contemplated improvements for which the 1919 assessment was levied. Upon payment of

the bonds, the assessment will have been fully discharged.

[9,10] The contention of the treasurer that the application to bond payments of the money in controversy would be a gift of public funds to a private person, in violation of section 31 of Article IV of the Constitution, is entirely without merit. Such money is not the property of the state or the district, but is a part of a trust fund held for the benefit of the bondholders. *River Farms Co. v. Gibson*, supra. Furthermore, payment of the legal obligation of the landowners to the bondholders is not a gift.

The county treasurer urges, however, that to permit a discharge of the unpaid assessments will discriminate against the landowners who have paid their assessments in full. Such result, it is argued, would cause them to bear the greater part of the cost of the improvement and deny to them equal protection of the laws, due process of law, grant to some landowners special privileges and immunities, and constitute special legislation.

[11] Under the applicable statutes, a landowner was given two methods of discharging the lien of the assessment. He could acquire outstanding bonds of a face value equal to the amount of the assessment and, upon delivering them to the treasurer, have the lien discharged. If he preferred to do so, he could pay such calls as might be levied from time to time against his property. Such were the terms of the contract which the landowner accepted when the bonds were issued. Each property owner had the choice of taking the course which he deemed the more advisable. “The equality of the Constitution is the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, is an equal law. [Citations.] So long as the statute does not permit one to exercise the privilege while refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground.” *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 284, 298 P. 481, 483.

Even if there be no legal basis prohibiting the application of the excluded funds to payment of the bonds, argues the county treasurer, a writ of mandate must be denied to prevent an inequity.

That there is presently sufficient money to pay the outstanding bonds, without resort to calls on the assessment, is a fact which results from the economic conditions of the times. In the years immediately following the issuance of the refunding bonds there was economic depression. During that time, many landowners were unable to pay the calls of the treasurer and their lands were sold for delinquencies. Finding no bidders willing to pay the statutory upset price, the treasurer was obligated to buy lands for the bond fund. By 1949, when the lands were sold, they had greatly increased in value. The amount here in controversy represents almost exclusively that increase in value. More accurately, that amount is an increment of the trust corpus from which the landowners' obligation to the bondholders was to be discharged. That all the landowners are not entitled to share in this fortuitous increase results from the course each selected to discharge the lien of his assessment.

The depression conditions which influenced the prices of land and the ability of property owners to pay calls also were reflected in the value of outstanding bonds. It has been stipulated that many property owners were able to buy bonds at a substantial discount and apply them at face value against the lien of their assessments. Because the bonds of latest maturity could be purchased at the greatest discount, in the main those surrendered were of that class. As a result there were fewer obligated landowners, thereby increasing the proportionate amount necessary to be paid by the remainder of them to meet the treasurer's calls to satisfy the currently maturing bonds. The treasurer's purchases of delinquent lands also increased the proportionate shares of the amounts necessary to meet bond payments. In addition, they were subjected to a 15 per cent charge over and above their shares to cover

possible delinquencies. Political Code, § 3480.²⁰

The course of action taken by each landowner was chosen with these facts clearly apparent. Those electing to discharge their liens by surrendering bonds purchased at a discount thought they were in a better position than the ones who decided to pay the calls as they were made. The landowners taking the second alternative relied upon the chance that the bond fund would be sufficient to meet all accruing amounts of principal and interest. That they have benefited by the exercise of business judgment which the law permitted is of no legal consequence in this proceeding. Theirs was the greater risk, and theirs was the greater gain.

The record does not support the treasurer's contention that Sutter Basin Corporation has waived the right to raise the constitutional question because its counsel appeared before committees of both houses of the Legislature and advocated the adoption of the amendment to section 3480 here in issue. The stipulation of facts shows that at no time did he advocate the exclusion from the treasurer's estimates of any money in the bond fund. He appeared in connection with proposed procedure in regard to the sale of delinquent lands.

These considerations compel the conclusion that a retroactive application of the 1949 amendment would impair the contract existing between the landowners and the bondholders.

Let a peremptory writ of mandate issue as prayed.

SHENK, SCHAUER, and SPENCE, JJ., concur.

GIBSON, C. J., dissents.

TRAYNOR, Justice.

I concur.

It is my opinion that the judgment herein follows necessarily from the premise established by the many California cases cited in the majority opinion that upon the issuance of bonds by a reclamation district

20. Now Water Code, § 51420.

a contract is created between the landowners in the district and the bondholders. Although persuasive arguments can be made against the soundness of this premise, see cases cited in *County of Los Angeles v. Rockhold*, 3 Cal.2d 192, 44 P.2d 340, 100 A.L.R. 164, it has become a rule of property governing the rights and duties of landowners and bondholders under past bond issues. It does not follow that the reasoning underlying the cases establishing the rule must be applied to future bond issues. See concurring opinion in *Boyd v. Oser*, 23 Cal.2d 613, 623, 145 P.2d 312. This court could provide a sound rule for the future by declaring that although those cases govern past bond issues, they are to be deemed overruled as applied to future bond issues. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360; *People v. Ryan*, 152 Cal. 364, 369, 92 P. 853; *People v. Maughs*, 149 Cal. 253, 263, 86 P. 187. A majority of this court, however, appears unwilling to re-examine the earlier cases at this time.

It bears noting that even though these cases are not overruled, the Legislature is free to provide that in future bond issues the relationship between landowner and district is that of sovereign and taxpayer and does not give the landowner contractual rights. The relationship between district and bondholder should of course remain contractual and the bondholder's rights free from impairment.

CARTER, Justice.

I dissent.

The premise on which the majority opinion is based is, that where bonds have been issued by a reclamation district which are secured by a special assessment levied upon the lands in the district according to the benefits received, there is a contract between the bondholders and the landowners arising out of the law existing at the time the bonds are issued which cannot be changed, insofar as the landowner is concerned, by subsequent legislation; that such a change occurred here by reason of the amendment to Political Code, section 3480 (now Water Code, § 51420) enacted in

1949, which required the treasurer to exclude from the bond fund any monies therein which were obtained from the sale and rental of lands, acquired by the district as the result of sales for delinquent assessments, when he made his estimate of the amount of the annual installment required to meet the unpaid assessment. It is held that such exclusion impaired the contract between the bondholders and landowners in that it changes the time and method of payment of the assessment and gives the bondholders additional security because the landowner was entitled to have the land sale and rental money used to pay the bonds before he could be required to pay any installment of the assessment.

It is conceded, as it necessarily must be, that the Legislature has plenary power with regard to reclamation districts and that the Legislature may change the law with respect to them at will. " * * * [T]he Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any laws of this State." Cal. Const., art. XI, § 13. It necessarily follows that, as far as the landowners are concerned, there is no contract between the district and the landowners arising out of the statutes which existed when the bonds were issued, because, if it were otherwise the Legislature would not have the plenary power it does have over the affairs of reclamation districts. The majority opinion states, however, that there is such a contract between the landowners and the bondholders which cannot be impaired by a change in the law, which is merely an indirect way of saying there is a contract between the landowner and the district. Such a holding is contrary to the overwhelming weight of authority, *County of Los Angeles v. Rockhold*, 3 Cal.2d 192, 44 P.2d 340, 100 A.L.R. 164, and the cases to the contrary in this state holding that there is such a contract between the bondholders and landowners should be overruled. In some of those cases it has been so stated when the issue was whether the bondholders' contract with the district had been impaired—

whether *their* rights could be lessened by subsequent legislation, not whether the landowners "rights" could be changed. *Islais Co. v. Matheson*, 3 Cal.2d 657, 45 P.2d 326; *Copeland v. Raub*, 36 Cal.App.2d 441, 97 P.2d 859; *River Farms Co. v. Gibson*, 4 Cal. App.2d 731, 42 P.2d 95. The other cases, *County of Los Angeles v. Rockhold*, 3 Cal.2d 192, 44 P.2d 340; *County of San Diego v. Childs*, 217 Cal. 109, 17 P.2d 734; *Hershey v. Cole*, 130 Cal.App. 683, 20 P.2d 972, that do hold that the *landowner* also has a contract right with the bondowner to the continuance of the existing law are clearly wrong. In the instant case the bondholders are not asserting that the money received from the rental and sale of delinquent lands must be considered in computing the annual assessment installment. The landowner is asserting that claim against the district and the legislative amendment to section 3680. He may not do so because of the plenary power of the Legislature over the taxes or assessments that the landowner may be required to pay.

While it is true that before the 1949 amendment to section 3680, the treasurer, in computing the annual assessment installment considered moneys already in the bond fund from any proper source as being available to pay the installment. That may be said to have been merely a method of arriving at the amount of the installment in which the landowner has no contract right because the basic assessment was made against his land in a lump sum and that is his fundamental liability.

Assuming there is a contract between the bondholders and landowners which the latter may insist cannot be impaired as against the district by any subsequent legislation, there has been no impairment here, and even if there has been to some extent, it may be justified under the police power.

The majority opinion states that the contract under section 3480 of the Political Code is that the bond fund was to consist of all assessments and amounts collected from the sale of delinquent lands, and such fund was to be used exclusively for the payment of bonds; that the treasurer shall annually estimate the amount of the installment on the assessment to be paid, and in

making his computation, shall give consideration to the amount then in that fund from any proper source. It is the latter provision which was changed by the 1949 amendment to that section which provided that the amount in the fund from the sale of lands should be excluded in computing the annual assessment call. Such a change does not constitute an impairment of the contract. The basic contract on the part of the landowner was an agreement to pay the *entire* assessment which was levied against his land, and it has always been payable in installments of such amounts and at such times as the board of directors of the district may direct. Political Code, § 3466; Water Code, § 51517. The computation provision was merely a method of arriving at the amount of an annual installment and did not purport to lessen the amount of the assessment payable. It did not give the landowners an absolute right to have the assessment installments computed in that way. It may have given them the right to insist that the money in the fund be used to pay bonds, but the time or method of the payment of the assessment was left to the discretion of the board of directors of the district and the Legislature. Indeed it may be that the method of computation of the installments was for the sole benefit of the bondholders rather than the landowners. It fixes a procedure which will assure the former of funds to pay their bonds and interest coupons as they fall due rather than a limitation on the amount of the installment that may be demanded.

It is also suggested that the bondholders are given greater security by the 1949 amendment than they had before, that is, an assessment call large enough in itself to pay principle and interest without crediting the amount already in the bond fund. The bondholders at all times had that security, because, by the terms of the bonds as set forth in the form of bond contained in section 3480, the bonds were "based upon and secured by an assessment levied on the lands".

The Legislature could have reasonably concluded that if there is some impairment of the contract it was justified under its police power. It could reasonably deter-

mine that there should be equity and fairness as between the landowners in the district and that it would be inequitable for the landowner here involved to obtain a windfall by reason of the money in the bond fund which was obtained from the sale of delinquent lands—that is, by excluding such money, he will not be excused from paying his assessment when the others have paid theirs. The Legislature may have reasonably decided that the most equitable method to meet the condition brought about by changing economic conditions was to require the assessments to be paid in full, leaving the district with surplus funds which will ultimately inure to the benefit of all landowners in the district, rather than giving one landowner a windfall. It is not a case of taking delinquent land sales money from the landowners to their detriment. Those funds still are held for the benefit of all of them. It is true that other owners have paid their assessments with bonds at their face value, which they purchased at a price below that amount during the depression, and hence benefited, but whether that matches the windfall the instant landowner will receive or whether it is better for the district to have the funds for the benefit of all under the 1949 amendment, was properly a matter of legislative determination. It should be noted that the Legislature could also consider that any assessment installment now paid is with inflated money, but the amount of the bond has not increased since the depression because the amount payable on the bonds is fixed.

The essence of the majority opinion's position seems to be that the landowners are entitled to have the bond fund exhausted and that source alone must first be used to pay the bonds and hence the regular annual assessment cannot be collected. That is substantially the same as *County of San Diego v. Hammond*, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155, where legislation was passed after an assessment and bond issue which was payable solely out of assessments against the lands benefited, which authorized the county to pay the assessments out of a general tax levy. Some of the landowners, who had paid all their assessments, urged that it would impair their contract,

under which the assessment was all they would have to pay; that by their being subject to the general tax to reduce assessments on landowners who had not paid their assessments, their contract that the bonds would be paid only by the assessments, was impaired. The court held it was not. To the same effect see *City of Dunsmuir v. Porter*, 7 Cal.2d 269, 60 P.2d 836. Likewise, in the instant case, petitioner's contract has not been impaired because it was always liable for the assessment and cannot insist that the bonds be payable solely from funds derived from the sale and rental of delinquent lands. Petitioner is not being injured because, to give it what it claims, would be a windfall, not something to which it is entitled.

It is my view that the petition should be denied.

Rehearing denied; GIBSON, C. J., and CARTER, J., dissenting.



40 Cal.2d 317

FAULKNER et al. v. CALIFORNIA TOLL BRIDGE AUTHORITY et al.

Sac. 6377.

Supreme Court of California, in Bank.

Feb. 25, 1953.

Suit was brought to enjoin the California Toll Bridge Authority and others from proceeding with construction and financing of proposed Richmond-San Rafael Bridge, and for writ of mandate compelling Authority to grant plaintiffs fair hearing on question whether bridge or earth fill type of crossing should be built. The Superior Court of Sonoma County, Hilliard Comstock, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Schauer, J., held that allegations of complaint failed to show that Authority had abused its authority.

Judgment affirmed.

**I. Administrative Law and Procedure 382
Bridges 8**

Resolutions of California Toll Bridge Authority approving opinion, determination, and recommendation of Department of

Public Works to construct Richmond-San Rafael Bridge, and authorizing issuance of revenue bonds and call for bids on construction, did not constitute "regulations" within meaning of sections of Administrative Procedure Act governing quasi-legislative action of administrative agencies, and therefore failure to comply with such sections in connection with resolutions was not unlawful. Government Code, §§ 11370-11445, 11371.

See publication Words and Phrases, for other judicial constructions and definitions of "Regulation".

2. Bridges ⇨7

Where San Francisco-Oakland Bay Bridge bonds were dated September 1, 1951, but they were not issued until November 27, 1951, they were subject to statutory amendment of September 22, 1951 excepting proposed Richmond-San Rafael Bridge from ten mile limit within which the law provided that other crossings should not be constructed while revenue bonds were "outstanding" against the San Francisco-Oakland Bay Bridge, since bonds were not "outstanding" until issued. Streets and Highways Code, §§ 30350, 30351, 30354.

See publication Words and Phrases, for other judicial constructions and definitions of "Outstanding".

3. Mandamus ⇨72

Mandamus issues only to compel performance of an act which the law specially enjoins, and will not lie to control discretion within area lawfully entrusted to administrative agency. Code Civ.Proc. § 1085.

4. Mandamus ⇨154(4)

Petition alleging that California Toll Bridge Authority had not considered a crossing other than proposed Richmond-San Rafael Bridge recommended to it by Department of Public Works, and that authority had not studied problem of construction of water conservation facilities, and that it had abused its discretion by failing to consider other types of structures and costs thereof, did not show that authority had failed to perform any act "specifically enjoined" by Toll Bridge Au-

thority Act, and therefore plaintiffs were not entitled to writ of mandate compelling authority to grant plaintiffs hearing on question whether bridge or earth fill type of crossing should be built. Code Civ. Proc. § 1085; Streets and Highways Code, §§ 30100, 30150, 30200.

5. Pleading ⇨34(1)

In construction of pleading for purpose of determining its effect, its allegations must be liberally construed with view to substantial justice between parties. Code Civ.Proc. § 452.

6. Pleading ⇨34(4)

In giving liberal construction to pleading, no intendment can be indulged in by court that pleader has not stated his case as strongly as it was possible to do so. Code Civ.Proc. § 452.

7. Pleading ⇨53(1)

Rule that plaintiff may plead inconsistent counts or causes of action in his complaint, if there are no contradictory or antagonistic facts, was not intended to sanction statement in verified complaint of certain facts as constituting transaction in one count or cause of action, and in another count or cause of action statement of contradictory or antagonistic facts as constituting same transaction.

8. Pleading ⇨53(1)

Rule that plaintiff may plead inconsistent counts or causes of action in his complaint, if there are no contradictory or antagonistic facts, does not permit pleader to blow both hot and cold in same complaint on subject of facts of which he purports to speak with knowledge under oath.

9. Mandamus ⇨172

Allegations by plaintiffs in third cause of action that California Toll Bridge Authority allowed plaintiffs and other opponents of plan for construction of bridge only one and one-half hours to present their arguments and facts against building of bridge and allowed proponents to present their views for about four hours, precluded court from construing more general and negative allegations of fifth cause of

action to mean that authority proceed without conducting any hearing or investigation.

10. Mandamus ⇨163

In suit to enjoin California Toll Bridge Authority from proceeding with construction and financing of Richmond-San Rafael Bridge, and for writ of mandate to compel authority to grant plaintiffs fair hearing on question whether bridge or earth fill type of crossing should be built, allegations that acts of authority were arbitrary, capricious, fraudulent, wrongful and unlawful, constituted mere "conclusions of law," which were not to be deemed admitted by a demurrer.

See publication Words and Phrases, for other judicial constructions and definitions of "Conclusion of Law".

11. Administrative Law and Procedure ⇨760

Subject to power of court to exercise independent judgment on evidence in certain review proceedings, courts generally have nothing to do with wisdom or expediency of measures adopted by administrative agency, to which formulation and execution of state policy have been entrusted, and will not substitute their judgment or notions of expediency, reasonableness, or wisdom for those which have guided agency. Code Civ.Proc. § 1094.5.

12. Administrative Law and Procedure ⇨749

Findings and determination of state agency come before reviewing court with strong presumption as to correctness and regularity.

13. Administrative Law and Procedure ⇨749

It is presumed, in absence of evidence establishing or pleading alleging the contrary, that necessary facts to support determination of state agency were ascertained and found, that agency duly considered evidence adduced at administrative hearing, that official duty was regularly performed, and that agency applied proper standard or test in reaching its decision.

1. Named as plaintiffs are: George C. Faulkner, on behalf of himself and all other prospective users of the proposed Richmond-San Rafael Bridge; G. S.

14. Mandamus ⇨154(2)

In suit to enjoin California Toll Bridge Authority from proceeding with construction and financing of Richmond-San Rafael Bridge, and for writ of mandate to compel authority to grant plaintiffs fair hearing on question whether bridge or earth fill type of crossing should be built, it was necessary that plaintiffs either attach to complaint a complete transcript of all evidence on which authority acted, or allege substance of all evidence and further aver with particularity elements, aspects, and principles wherein such evidence supported conclusion that authority abused discretion.

15. Mandamus ⇨154(4)

In suit to enjoin California Toll Bridge Authority from proceeding with construction and financing of Richmond-San Rafael Bridge, and for writ of mandate to compel authority to grant plaintiffs fair hearing on question whether bridge or earth fill type of crossing should be built, complaint alleging that at hearing authority accorded plaintiffs less time than plaintiffs wanted for presentation of their views, and less time than was devoted to hearing opposing views, and that on evidence before authority, it came to conclusion adverse to views of plaintiffs but conclusion within its statutory power to reach, failed to show that authority abused its discretion.

Byers, Burd & Fraser, Berkeley, for appellants.

Edmund G. Brown, Atty. Gen., E. G. Funke, Asst. Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., and Robert E. Reed, Atty. for Dept. of Public Works of the State, Sacramento, for respondents.

SCHAUER, Justice.

Plaintiffs¹ appeal from a judgment entered on the sustaining without leave to

Stone, on behalf of himself and all other citizen taxpayers of the State of California; Herbert Schulze, on behalf of himself and all other farmers and land

amend of defendants' ² general demurrer to plaintiffs' complaint for injunction, mandamus, and general relief. In plaintiffs' language, "This is an action to restrain the California Toll Bridge Authority and the Department of Public Works from proceeding with the construction and financing of the Richmond-San Rafael Bridge * * * The complaint seeks a temporary restraining order and a preliminary and permanent injunction restraining Defendants from proceeding with the proposed construction work and the financing thereof. Also sought are a * * * judgment declaring invalid certain resolutions of Defendants * * * and the acts of Defendants committed pursuant thereto, and a writ of mandate to compel the California Toll Bridge Authority to grant Plaintiffs herein a fair and adequate hearing on the question of whether a bridge or an earth fill type of crossing should be built." We have concluded that the demurrer was properly sustained and that the judgment should be affirmed.

The complaint, framed in five causes of action, is based upon three theories. So far as here material, allegations common to all causes of action are: On September 23, 1952, defendants held a hearing in Sacramento concerning the proposed construction of a highway toll bridge (hereinafter termed the bridge) between Richmond and San Rafael (i. e., between the County of Contra Costa and the County of Marin), which was continued to September 26, 1952. On the latter date, in Sacramento, defendant California Toll

Bridge Authority (hereinafter termed the authority) "adopted a resolution approving the opinion, determination, and recommendation of the Department of Public Works to construct the * * * Bridge, and authorizing the issuance of revenue bonds to obtain funds for construction * * *; said Authority also adopted a resolution directing the preparation of a resolution authorizing the issuance of toll bridge revenue bonds and an Official Statement in connection therewith." On November 7, 1952, the authority adopted the following resolutions: (a) "authorizing the creation of an issue of not exceeding \$72,000,000 Richmond-San Rafael Toll Bridge Revenue Bonds and providing for the initial issuance of \$62,000,000 principal amount of Series A bonds"; (b) "approving the official statement of the Authority relating to said Series A Bonds"; (c) "authorizing the sale of Series A bonds for the purpose of providing funds for the construction of the Bridge and directing publication of Notice of Sale of" such bonds; (d) "directing the Department of Public Works to call for bids on construction of the substructure and superstructure of said Bridge; * * * and to fix the date for the opening of said bids at not later than December 22, 1952."

Plaintiffs' first theory (upon which their first three alleged causes of action are based) is that the authority's resolutions of September 26 and of November 7, 1952, constituted "regulations" within the meaning of the sections of the California Administrative Procedure Act (hereinafter term-

owners in Sonoma County; Petaluma Sportsmen Club, a California nonprofit corporation, on behalf of itself and all owners of salt marsh lands bordering on and contiguous to the San Francisco Bay north of the Golden Gate Bridge on the West side of San Francisco Bay and north of the Berkeley Pier on the East side of San Francisco Bay.

2. Named as defendants are California Toll Bridge Authority, a public corporation; the five individual members of the Authority; and Frank B. Durkee, as Director of the Department of Public Works of the State of California.

The Toll Bridge Authority is "composed of the Governor, Lieutenant Gov-

ernor, the Director of Public Works, Director of Finance, and a person or officer of the State appointed by the Governor" (Sts. & Hy.Code, § 30050); both the Director of Public Works (Gov.Code, § 14002) and the Director of Finance (Gov. Code, § 13002) are appointed by and hold office at the pleasure of the Governor.

Section 14004 of the Government Code provides that the Director of Public Works "shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the department [of Public Works] except as otherwise expressly provided by law."

ed the act) governing "quasi-legislative" action of administrative agencies, and that the authority's admitted failure to comply with such sections in connection with the resolutions was unlawful.

The act is set forth in Chapters 4 and 5 of Title 2, Division 3, Part 1, of the Government Code, and it is upon certain provisions of Chapter 4 (i. e., sections 11370-11445) that plaintiffs rely.

Section 11371 provides, so far as here material, that as used in Chapter 4 "Regulation" means every rule, regulation, order, or standard of general application * * * adopted by any state agency³ to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency." Section 11380 requires that "Every state agency shall: (a) File with the Secretary of State a certified copy of every regulation adopted by it except one which: (1) Establishes or fixes rates, prices or tariffs. (2) Relates to the use of public works, including streets and highways, under the jurisdiction of any state agency when the effect of such order is indicated to the public by means of signs or signals. (3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the State * * *" Sections 11409 through 11415 provide for publication in the California Administrative Code (and Register) of all regulations required to be filed with the Secretary of State, and for sale of copies of such Code and Register. Sections 11420 through 11427 have as their purpose the establishment of "basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations * * * [which] are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted * * *" except that they do not apply "to any regulation not required to be filed with the Sec-

retary of State * * *" (§§ 11420, 11421⁴.)

It is plaintiffs' contention that the authority's resolutions here involved were "regulations" required to be filed with the Secretary of State under the provisions of section 11380, that adoption by the authority of such resolutions constituted exercise of a "quasi-legislative power," and that the authority's failure to comply with section 11380 and with the procedural requirements of sections 11420 through 11427 was therefore unlawful and renders invalid the resolutions and any action taken thereunder.

[1] We are of the view, however, that defendants are correct in their position that the resolutions were not of "general application * * * adopted * * * to implement, interpret, or make specific the law enforced or administered by" the authority "or to govern its procedure," and hence, regardless of how they might be described or identified otherwise, do not fall within the definition (§ 11371) of a regulation which must be filed with the Secretary of State. Rather, they were adopted for particular application to the subject of either approving or disapproving, under the provisions of the California Toll Bridge Authority Act (Sts. & Hy. Code, § 30000 et seq.), the recommendation of the Department of Public Works that the bridge be constructed, and of authorizing the issuance of revenue bonds following approval of such recommendation (Sts. & Hy. Code, § 30200⁵). Plaintiffs argue that the resolutions are of general application in that the tolls to be collected on the bridge affect the public generally, and that the bonds to be issued may be purchased by any one in the world. However, inasmuch as the "application" so urged by plaintiffs relates to only one particular bridge, and solely to the specific project described, and as the resolutions (as alleged) do not purport to treat generally with, for instance, all bridges or all toll bridges or any open

3. Section 11371 also provides that "State agency" does not include an agency in the judicial or legislative departments of the State Government."

Cal. Rep. 253-254 P.2d-17

4. Section 11421 also sets forth other exceptions, not here material.

5. Section 30200 is quoted in full on page 11, post.

class under the jurisdiction of the authority, we are satisfied that plaintiff's position in this respect is without merit. Moreover, it is to be noted that section 11380 (Gov. Code) expressly excepts a regulation which "Establishes or fixes rates, prices or tariffs," or "Is directed to a specifically named person or to a group of persons and does not apply generally throughout the State."

Furthermore, it appears that the pertinent resolutions are not calculated or effective to "implement, interpret, or make specific the law enforced or administered by" the authority (§ 11371), but rather that they were adopted in the course of compliance with the statutory mandate that the authority act, one way or the other, upon the recommendation of the Department of Public Works that the bridge be constructed (§ 30200, Sts. & Hy. Code). In other words, the resolutions constituted steps in the performance of a statutory duty, rather than acts which would "implement, interpret, or make specific the law."

Since the resolutions do not fall within the definition of a "regulation" required to be filed with the Secretary of State, it becomes unnecessary to determine whether the authority, in adopting them, was exercising a "quasi-legislative power" as that term is used in section 11420 of the Government Code.

[2] Plaintiffs' second theory forms the basis of their fourth alleged cause of action. They aver that a portion of the proposed Richmond-San Rafael Bridge will be within ten miles of the San Francisco-Oakland Bay Bridge, that revenue bonds are still outstanding against the latter bridge, and that such bonds were on November 27, 1951, authorized by the authority and issued, but "were dated and bore interest from September 1, 1951." It is plaintiffs' contention that construction of the new bridge would violate the so-called ten mile limit within which the law once provided (Sts. & Hy. Code, §§ 30350, 30351) that other crossings should not be constructed while revenue bonds were "outstanding" against the Bay Bridge. It may further be noted that under section 30353, Streets and Highways Code,

the prohibitions of the ten mile limit "constitute a contract to that effect for the benefit of the holders of" outstanding bonds.

By a 1951 amendment of section 30354 of the Streets and Highways Code, effective September 22, 1951, a highway bridge or other crossing between the County of Marin and the County of Contra Costa was excepted from such ten mile limit. Plaintiffs argue that since the Bay Bridge bonds are dated September 1, 1951, they, or their subsequent holders, acquired all the rights provided by the law in existence at that time and could not be affected by the September 22 amendment. Inasmuch as the bonds could take effect and bear interest only from the date of issuance and delivery (*City of Venice v. Lawrence* (1914), 24 Cal.App. 350, 355, 141 P. 406; *Merced River Electric Co. v. Curry* (1910), 157 Cal. 727, 730, 109 P. 264), it is apparent that since they were not issued, and thus not "outstanding," until November 27, 1951, they were subject to the September 22 amendment excepting the proposed new bridge from the ten mile limit. It follows that plaintiffs' second theory is likewise untenable.

Plaintiffs state that their third theory (fifth cause of action) is that "the Authority has made no adequate study and investigation of the earth fill type of crossing as compared with the Bridge and that such constitutes an abuse of discretion." The averments of the complaint relative to this theory are that defendants "have decided to build said Bridge without investigating other types of structures or the costs thereof and more particularly * * * an earthen fill type of crossing or the costs thereof * * * [and] have failed also to study and investigate the costs of insurance and physical operation and maintenance of an earth fill barrier as compared with said Bridge or the comparable durability of said structures in the face of weather, earthquakes, and bombing attacks, or the comparable ease of widening said structures to meet future traffic needs of the San Francisco Bay area * * * Plaintiffs are informed and believe that said Bridge will not be able to carry rail transportation facilities at any future time * * * and * * * that an earth fill type of

crossing could carry rail transportation facilities * * * Defendants have failed to investigate and consider in their predictions of the future transportation needs of the Bay Area whether rail transportation facilities are necessary. The planned Bridge is a 2-lane bridge and is inadequate for present traffic needs of San Francisco Bay Area." Plaintiffs further allege that "Defendants have decided to build said Bridge without investigating or considering whether or not the building of said Bridge would interfere either physically or financially with structures which might be built in the future in and across San Francisco Bay for water conservation purposes." Finally, it is alleged that "such insufficient investigation, study and consideration as heretofore alleged constitutes arbitrary, capricious and unreasonable conduct on behalf of Defendants and their decision to construct said Bridge based upon such insufficient investigation constitutes an abuse of the discretion vested in said Authority by the provisions of the Toll Bridge Authority Act." Plaintiffs ask the issuance of a writ of mandamus requiring the authority and the Department of Public Works to investigate, study, and consider an earth fill type of crossing, and whether the construction of the bridge "will interfere in any way with the construction of water conservation facilities in and about the North San Francisco Bay Area."

[3,4] It is elementary that mandamus issues only "to compel the performance of an act which the law specially enjoins" (Code Civ.Proc., § 1085) and will not lie to control discretion within the area lawfully entrusted to the administrative agency (Lindell Co. v. Board of Permit Appeals (1943), 23 Cal.2d 303, 315, 144 P.2d 4, 16 Cal.Jur. 808-810, and cases there cited). It is our view that plaintiffs have not shown that the authority has failed to perform any act "specially enjoined" by the Toll Bridge Authority Act. That act (Streets and Highways Code) provides:

Section 30100: "Whenever in the opinion of the authority *and* of the department it is necessary or desirable so to do, the authority shall authorize and direct the department to build or acquire for and in the

name of the State any *or all of the following*: (a) Toll bridges, tubes or other toll highway crossings across water, bays, arms of bays, straits, rivers, and streams in California * * *" (Italics added.)

Section 30150: "The department shall have full charge of the acquisition and construction of all toll bridges and other toll highway crossings * * * authorized by the authority * * *"

Section 30200: "Whenever the department determines that it is for the best interests of the public highways in the State that a new toll bridge or other highway crossing be constructed and operated by the State, the director of the department shall submit its recommendation to that effect to the authority, together with preliminary estimates of the cost of construction thereof, an estimate of the amount required to be raised for that purpose by the issuance of revenue bonds, and a statement of the probable amount of money, property, materials, or labor to be contributed from other sources in aid of the construction.

"If a majority of the members of the authority concurs in the recommendation of the department, the authority shall adopt a resolution declaring that public interest and necessity require the construction of the toll bridge or other highway crossing and authorizing the issuance of revenue bonds for the purpose of obtaining funds in an amount not in excess of that estimated to be required for the construction thereof."

No statutory provision or other authority has been cited to, or discovered by, us which specifically directs the authority to consider a crossing other than one recommended to it by the department, or to study the problem of construction of water conservation facilities. The question in this respect therefore is narrowed to a consideration and determination of whether the complaint shows that the authority, in resolving the issues which were before it, arbitrarily abused its discretion by failing to consider "other types of structures or the costs thereof and more particularly * * * an earthen fill type of crossing" in the course of deciding whether "public interest and necessity" required it to concur in the recommendation of the department that the bridge be con-

structed "for the best interests of the public highways."

We are of the view, for the several reasons hereinafter stated, that no such abuse of discretion by the authority has been shown. *Firstly*, the authority is not directed or empowered to study or consider water conservation problems as such; their only possible pertinency here would depend upon a showing that something related thereto also related adversely to the construction of the proposed bridge and rendered the approval of its construction, upon the evidence which was before it, an abuse of discretion by the authority. *Secondly*, plaintiffs have alleged as a part of their third stated cause of action that "At the hearing on September 23, 1952, the Authority allowed representatives of Plaintiffs and other opponents to the plan to build said Bridge about one and one-half hours to present their arguments and facts against the building of said Bridge. The Authority allowed the proponents of said Bridge to present their views to the Authority for about four hours." It thus directly appears that the authority did grant plaintiffs a substantial opportunity to be heard and did consider arguments and facts advanced by them. The fact that proponents of the bridge were allowed a greater period of time to present their views and were also permitted (according to plaintiffs' allegations) to again appear before the authority at the hearing of September 26, 1952, does not support plaintiffs' contention that their objections to the bridge as opposed to an earth fill crossing were not studied and considered before the authority reached a decision.

[5-9] It is, of course, the rule that "Since the enactment of section 452 of the Code of Civil Procedure * * * it has been generally recognized that in the construction of a pleading for the purpose of determining its effect 'its allegations must be liberally construed, with a view to substantial justice between the parties'" (Mix v. Yoakum (1927), 200 Cal. 681, 687, 254 P. 557) but it is also the law that even while giving to a pleading "the most liberal construction permitted by section 452 of the Code of Civil Procedure no intendment can be indulged in that the pleader has not stat-

ed his case as strongly as it was possible so to do" (Haas v. Greenwald (1925), 196 Cal. 236, 243, 237 P. 38, 59 A.L.R. 1493; Higgins v. Security Trust etc. Bank (1928), 203 Cal. 398, 401, 264 P. 744. Furthermore, although a plaintiff may plead inconsistent counts or causes of action in his complaint (see Wilkerson v. Seib (1942), 20 Cal.2d 556, 563-564, 127 P.2d 904) even where, as here, it be verified, if there are no contradictory or antagonistic facts (see Steiner v. Rowley (1950), 35 Cal.2d 713, 718-719, 221 P.2d 9; Beatty v. Pacific States S. & L. Co. (1935), 4 Cal.App.2d 692, 697, 41 P.2d 378), we are in accord with the view stated by the court in the Beatty case that the rule was not "intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath." Here, the more specific facts affirmatively alleged in the third cause of action (that the authority "allowed representatives of Plaintiffs and other opponents to the plan * * * about one and one-half hours to present their arguments and facts against the building of said Bridge * * * [and] allowed the proponents of said Bridge to present their views to the Authority for about four hours") must be accepted as precluding our construing the more general and negative allegations of the fifth cause of action to mean that the authority did in truth proceed without conducting any hearing or investigation and without permitting or considering evidence or arguments pertinent to the proper discharge of its duty.

[10] *Thirdly*, it is to be borne in mind in relation to this fifth cause of action that the complaint here shows that a duly constituted state agency has conducted a hearing and taken action which, upon the face of the proceedings, appears to be not only within its allotted jurisdiction but also a proper discharge of its statutory duty. In reviewing the acts of a state board it has

been held that a petition which alleges an abuse of discretion and which also incorporates a transcript by reference will be examined in the light of the evidence contained in the transcript to determine whether a cause of action is stated. (*Sipper v. Urban* (1943), 22 Cal.2d 138, 141, 137 P.2d 425; see also *Dare v. Bd. of Medical Examiners* (1943), 21 Cal.2d 790, 795-800, 136 P.2d 304; *Russell v. Miller* (1943), 21 Cal.2d 817, 819-820, 136 P.2d 318.) Allegations that the acts of a commission or board were "arbitrary, capricious, fraudulent, wrongful and unlawful," like other adjectival descriptions of such proceedings, constitute mere conclusions of law which are not to be deemed admitted by a demurrer. (*Meyer v. Board of Public Works* (1942), 51 Cal. App.2d 456, 470, 125 P.2d 50; *Jones v. O'Toole* (1923), 190 Cal. 252, 255, 212 P. 9.)

[11] Subject, of course, to the power of the court to exercise an independent judgment on the evidence in certain review proceedings (see e. g., *Dare v. Bd. of Medical Examiners* (1943), *supra*, 21 Cal.2d 790, 794, 136 P.2d 304; *Code of Civ.Proc.*, § 1094.5) it has been stated as a general principle, gleaned from the cases, that "The courts have nothing to do with the wisdom or expediency of the measures adopted by an administrative agency to which the formulation and execution of state policy have been entrusted, and will not substitute their judgment or notions of expediency, reasonableness, or wisdom for those which have guided the agency." (2 Cal.Jur.2d 361, § 219; see also *Hansen v. State Board of Equalization* (1941), 43 Cal.App.2d 176, 179, 110 P.2d 453; *Maxwell v. Civil Service Commission* (1915), 169 Cal. 336, 339, 146 P. 869; *Rehfeld v. San Francisco* (1933), 218 Cal. 83, 85, 21 P.2d 419.)

[12, 13] A concise and sufficiently comprehensive statement of the presumptions which ordinarily attach to acts of state agencies when they are attacked in judicial proceedings is found (together with citations of authorities) in 2 Cal.Jur.2d 355-356, § 216: "The findings and the determination come before the reviewing court with a strong presumption as to their correctness and regularity. Thus, it is presumed, in the absence of evidence establishing [or plead-

ing alleging] the contrary, that the necessary facts to support the determination were ascertained and found, that the agency duly considered the evidence adduced at the administrative hearing, that official duty was regularly performed, and that the agency applied the proper standard or test in reaching its decision."

From what has been said it appears that plaintiffs' pleading must be examined in the light of the presumptions noted and that plaintiffs, to state a cause of action warranting judicial interference with the official acts of defendants, must allege much more than mere conclusions of law; they must aver the specific facts from which the conclusions entitling them to relief would follow.

[14] Allegations that the investigation of an earthen fill type of crossing by defendants was "insufficient" and that their action was "arbitrary, capricious and unreasonable" and "constitutes an abuse of the discretion vested in said Authority" are, as hereinabove indicated, only conclusions of law and are not admitted by the demurrer. Since the presumptions, as above noted, are all in favor of the regularity of the authority's actions, since it does appear that the authority conducted a hearing received evidence, and considered facts and arguments, and since only factual averments are material, it is our view that to plead a cause of action in such a case as is attempted to be stated in the fifth cause of action, the plaintiff must either attach to the complaint a complete transcript of all the evidence upon which the authority acted (which in this case presumptively would include, among other things, a report of an "investigation and study of the feasibility of financing and constructing * * * a toll bridge or other toll highway crossing between the County of Marin and the County of Contra Costa * * * and * * * whether such a bridge or other toll highway crossing is feasible and is for the best interests of the public highways," as impliedly called for in the Budget Act of 1950 [Stats.1950, p. 255, Item 245.1, p. 311], a report on an application by the State of California for a Department of Army permit for the construction of the proposed

bridge, and a report on the expenditure of \$750,000 or so much thereof as may have been found necessary, and the surveys, plans, etc., for which such fund was appropriated, all as impliedly called for or authorized by an act of the Legislature [Stats. 1951, ch. 1473, p. 3451]) or, at the minimum, must allege the substance of all of the evidence which the authority did receive and further aver with particularity the elements, aspects and the principles wherein such evidence, considered in the light of the plaintiffs' contentions, supports the conclusion that the authority abused the discretion vested in it. By no other means, since the averment of naked conclusions adds nothing, can the pleading show that the agency in a case such as this did in fact abuse its discretion.

To elucidate our holding still further, it means this: When it appears that an order made by the authority is within its jurisdiction and that in making such order the authority conducted a hearing, heard the interested parties, and has acted upon substantial evidence, we cannot draw the inference that it has abused its discretion unless at least the substance of the evidence upon which it acted is alleged. In the absence of the evidence an abuse of discretion cannot be shown by mere allegations of what the authority did not do or did not consider. It is what the authority did do upon the evidence which was before it which must be attacked if the attack is to prevail; only in the light of the evidence before it when it acted could its refusal to hear further evidence be shown to be erroneous or could the inference be drawn that it abused its discretion in not doing something other than what it did do.

[15] Tested by the standards which we have explained it appears that the complaint in its fifth cause of action shows no more, in any material sense, than that the authority at a hearing on a matter within its jurisdiction, accorded the plaintiffs less time than they wanted for presentation of their views, and less time than was devoted to hearing opposing views, and upon the evidence before it, the substance of which we do not know, came to a conclusion adverse to the views of plaintiffs, but a con-

clusion within its statutory power to reach. Thus there is no basis for concluding that the authority abused its discretion in failing to make further studies or consider further other types of crossings.

Plaintiffs have not, either in this court or in the trial court, requested leave to amend (such request, we recognize, is not necessary for certain purposes, Code Civ.Proc., § 472c), or suggested that any amendment materially affecting any of their alleged causes of action could be added, and no claim is made that the authority acted arbitrarily or abused its discretion otherwise than in the particulars alleged in the complaint. Furthermore, it is not claimed that the evidence which was before the authority (the substance of which, as already mentioned, we do not know, but which must be presumed to have included the engineering surveys and reports on feasibility and desirability of the proposed type and location of bridge as hereinabove mentioned) would, if the substance thereof were fully alleged, show that the authority actually had before it no engineering studies and no feasibility or desirability reports, or would show that no consideration was given to the question as to what type of crossing would be most feasible and the construction of which would best serve the interests of the people in the extension and maintenance of the State's highways, or that the authority's determinations and actions are as a matter of law without substantial evidentiary support.

Pertinent also to the plaintiffs' lack of desire (if not definite unwillingness) to include in their pleadings all of the evidentiary matters which were before the authority, the record on appeal shows that at the hearings on the demurrer the *defendants* produced, had marked for identification, and asked the trial court to take judicial notice of, the following documents: (1) the report of the Department of Public Works on the proposed highway toll crossing; (2) reporter's transcript of the authority's meeting of September 23, 1952; (3) reporter's transcript of the authority's meeting of September 26, 1952. The record further shows that the trial court in its memorandum opinion stated, among other

things, that "The court has not taken notice of the reporter's transcript of the meetings of the Toll Bridge Authority of September 23rd, 1952 and September 26th, 1952, or of the report of Ralph A. Tudor, Special Engineer Consultant, to the * * * Director of Public Works of California, dated January 2, 1951, which were marked for identification, and of which defendants urged that the court should take judicial notice."

Plaintiffs in their memorandum of points and authorities (filed with their complaint) further disclose the limited extent of their theory of attack in relation to asserted abuse of discretion. It is not that the authority made *no* study or investigation of an earth fill type of crossing, but that, in plaintiffs' own language, "the Authority has made no *adequate* study and investigation of the earth fill type of crossing as compared with the Bridge and that such constitutes an abuse of discretion." (Italics added.) They further assert in such memorandum that they are "prepared to show on the trial of the merits * * * that the record of the hearings before the Authority contains no evidence as to the costs of insurance, physical operation and maintenance of an earth fill crossing as compared with the Bridge or the comparable durability of the two structures in the face of earthquakes, bombing attacks or the comparable ease of widening the structures to meet future traffic needs of the San Francisco Bay Area. In addition, the record of the hearings * * * contains no evidence that the Authority studied the need for rail transportation both for rapid transit facilities and for freight and other passenger service in the Bay Area. * * * The record shows that no original investigation or determination was made by the Authority or its agents as to the costs of an earth fill crossing. * * * the record will show that no study was made of the question whether such a Bridge would interfere with future water conservation facilities in the North Bay Area. * * * The record will show * * * that de-

tailed and thorough studies of seven different steel Bridges were made. All were similar structurally but differed in location only. The record will show that neither the Authority nor its agents ever made an original drawing or thought of an original plan for an earth fill crossing. Nor was any study of different methods to construct such an earth fill crossing ever undertaken. It would seem that the only reasonable way to plan a structure of such proportions and cost as a bridge across the bay is for the Authority to study and investigate thoroughly various possible types of structures as well as various locations for each type of structure. The record will show that the Authority has acted arbitrarily and unreasonably in deciding to build the Bridge without adequately investigating an earth fill type crossing."

Again we note the emphasis on plaintiffs' theory in the sentence last above quoted, "The record will show that the Authority has acted arbitrarily and unreasonably in deciding to build the Bridge without *adequately* investigating an earth fill type crossing." (Italics added.)

It is our conclusion that the plaintiffs' arguments as above set forth, like the averments in their fifth cause of action, relate at most to the wisdom of defendants' acts, and that on any tenable view of the law plaintiffs fall short of showing either that the complaint alleges or could be amended to allege facts from which a court could draw the conclusion that the authority had abused the discretion delegated to it by law. Accordingly we must conclude that the complaint, in its fifth cause of action, as well as in the others already discussed, is vulnerable to the demurrer and that the trial court's order sustaining such demurrer was correct.

For the reasons above stated, the judgment is affirmed. Pursuant to stipulation of the parties, let the remittitur issue forthwith.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

40 Cal.2d 334

CALIFORNIA WATER, TRANSIT & DEFENSE PROJECT v. CALIFORNIA TOLL BRIDGE AUTHORITY et al.

Sac. 6380.

Supreme Court of California, in Bank.

Feb. 25, 1953.

Suit was brought against the California Toll Bridge Authority and others to have toll bridge revenue bonds declared invalid and to enjoin defendants from proceeding with construction of proposed Richmond-San Rafael Bridge. The Superior Court of Napa County, Mervin C. Lernhart, J., entered judgment adverse to plaintiff, and it appealed. The Supreme Court, Schauer, J., held that resolution of the California Toll Bridge Authority in connection with proposed Richmond-San Rafael Bridge that it will not engage in or, so far as it lay in its power, permit construction of another bridge within eight miles of the Richmond-San Rafael Bridge, did not impair any legal rights of Bridge and Highway District to construct earth fill crossing within eight miles of bridge as authorized by Streets and Highways Code.

Judgment affirmed.

Bridges

Resolution of the California Toll Bridge Authority in connection with proposed Richmond-San Rafael Bridge that it will not engage in or, so far as it lay in its power, permit construction of another bridge within eight miles of the Richmond-San Rafael Bridge, did not impair any legal rights of Bridge and Highway District to construct earth fill crossing within eight miles of bridge as authorized by Streets and Highways Code. Streets and Highways Code, §§ 27000, 27022, 27164, 27167, 27171, 30207, 30208, 30221, 30235, 30350, 30353, 30354, 30506, 30812, 30813.

Byers, Burd & Fraser, Berkeley, for appellant.

1. Defendants who were named and have appeared herein are the California Toll Bridge Authority; the five individual members of the authority; Frank B. Durkee, as Director of the Department of Public Works of the State of Cal-

Edmund G. Brown, Atty. Gen., E. G. Funke, Asst. Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., Robert E. Reed, Atty. for Dept. of Public Works of the State, Sacramento, Orrick, Dahlquist, Neff & Herrington, San Francisco, for respondents.

SCHAUER, Justice.

This is a companion case to *Faulkner v. California Toll Bridge Authority*, Cal.Sup., 253 P.2d 659, our opinion in which has been this day filed. As in that case, plaintiff here appeals from a judgment entered on the sustaining without leave to amend of defendants' general demurrer to plaintiff's complaint. In this suit plaintiff seeks to have declared invalid the toll bridge revenue bonds more particularly described in our opinion in the *Faulkner* case, together with various resolutions of the defendant California Toll Bridge Authority, hereinafter termed the authority, and to enjoin the defendants¹ from proceeding with the construction of the proposed toll bridge between Richmond and San Rafael. We have concluded that the demurrer was properly sustained and that the judgment of the trial court should be affirmed.

In material substance the complaint alleges: Plaintiff is a nonprofit corporation, incorporated in this state; defendant authority adopted the various resolutions of September 26, 1952, and of November 7, 1952, which are more fully described in the *Faulkner* case (such portion of the resolutions as is particularly concerned in this case is hereinafter set forth), and on December 17, 1952, the authority "re-adopted" the four resolutions of November 7; bids for construction of the substructure and superstructure of the bridge were received and opened on December 19, 1952, by officials of the Department of Public Works, and that department intends to accept such bids prior to delivery of the Series A Bonds which were authorized

ifornia; and Blyth & Co., Inc., alleged to be a purchaser from the authority of certain of the toll bridge revenue bonds proposed to be issued to finance construction of the new bridge.

by one of the November 7 resolutions; on December 29, 1952, the authority sold the Series A Bonds to four companies, including defendant Blyth & Co., Inc.; the bid of the four companies was the only offer to purchase the bonds which the authority received; the authority intends to deliver the bonds as soon as practicable to the four companies and thereafter construction of the bridge will begin.

The provisions of section 7.09 of one of the November 7 resolutions "authorizing the creation of Richmond-San Rafael Toll Bridge Revenue Bonds and providing for the issuance of" the Series A Bonds are the provisions upon which plaintiff particularly relies. Those provisions are alleged in its complaint and are shown herein in footnote 2.

Plaintiff further alleges that it intends to form a Bridge and Highway District pursuant to the provisions of the Bridge and Highway District Act (§§ 27000 to 27325 of the Sts. & Hy.Code), in order to construct an earth fill crossing across north San Francisco Bay (between the County of Marin and the County of Contra Costa) which will be within eight miles of the proposed toll bridge, will accommodate automobile and railroad traffic, and will "be financed by the issuance of bonds secured by tolls"; that defendant authority, in accordance with its agreement expressed in section 7.09 of its resolution (quoted hereinabove in footnote 2) that "it will not engage in, or so far as lies in its power per-

mit" the construction of another crossing within eight miles of the new bridge, "will try to prevent Plaintiff from organizing" the Bridge and Highway District and "will try to prevent the construction of" the earth fill crossing by such district; that organization of the district will take "a great deal of Plaintiff's money and effort"; that in "order to develop the plans for said earth-fill crossing, Plaintiff has spent" over \$10,000 and "has expended a great deal of effort over a period of time in excess of two years"; that if section 7.09 is valid and if it restricts the power of such a district "to construct a toll crossing in any location it desires, the money and effort expended in creating and developing the said plan for an earth-fill crossing * * * will be completely and absolutely wasted, the intention of Plaintiff to form a Bridge and Highway District will be completely thwarted and, consequently, plaintiff will suffer irreparable injury and damage. The eight-mile limitation [expressed in section 7.09] would prevent the construction of any crossing across north San Francisco Bay by any Bridge and Highway District organized by Plaintiff."

Plaintiff's contentions appear to be, firstly, that the right of its proposed Bridge and Highway District to construct and finance a toll crossing under the authority of sections 27164, 27167, and 27171 of the Streets and Highways Code will be nullified if section 7.09 of the authority's resolution is valid, and secondly, that by the eight mile

2. Section 7.09 reads as follows: "*Competitive Facilities*. The Authority covenants and agrees that it will not engage in, or so far as lies in its power permit, the erection, construction or maintenance of any other vehicular or inter-urban railway bridge, subway, tunnel, barrier or other crossing, over, under, through or across San Francisco Bay between the County of Contra Costa on the one side and the County of Marin on the other side, *within a distance of eight miles from either side of the Bridge* [italics added], and will use its best efforts to prevent the granting of any franchise, for the operation and maintenance of any vehicular or passenger ferry or other similar means of crossing the said waters between the points aforesaid and within the limits afore-

said, so long as any of the Bonds are outstanding. The provisions of this Section 7.09 are in lieu of and in substitution for any similar provisions of law existing at the date of adoption of this Resolution; provided, however, that nothing herein contained shall prevent the construction of (a) any salt water or other barrier which does not provide for vehicular traffic thereon or (b) any salt water or other barrier providing for such vehicular traffic upon or over the rim or surface thereof, provided the Bonds issued or to be issued hereunder are either (i) secured by a first lien upon all revenues of such salt water or other barrier or (ii) are called for redemption and redeemed prior to the construction of such salt water or other barrier."

limitation expressed in such section 7.09 the authority has violated section 30354 of the Streets and Highways Code (which provides certain exceptions to the ten mile limit within which section 30350 of that code prohibits the construction of a second crossing while revenue bonds against a prior crossing are outstanding and unpaid). Plaintiff asks that the court either declare invalid section 7.09 of the resolution or declare that the section applies neither to a Bridge and Highway District organized pursuant to the Bridge and Highway District Act nor to the earth fill crossing proposed by plaintiff; that the court further declare invalid the whole of the authority's four resolutions of November 7, 1952 (re-adopted December 17, 1952), authorizing creation and issuance of the revenue bonds, and declare the bonds invalid; and that an injunction issue restraining defendants from proceeding with construction of the Richmond-San Rafael Bridge and from taking any action to prevent plaintiff from organizing its proposed district or to prevent any such district from constructing the proposed earth fill. We have concluded that none of plaintiff's contentions is tenable and that the trial court correctly sustained the demurrer.

It is apparent from the provisions of section 30506 of the Streets and Highways Code that any right of a Bridge and Highway District to construct and finance the earth fill toll crossing sponsored by plaintiff cannot, insofar as the legal aspects thereof are concerned, be nullified by action taken by the authority by resolution or otherwise. That section specifically states that if after petition from such a district for authority to construct the crossing the authority "refuses to authorize" or "does not within three years from the receipt of the petition authorize" the construction, the district may construct such crossing "subject to the limitations of Article 7" (the ten mile limit, with exceptions). (See also Sts. & Hy. Code, §§ 30812, 30813.) Moreover, the authority does not purport, by section 7.09 of its resolution, to forbid, or place any legally binding restrictions upon, the efforts of a district to finance and construct the cross-

ing advocated by plaintiffs, but only to refrain from engaging in, or "so far as lies in its power" from permitting, the construction so long as any of the Richmond-San Rafael Bridge bonds are outstanding. Since the authority is without power to place any legal impediment in the way of the construction, plaintiff's argument that its right to proceed with its proposed earth fill toll crossing will be lost if section 7.09 is valid, is without merit.

In addition, it appears that the authority not only has not by section 7.09 of its resolution violated section 30354 of the Streets and Highways Code, but that it has acted within the powers conferred upon it by statute. Section 30354 provides, so far as here material, that the "limitations and provisions" of section 30350 do not apply to the construction of a highway bridge or other crossing between the County of Marin and the County of Contra Costa. Section 30350 states that "As long as any of the bonds issued * * * for the * * * construction * * * of any toll bridge * * * are outstanding and unpaid, there shall not be * * * constructed * * any other bridge * * * or other crossing over, under, through, or across the [same] waters * * * within a distance of 10 miles from either side of such bridge * * *" By section 30353 of the same code it is declared that "The provisions of Sections 30350 * * * are binding upon the authority, the State, all of its departments, agencies, or instrumentalities, any and all private, political, municipal, and public corporations and subdivisions, including cities, counties, and districts of any nature whatever. The prohibitions * * * restrict and limit the powers of the Legislature in respect to the matters mentioned in those sections as long as any such bonds are outstanding and unpaid and constitute a contract to that effect for the benefit of the holders of all such bonds." From the cited sections it is apparent that the purpose of the ten mile limit with exceptions is to protect the holders of bonds outstanding against crossings to which the limit applies and to restrict the right of the various agencies named in section 30353 to impair such protection, and that it is not the

purpose of such sections to forbid the authority from offering as an inducement to prospective purchasers of bonds the greater protection of the eight mile limit within which it agrees, under section 7.09 of its resolution, "that it will not engage in, or so far as lies in its power permit," construction of another crossing within a distance of eight miles from either side of the proposed bridge. This view finds further support in the provision of section 30221, that "Whenever any bonds are to be issued pursuant to this chapter [the Toll Bridge Authority Act], the authority, from time to time, upon such terms and conditions in all respects as it approves and consistently with this chapter, may enter into indentures or agreements containing any or all of the following provisions * * * (d) Such other provisions for the protection of the holders of the bonds as the authority approves * * * " (See also sections 30207, 30208, 30235.)

Inasmuch as the authority has not, by the provisions of the resolution here attacked by plaintiff, impaired any legal rights of a Bridge and Highway District to construct the earth fill crossing advocated by plaintiff, it becomes unnecessary to consider defendants' further contention that plaintiff does not have the legal power to create such a district. (See Sts. & Hy.Code, § 27022; Golden Gate Bridge and Highway Dist. v. Felt (1931), 214 Cal. 308, 312-313, 5 P.2d 585.)

We can well understand that the practical effect of the authority's determination—which, of course, is the determination of the State of California—to construct the so-called high-level type of bridge at this time will probably, if not inevitably, make it more difficult for plaintiff and the many others who favor the earthen fill type of construction, to attain their objective. But inasmuch as the practical effect which it is asserted section 7.09 of the authority's resolution may have on the plans of plaintiff is not unlawful, such resolution cannot be held to be void. As we indicated in the Faulkner case it is to the California Toll Bridge Authority and to the Department of Public Works that the State of California

has delegated the power and the duty to make the choices involved in such undertakings and upon the proceedings now before us the court may not properly concern itself at all with any question as to the wisdom of the determinations which such defendants have reached.

For the reasons above stated, the judgment is affirmed. Pursuant to stipulation of the parties, let the remittitur issue forthwith.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.



40 Cal.2d 341

**CALIFORNIA TOLL BRIDGE AUTHORITY
v. DURKEE.**

Sac. 6370.

Supreme Court of California, in Bank.

Feb. 25, 1953.

The California Toll Bridge Authority sought in original proceedings a writ of mandate to compel Director of Public Works to sign and execute the Richmond-San Rafael Bridge revenue bonds. The Supreme Court, Schauer, J., held that inasmuch as Authority had been accorded its remedy at law in two other cases, which had been appealed to Supreme Court from Superior Court, Authority was not entitled to writ of mandate.

Alternative writ discharged and peremptory writ denied.

Mandamus ☞5

Where Supreme Court in two cases appealed from Superior Court had upheld right of California Toll Bridge Authority to proceed with construction and financing of the Richmond-San Rafael Bridge, so that Authority had been accorded its remedy at law that it sought in original mandamus proceedings in Supreme Court to compel Director of Public Works to sign and execute bridge revenue bonds, Supreme Court would discharge alternative writ and deny peremptory writ.

Edmund G. Brown, Atty. Gen., E. G. Funke, Asst. Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., George Herrington and Orrick, Dahlquist, Neff & Herrington, San Francisco, of counsel, for petitioner.

Holloway Jones and Jack M. Howard, San Francisco, Byers, Burd & Fraser, Berkeley, Wagener & Brailsford, Oakland, for respondent.

SCHAUER, Justice.

Petitioner California Toll Bridge Authority seeks a writ of mandate to compel respondent Director of Public Works to sign and execute¹ the Richmond-San Rafael Bridge Toll Bridge Revenue Bonds, Series A, discussed in *Faulkner v. California Toll Bridge Authority*, Cal.Sup., 253 P.2d 659, and in *California Water, Transit and Defense Project v. California Toll Bridge Authority*, Cal.Sup., 253 P.2d 670, our opinions in which have been this day filed. The alternative writ issued.

The petition for the writ alleges the facts as to the filing of the two superior court actions which were the subjects of appeal in those two opinions; sets forth the substance of the grounds for attacking the bonds, as alleged in the complaints in such actions; states that demurrers to such complaints were sustained without leave to amend, in the respective superior courts in which the actions were filed, and that judgments were entered accordingly; and also alleges that (as of the date the petition for the writ was filed) an appeal to this court had been taken in the first of such actions, and that in the other of such actions an appeal to this court was to be taken.

It is particularly alleged in the petition that the petitioner, acting upon the report and recommendation of the Department of Public Works and having approved such recommendation, had authorized the issuance of Toll Bridge Revenue Bonds in an amount not to exceed \$72,000,000, whereof \$62,000,000 principal amount was authorized for immediate issuance; that on December 29, 1952, bonds in such amount

had been duly sold; that under the terms of the Official Notice of Sale of such bonds the purchasers "are entitled to cancel the contract of sale unless said bonds were delivered to them * * * on or before February 27, 1953, free of any litigation with respect to said Bonds." It is also alleged that construction bids for construction of the substructure and superstructure of the proposed Richmond-San Rafael Bridge had been duly received by the Department of Public Works, that such construction bids are "highly advantageous to the State," and that "under the terms of the contracts * * * such contracts must be awarded * * * on or before February 17, 1953, and said contracts accompanied by Performance Bonds and Labor and Material Bonds of the contractors must be actually signed and executed * * * on or before February 27, 1953."

It is further alleged in the petition that "by reason of the pendency of said litigation in the Superior Courts of the State of California, and notwithstanding the judgments of each of said Superior Courts sustaining without leave to amend the general Demurrers of Petitioner California Toll Bridge Authority, Respondent is in doubt as to the legality of the proceedings taken by Petitioner herein, California Toll Bridge Authority, and the legality of Richmond-San Rafael Bridge Toll Bridge Revenue Bonds." No other ground is alleged for respondent's refusal to sign and execute the bonds. Petitioner alleges also that it has no plain, speedy or adequate remedy in the ordinary course of law; the delay incident to appeal is the only ground given for asserting that the remedy at law is inadequate.

Respondent Durkee has made return to the alternative writ by way of a general demurrer and plaintiffs in the two superior court cases have been permitted to file their complaint in intervention in this mandamus proceeding, but they ask only that the alternative writ heretofore issued be discharged and the peremptory writ denied, and seek no affirmative relief.

1. Streets and Highways Code, section 30210: "All bonds shall be signed by the director of Public Works] * * *

Inasmuch as our opinions in the two superior court cases have now been filed and remittiturs therein have issued, petitioner has been accorded its remedy at law. It follows that the alternative writ should be, and it is hereby, discharged, and the peremptory writ is denied.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.



116 Cal.App.2d 310

ELLIS v. D'ANGELO et al.

Civ. 15173.

District Court of Appeal, First District,
Division 2, California.

Feb. 27, 1953.

Hearing Denied April 27, 1953.

Action by baby sitter against four year old boy and his parents. One count of complaint alleged battery by boy. A second count alleged that baby sitter suffered injuries as proximate result of boy having negligently shoved and pushed baby sitter violently to floor. The third count sought recovery from parents for their negligence in failing to warn baby sitter of boy's habit of violently attacking people. The Superior Court, City and County of San Francisco, Theresa Meikle, J., sustained demurrer to first amended complaint without leave to amend and plaintiff appealed from judgment for defendants. The District Court of Appeal, Dooling, J., held that first count failed to state cause of action and that second and third counts stated causes of action.

Reversed with directions to overrule demurrer to first and third counts.

1. Infants ⇨59

Insane Persons ⇨80

In enacting section of Civil Code providing that minor or person of unsound mind is civilly liable for wrongs done by him but is not liable for exemplary damages unless he was capable of knowing that act was wrongful, Legislature intended that minor or person of unsound mind should be liable in compensatory damages for

his tortious conduct even though he was not capable of knowing wrongful character of his act at time that he committed it. Civ.Code, § 41.

2. Infants ⇨59

Generally, infant is liable for his torts even though he lacks mental capacity to recognize wrongfulness of his conduct so long as he has mental capacity to have state of mind necessary to commission of particular tort with which he is charged.

3. Infants ⇨60, 61

As between battery and negligent injury, infant may have capacity to intend violent contact which is essential to commission of battery when same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is essential capacity of mind to create liability for negligence.

4. Infants ⇨61

In the case of infants, no different measure of negligence is to be applied to their primary than to their contributory faults.

5. Infants ⇨61

Negligence ⇨85(2)

As respects negligence or contributory negligence, a minor is expected to use not quantum of care expected of adults but only that amount of care which is ordinarily used by children of same age under similar circumstances.

6. Infants ⇨61

A four year old child does not have mental capacity for seeing possibilities of his inadvertent conduct which will rationally support a finding that he is negligent.

7. Infants ⇨92

A complaint alleging that plaintiff suffered injuries as proximate result of four year old child negligently shoving and pushing plaintiff violently to floor was insufficient to state cause of action in view of four year old child having no mental capacity for negligent conduct.

8. Infants ⇨102

Whether four year old child was capable of intending the violent or harmful striking of another, so as to be liable

for compensatory damages for the battery, was question of fact. Civ.Code, § 41.

9. Parent and Child ☞13(1)

Notwithstanding the rule in California and generally at common law that there is no vicarious liability on parents for torts of child, parents may become liable for injury caused by child where parents' negligence has made it possible for child to cause injury complained of and probable that it would do so.

10. Parent and Child ☞13(2)

Complaint alleging that parents employed plaintiff for first time as baby sitter for four year old son, that parents knew and failed to warn plaintiff that son habitually engaged in violently attacking and throwing himself forcibly and violently against other people and violently shoving and knocking them and that shortly after plaintiff entered on her duties in the home the son attacked her to her resultant injury stated cause of action against parents for their negligence.

Shirley, Saroyan, Calvert & Sullivan, San Francisco, for appellant.

Alexander, Bacon & Mundhenk, San Francisco, Herbert Chamberlin, San Francisco, for respondent.

DOOLING, Justice.

The plaintiff appeals from a judgment for the defendants entered after a demurrer was sustained to her first amended complaint without leave to amend. The complaint is in three counts. Count one alleges a battery by defendant Salvatore D'Angelo, a minor of the age of four years; the second count alleges injuries suffered by the plaintiff as the proximate result of the minor defendant negligently shoving and pushing the plaintiff violently to the floor; the third count seeks a recovery from the parents of the child for their negligence in failing to warn or inform plaintiff of the habit of the child of violently attacking other people. According to the allegation the plaintiff was by the minor defendant "pushed, impelled and knocked * * * violently to the floor" and suffered serious

injuries including a fracturing of the bones of both her arms and wrists.

The two counts against the minor will be discussed together. Appellant points to the language of Civil Code, section 41: "A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful."

[1] This section is based upon sections 23 and 24 of the Field Commission's draft of a Civil Code which was submitted to the New York Legislature in 1865. This may be an anachronistic vestige of earlier common law principles, in other fields now outmoded, of liability without fault for trespass *vi et armis* (see Bohlen, Liability In Tort Of Infants And Insane Persons, 23 Mich.L.Rev. 9) but it remains true that our legislature in Civ.Code, sec. 41 above quoted by providing that a minor or person of unsound mind is civilly liable for wrongs done by him, and particularly by the qualification that he shall not be held for exemplary damages unless he was capable of knowing that the act was wrongful, has indicated clearly that it intended that a minor or person of unsound mind should be liable in compensatory damages for his tortious conduct even though he was not capable of knowing the wrongful character of his act at the time that he committed it. Startling as this idea may be at first blush, we are bound by this legislative declaration and taking it, and the state of the common law with relation to the liability of infants and persons of unsound mind of which it was intended as a codification, it is our duty to determine the legislative intent and to enforce it.

It is generally stated in 27 Am.Jur., Infants, sec. 90, pp. 812-813: "Liability of an infant in a civil action for his torts is imposed as a mode, not of punishment, but of compensation. If property has been destroyed or other loss occasioned by a wrongful act, it is just that the loss should fall upon the estate of the wrongdoer rather than on that of a guiltless person, and that without reference to the question of moral

guilt. Consequently, for every tortious act of violence or other pure tort, the infant tort-feasor is liable in a civil action to the injured person in the same manner and to the same extent as an adult. * * * Infancy, being in law a shield and not a sword, cannot be pleaded to avoid liability for frauds, trespasses, or torts. * * *

"A child of tender years may be held liable for acts of violence, and liability has often been imposed for the injuries caused by such acts, although committed in play and without the intent to inflict substantial injury. Of course, if the injury was an accident, or the acts of the child were only the natural activity of friendly play, there is no liability."

So Prosser in his work on Torts, pp. 1085-1086 says:

"The law of torts * * * has been more concerned with the compensation of the injured party than with the moral guilt of the wrongdoer, and has refused to hold that an infant is immune from assault and battery, trespass, conversion, defamation, seduction, and negligence. * * *

"This general rule denying immunity must, however, be qualified in a number of respects. In many torts, the state of mind of the actor is an important element. For example, an intent to bring about physical contact is necessary to battery, and in most jurisdictions 'scienter,' or intent to deceive, is said to be essential to deceit. It has been recognized that a child may be of such tender years that he is not an intelligent actor and is incapable of the specific intent required, so that the tort has not been committed, and the event is to be classified as an unavoidable accident. Likewise, in the case of negligence, children have been recognized as a special group to whom a more or less subjective standard of conduct is to be applied, which will vary according to their age, intelligence and experience, so that in many cases immunity is conferred in effect by finding merely that there has been no negligence."

The same qualification last quoted from Prosser is stated in 27 Am.Jur. sec. 91, pp. 813-814: "The general rule that infants are responsible, like other persons, for their torts is subject to the qualification that the torts for which they are so liable must not involve an element necessarily wanting in their case. Their liability may be affected by their mentality. Thus, in the case of slander, malice is a necessary ingredient in the wrong. * * * It is obvious, therefore, that in the case of slander an infant cannot be held liable for his tort until he arrives at that age or acquires that capacity which renders him morally responsible for his actions. * * * There is authority to the effect that a minor charged with actionable negligence is not to be held to the standard of care of an adult without regard to his nonage and want of experience. Reasonable care, having regard to the age and stage of development of the individual, is required of minors as well as adults, and no different measure is to be applied to their primary than to their contributory faults. * * * A child is required to exercise only that degree of care which the great mass of children of the same age ordinarily exercise * * * taking into account the experience, capacity, and understanding of the child."

See also 1 Cooley on Torts, 4th Ed., sec. 64, pp. 186-187, sec. 66, p. 194 et seq.; Harper on Torts, sec. 282, pp. 616-617.

[2, 3] From these authorities and the cases which they cite it may be concluded generally that an infant is liable for his torts even though he lacks the mental development and capacity to recognize the wrongfulness of his conduct so long as he has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he is charged. Thus as between a battery and negligent injury an infant may have the capacity to intend the violent contact which is essential to the commission of battery when the same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence.

[4,5] We may take it as settled in the case of infants as stated in the quotation from Am.Jur. above set out that "no different measure (of negligence) is to be applied to their primary than to their contributory faults." In a case involving the question of the liability of an infant for his negligent conduct the court in *Hoyt v. Rosenberg*, 80 Cal.App.2d 500 at pages 506-507, 182 P.2d 234, at page 238, 173 A.L.R. 883, said: "While the question as to whether a minor has been negligent in certain circumstances is ordinarily one of fact for the jury, an affirmative finding thereon * * * must conform to and be in accordance with the established rule that a minor is expected to use, not the quantum of care expected of an adult, but only that degree or amount of care which is ordinarily used by children of the same age under similar circumstances." This is the same test applied in determining a child's contributory negligence. (19 Cal.Jur., Negligence, sec. 41, pp. 604-605.)

[6,7] So far as the count charging the infant defendant with negligence is concerned the question presented to the court is whether as a matter of common knowledge we can say that a child four years of age lacks the mental capacity to realize that his conduct which is not intended to bring harm to another may nevertheless be reasonably expected to bring about that result. In the absence of compelling judicial authority to the contrary in the courts of this state we are satisfied that a four year old child does not possess this mental capacity. In the case of *Crane v. Smith*, 23 Cal.2d 288, 301, 144 P.2d 356, 364, the court said of a three year old child: "And since Janice was too young to be guilty of contributory negligence, the appellant's liability to her is established." In support of this holding the court cited *Gonzales v. Davis*, 197 Cal. 256, 240 P. 16, which involved a five year old child.

Appellant cites *Baugh v. Beatty*, 91 Cal. App.2d 786, 793, 205 P.2d 671, 675, where the court said of a four year old boy: "Whether a minor of tender years has conducted himself with the care and prudence due from one of his years and experience is

strictly a question of fact for the jury." The court cited only *Opelt v. Al. G. Barnes Co.*, 41 Cal.App. 776, 183 P. 241, which involved a ten year old child. The child had been bitten by a chimpanzee at a circus and the court later stated the question to be "whether plaintiff knowingly and voluntarily invited the injury" and "knowingly or consciously placed himself in danger." Such conduct is more than negligence since it involves the intentional taking of a risk and the opinion on its face indicates that the court was making no clear distinction between mere negligent conduct and deliberate and premeditated conduct.

No purpose will be served by reviewing all the authorities. None has been found in this State which we feel compels us to hold that a four year old has the mental capacity for negligent conduct. It is stated in a note collecting the cases from other jurisdictions in 107 A.L.R. 102 et seq.: "In a majority of the cases it seems that the courts have regarded a child between the ages of four and five years as incapable of personal negligence, the rule of conclusive incapacity applying to a child of such an age." (See further cases collected in the supplement to this note in 174 A.L.R. 1119.) We are satisfied from our own common knowledge of the mental development of four year old children that it is proper to hold that they have not at that age developed the mental capacity for foreseeing the possibilities of their inadvertent conduct which would rationally support a finding that they were negligent. The mental development of children from that age forward is so rapid that cases such as *Smith v. Harger*, 84 Cal.App.2d 361, 191 P.2d 25 dealing with a five year old child are not helpful to us.

[8] When it comes to the count charging battery a very different question is presented. We certainly cannot say that a four year old child is incapable of intending the violent or the harmful striking of another. Whether a four year old child had such intent presents a fact question; and in view of section 41 of the Civil Code which makes the recognition of the wrong-

ful character of the tort immaterial so far as the liability for compensatory damages is concerned, we must hold that the count charging battery states a cause of action.

[9, 10] The third count is without question sufficient to state a cause of action against the defendant parents. It alleges that these defendants employed plaintiff for the first time to act as baby sitter for their son, that the son "habitually engaged in violently attacking and throwing himself forcibly and violently against other people, and violently shoving and knocking them, all of which said defendant parents knew", that said "parents negligently and carelessly failed to warn plaintiff of said child's said traits and disposition and negligently and carelessly failed to inform plaintiff that said child habitually indulged in such violent and furious attacks on others," and that shortly after plaintiff entered on her duties in the home the child attacked her to her resultant injury.

While it is the rule in California, as it is generally at the common law, that there is no vicarious liability on a parent for the torts of a child there is "another rule of law relating to the torts of minors which is somewhat in the nature of an exception, and that is that a parent may become liable for an injury caused by the child, where the parent's negligence made it possible for the child to cause the injury complained of, and probable that it would do so." *Buelke v. Levenstadt*, 190 Cal. 684, 689, 214 P. 42, 44; *Rocca v. Steinmetz*, 61 Cal.App. 102, 214 P. 257.

Section 316, Restatement of Torts states the rule:

"A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

"(a) knows or has reason to know that he has the ability to control his child, and

"(b) knows or should know of the necessity and opportunity for exercising such control."

In a note in 155 A.L.R. at p. 87 cases are collected under the following statement: "The parent will incur liability for his minor child's intentional acts of violence or damage to persons or property if, knowing of the child's vicious or destructive tendencies or acts, he fails to exercise reasonable measures to restrain or discipline the child and thus encourages or acquiesces in such misconduct on the part of the child."

Among the cases there cited are *Condel v. Savo*, 350 Pa. 350, 39 A.2d 51, 155 A.L.R. 81, which held liable the parents of a boy who assaulted a younger child and threw him down an embankment where the boy was in the habit of attacking younger children and the parents with knowledge of such conduct had failed to exercise reasonable care to control him; *Norton v. Payne*, 154 Wash. 241, 281 P. 991, where under similar circumstances of previous conduct and lack of restraint the child struck a younger child in the eye with a stick; *Ryley v. Lafferty*, D.C., 45 F.2d 641, also an assault on a younger child with similar knowledge of previous conduct and lack of restraint; *Hoverson v. Noker*, 60 Wis. 511, 19 N.W. 382, where two young boys were in the habit of shooting guns and shouting at passersby and the parents with knowledge took no care to prevent their conduct; *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933, where with knowledge that he was using it negligently the parents permitted their son to continue in possession of an air gun.

Most nearly in point is *Zuckerberg v. Munzer*, 197 Misc. 791, 95 N.Y.S.2d 856, affirmed 277 App.Div. 1061, 100 N.Y.S.2d 910. In this case, as in ours, a person employed in the household was attacked by a young son. Plaintiff charged that the boy's tendency to assault people was well known to the parent and that the parent had not warned the plaintiff of this propensity. The court citing *Harper's Law of Torts*, sec. 283 said: "There are situations in which the parent may be held liable * * * 4. Where the parent's negligence consists entirely of his failure to restrain the child from vicious conduct imperilling others, when the parent has knowledge of

the child's propensity toward such conduct."

See also: Prosser on Torts, p. 914; Shearman & Redfield on Negligence, Rev.Ed. Zipp, sec. 144, p. 344; 67 C.J.S., Parent and Child, § 68, pp. 798-800; Agnesini v. Olsen, 277 App.Div. 1006, 100 N.Y.S.2d 338; Sawyer v. Kelly, 194 Okl. 516, 153 P.2d 97; Mazzocchi v. Seay, 126 W.Va. 490, 29 S.E.2d 12; Gudziwski v. Stemple-sky, 263 Mass. 103, 160 N.E. 334; Kuchlik v. Feuer, 239 App.Div. 338, 267 N.Y.S. 255; Vallency v. Rigillo, 91 N.J.L. 307, 102 A. 348; Davis v. Gavalas, 37 Ga.App. 242, 139 S.E. 577; Mendola v. Sambol, 166 Pa.Super. 351, 71 A.2d 827.

Respondent relies on Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407; Hagerty v. Powers, 66 Cal. 368, 5 P. 622; Figone v. Guisti, 43 Cal.App. 606, 185 P. 694; and Hudson v. Von Hamm, 85 Cal. App. 323, 259 P. 374 as stating a different rule for California. Hagerty v. Powers was a case in which the complaint alleged that the defendant father negligently etc. permitted his eleven year old son to have a loaded revolver. The complaint did not allege any propensities in the child making it dangerous for him to have a gun or that any such was known to the father. The court said "that a father is not liable * * * for the torts of his child, committed without his knowledge, consent, or sanction". [66 Cal. 368, 5 P. 622.] We entertain no doubt that today if the complaint stated facts showing traits in the child making it dangerous to let him have a loaded pistol and knowledge of those traits by the father it would be held to state a cause of action. The case would then on principle be no different from Rocca v. Steinmetz, supra, 61 Cal.App. 102, 214 P. 257, where liability was imposed on a father who negligently allowed his son to drive an automobile with knowledge that he was a careless and reckless driver.

Figone v. Guisti, supra, 43 Cal.App. 606, 185 P. 694, involved a 17 year old boy who

shot another with a pistol left by the boy's father in a drawer. No proof was made that the boy was reckless or unfit in any way to have access to a loaded pistol. Such proof was attempted by showing that the gun on a previous occasion had been exhibited by the boy to another. The court said of this evidence: "There is nothing in this evidence to show that young Guisti showed any inclination to injure any one." 43 Cal.App. at page 612, 185 P. at page 697.

Hudson v. Von Hamm, supra, 85 Cal. App. 323, 259 P. 374 was an attempt to impose vicarious liability on the parent for a tort committed by the child in Hawaii, where by statute the parent even without fault is made liable for the torts of his child. The court held the enforcement of such liability contrary to the policy of the forum. There was no discussion of the question of the parent's liability for his own negligence. The court 85 Cal.App. at page 326, 259 P. at page 376, quoted Shearman & Redfield on Negligence to the following effect: "He is liable, however, only for his own fault, and not for that of the child." The only allegation of knowledge by the parent was that the child was "disposed to climb about the furniture", clearly not enough to show dangerous conduct.

In Weber v. Pinyan, supra, 9 Cal.2d 226, at page 235, 70 P.2d 183, at page 188, 112 A.L.R. 407, the court said: "It is the settled rule in this state that a parent is not liable for the tort of his minor child without participation in the fault by the parent." This was only a cryptic way of saying that where the parent is without fault he is not liable for the tort of his minor child.

The judgment is reversed with directions to the trial court to overrule the demurrer to the first and third counts of the amended complaint.

NOURSE, P. J., and GOODELL, J., concur.

116 Cal.App.2d 404

KUIST v. CURRAN et al.
Civ. 19249.

District Court of Appeal, Second District,
Division 1, California.
March 2, 1953.

Action for injuries sustained by newspaper vendor when she was struck, while standing, 65 feet south of intersection, in middle of six-lane, north-south highway, by defendants' automobile, which was making left turn across highway after leaving gasoline station located on southeast corner of intersection. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that the jury had not been properly instructed.

Reversed and remanded for new trial.

Doran, Acting P. J., dissented.

1. Automobiles ⇨246(4)

In action for injuries sustained by newspaper vendor when she was struck, while standing, 65 feet south of intersection, in middle of six-lane, north-south highway, by defendant's automobile, which was making left turn across highway after leaving gasoline station located on southeast corner of intersection, it was error for trial court, which instructed that both parties were required to exercise ordinary care, to fail to explain that a greater amount of such care was required of defendant by reason of fact that she was operating automobile.

2. Trial ⇨252(8)

In action for injuries sustained by newspaper vendor when she was struck, while standing, 65 feet south of intersection, in middle of six-lane, north-south highway, by defendant's automobile, which was making left turn across highway after leaving gasoline station located on southeast corner of intersection, it was error to give instruction, with regard to statute requiring pedestrian, crossing roadway at point other than marked crosswalk or intersection, to yield right of way, in absence of any showing that plaintiff was, at time of accident, in act of crossing roadway. Vehicle Code, § 562(a, b).

3. Automobiles ⇨246(53)

In action for injuries sustained by newspaper vendor when she was struck, while standing, 65 feet south of intersection, in middle of six-lane, north-south highway, by defendant's automobile, which was making left turn across highway after leaving gasoline station located on southeast corner of intersection, it was error to give instruction on subject of imminent peril, where defendant's own testimony, as well as that of her witnesses, made it manifest that she was not confronted by sudden and unexpected peril.

4. Negligence ⇨12

A mere necessity for quick action does not constitute an "emergency" within imminent peril rule, where situation or danger calling for such action is one which should reasonably have been anticipated and which person charged with negligence should have been prepared to meet.

See publication Words and Phrases, for other judicial constructions and definitions of "Emergency".

5. Automobiles ⇨245(72, 91)

In action for injuries sustained by newspaper vendor when she was struck, while standing, 65 feet south of intersection, in middle of six-lane, north-south highway, by defendant's automobile, which was making left turn across highway after leaving gasoline station located on southeast corner of intersection, questions as to whether plaintiff had been guilty of contributory negligence and as to applicability of doctrine of last clear chance were for jury under evidence.

Manasse & Crowley, Arthur J. Crowley,
Hollywood, for appellant.

C. F. Jorz, and John G. Zelezny, Los
Angeles, for respondents.

PATROSSO, Justice pro tem.

In this action for personal injuries, plaintiff appeals from a judgment in favor of the defendants entered upon the verdict of the jury.

The accident in question occurred near the southeast corner of the intersection of

Fletcher and Riverside Drives in the City of Los Angeles, at or about 4 o'clock in the afternoon. The former runs in a general northerly and southerly direction, and the latter in a general easterly and westerly direction. Appellant is a newspaper vendor, and at about 4 o'clock on the day in question was standing in the middle of Fletcher Drive approximately 65 feet south of the southerly line of Riverside Drive. There is a gasoline station located on the southeast corner of the intersection with a driveway to Fletcher Drive approximately opposite from where the appellant was standing. The defendant Myrtle Curran (hereinafter referred to as the respondent) had driven into this service station for the purpose of inquiring the directions to the home of a friend whom she intended to visit. When leaving the service station, respondent stopped in the driveway to permit the passage of traffic on Fletcher Drive, and then proceeded into the street with the intention of making a left turn for the purpose of driving southerly on Fletcher. At this point Fletcher Drive is a 6-lane highway with a dividing line in the center. The respondent testified that while stopped in the driveway preparatory to entering Fletcher she observed the appellant standing facing south with her back to respondent in a position a foot or so east of the double white center line of Fletcher. Respondent proceeded to leave the driveway at a speed of from 2 to 5 miles per hour, driving in the general direction of where appellant was standing. Respondent testified that she intended to pass behind or to the north of appellant, and that when her car was in the immediate vicinity of

the appellant the latter took one step backward and turned to her right, moving a distance variously stated of from 18 to 20 inches and from three and a half to four feet when the accident occurred¹. Respondent admits that she gave no warning of her approach by sounding her horn or otherwise, and the only inference to be drawn from her testimony is that appellant was at all times oblivious to the fact that respondent's car was approaching her and likewise that this fact was at all times apparent to the respondent.

Primarily, appellant complains of the action of the trial court in giving and refusing certain instructions.

[1] Appellant requested and the court refused to give the following instruction: "You are instructed that the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that she was operating and driving an automobile, which is an instrument capable of inflicting serious and often fatal injuries upon others using the highway."

Instructions in substantially similar language have received judicial approval. *Weihe v. Rathejen Mercantile Co.*, 34 Cal. App. 302, 305, 167 P. 287, hearing by Supreme Court was denied; *Vedder v. Bireley*, 92 Cal.App. 52, 58, 267 P. 724; *Pinello v. Taylor*, 128 Cal.App. 508, 514, 17 P.2d 1039, hearing by Supreme Court denied; *Broun v. Blair*, 26 Cal.App.2d 613, 614, 80 P.2d 95; *Martin v. Vierra*, 34 Cal.App. 2d 86, 93, 93 P.2d 261, 94 P.2d 567, hearing

1. Respondent testified as follows:

"Q. How far would you estimate Mrs. Kuist stepped backward? A. There, again, this length I indicated was what I meant she stepped backwards.

"Q. Could it be 18 or 20 inches she stepped backwards? A. Whatever something like that would be.

"The Court: Approximately 3½ or 4 feet.

"A. Thereabouts.

"Q. Remember when your deposition was taken? A. Yes, I do.

"Q. Directing your attention to this language (in the deposition):

"Q. She stepped backward and swung to her right? A. Yes, toward my car.

"Q. Toward your car. How far did she swing toward your car? A. Well, I would judge probably, oh, something like that, 18 or 20 inches."

"Q. Was that your testimony at the time the deposition was taken? A. That is right.

"Q. So that Mrs. Kuist did not move more than 20 inches from the time you first saw her until the time you struck her? A. As I said in giving the deposition, probably 18 or 20 inches; I was a poor judge."

by Supreme Court denied; *Geisler v. Rugh*, 19 Cal.App.2d 738, 742, 66 P.2d 671, hearing by Supreme Court denied; *Dawson v. Lalanne*, 22 Cal.App.2d 314, 70 P.2d 1002. In the last cited case it was held that failure to give such an instruction alone constituted reversible error, while in *Vedder v. Bireley*, and *Pinello v. Taylor*, supra, it was held that the failure to give such an instruction coupled with other errors in the instructions required a reversal. However, in *Warnke v. Griffith Co.*, 133 Cal.App. 481, 496, 24 P.2d 583, 589, (hearing by Supreme Court denied) it was held that it was not error to refuse "a very long instruction" which contained language somewhat similar to that of the instruction requested and refused here. There, however, the instruction differed from that requested here in that it referred to a motor vehicle as "a dangerous instrumentality" and it may be noted also that the court seemingly approved as a correct statement of law the principle expressed the requested instruction here, for 133 Cal.App., at page 497, 24 P.2d at page 590, it is said: "(W)hile it is undoubtedly true that the amount of care required of the driver of the truck was greater than that required of appellant, as set forth in the part of the instruction refused by the court, and while such instruction sets forth a correct principle of law, we are of the opinion that the charges given by the court are equally sound as principles of law."

In *DeVictoria v. Erickson*, 83 Cal.App. 2d 206, 188 P.2d 276, the court affirmed an order granting plaintiff a new trial in which one of the errors of law assigned was the failure of the trial court to give a substantially identical instruction. In the course of its opinion, however, the court indicates that the propriety of giving or refusing such an instruction is to be determined in the light of the facts in each particular case. With this as a predicate, respondent asserts that the line of demarcation is "whether the pedestrian in question is traversing the street at a place where he has a greater right to cross, such as at an intersection, in a marked or unmarked crosswalk, or to or from a safety island in contradistinction to crossing elsewhere on

the highway." True additional considerations may be applicable with respect to pedestrians crossing a street at a point other than an intersection or marked crosswalk, such as the duty of the pedestrian to yield the right of way, but we find nothing in the cases cited which have considered the propriety of such an instruction which suggests that the legal principle embodied therein is confined to those cases where the pedestrian is injured in a portion of the highway where he may be said to have some superior right to be. See *Raymond v. Hill*, 168 Cal. 473, 483, 143 P. 743. Here as in *Dawson v. Lalanne*, supra, the jury were instructed that it was "the duty of every person using a public highway whether a pedestrian or the driver or operator of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision" and the authorities cited would seem to require an amplification of this statement in order that the jury may be made to understand that, although the degree of care required of each party is the same, the amount or quantum is greater in the case of the driver of a motor vehicle. However, were this the only error in the case we would have considerable hesitancy in reversing the judgment by reason thereof, but, it is to be considered in connection with the other assignments of error.

[2] Appellant next complains of the giving of an instruction containing the language of subdivisions "a" and "b" of section 562 of the Vehicle Code requiring a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection to yield the right of way to all vehicles upon the roadway. The basis of appellant's contention is that there is no evidence that the appellant at the time of the accident was in the act of crossing the roadway, and with this contention we are constrained to agree. In undertaking to justify the giving of this instruction counsel for respondent assert: "Viewing the evidence in the light most favorable to the respondent and indulging in all reasonable inferences which favor sustaining the trier of fact, we find that a pedes-

trian on the opposite side of the street had signalled to the plaintiff for a paper; that it was plaintiff's intention to cross the street to sell the pedestrian a newspaper; that she had suddenly, and without warning, whirled *and moved about three feet in starting across the highway.*" No transcript references are given in support of the foregoing, and a careful examination of the record fails to disclose any evidence supporting the statement that appellant "moved three feet in starting across the highway".

Appellant testified that immediately prior to the accident she observed a pedestrian walking northerly on the sidewalk on the westerly side of Fletcher, and thinking he might be a prospective customer she turned to face west to watch his progress; that as he approached a point approximately opposite her he signalled that he desired to purchase a paper, and that she was about to look to the north to see if there was any southbound traffic when she was struck. She testified that the only change from her previous position was to shift her feet so that she was facing in a westerly direction instead of a southerly direction as previously, and positively denied that she started to cross the street at any time prior to the time she was struck by respondent's automobile. Respondent testified that from the time she first observed appellant she was facing south and that immediately before the impact the appellant "swung to her right and stepped backward toward respondent's car" (either northerly or easterly, depending upon whether or not appellant was then facing south or west). But there is no suggestion in respondent's testimony that appellant at any time moved in a westerly direction toward the west side of Fletcher. The only other witness who testified upon the trial was a passenger in respondent's automobile. Her testimony was to the effect that as respondent's car was in the driveway of the service station proceeding into Fletcher Drive she observed the appellant standing near the double line on Fletcher facing south and that when respondent's car was within four feet of the appellant the latter made a complete turn so as to face *north* and took

a step and collided with respondent's car. This witness also testified that after the accident the appellant was on both of her knees a foot or two *east* of the double white line on Fletcher Drive.

We see nothing in the foregoing testimony to even suggest that at the time of or immediately prior to the accident appellant was crossing Fletcher Drive from east to west. The most that can be said is that she intended to do so but before she could carry out her intention in this respect she was struck by respondent's automobile. In the circumstances the giving of the instruction was improper, and may well have misled the jury to the appellant's prejudice, particularly in view of the fact that this instruction was followed by one in the language of BAJI 150 to the effect that the failure to yield to one to whom the law has given the right of way is negligence unless circumstances resulting from causes beyond the control of the driver or pedestrian are such as to excuse and justify him in such failure.

[3] Appellant also complains of the giving of an instruction upon the subject of imminent peril (BAJI 137). There is no contention that this instruction is not a correct statement of the law, but appellant asserts that it was improper to give the same because (1) the evidence compels the conclusion that the respondent was negligent, and (2) she was not "suddenly and unexpectedly confronted with peril". While the evidence speaks rather eloquently of negligence upon the part of the respondent, we are not prepared to say that it must be held that it established negligence upon her part as a matter of law. However, we agree that the giving of this instruction was improper for the second reason assigned by appellant. Respondent's own testimony, as well as that of her witness, makes manifest that she was not confronted by a *sudden and unexpected peril*. Certainly one who knowingly drives in the direction of a pedestrian standing in the street, and being aware that the pedestrian is oblivious to the approach of the vehicle, can hardly be heard to say that she was confronted by an unexpected peril by reason of the fact that the pedestrian

changed her position by taking one step when the vehicle was within four feet of her. Indeed, in such a situation a driver would readily expect the possibility of such an occurrence. To say that the movement of appellant here was unexpected is tantamount to saying that if respondent had driven directly toward appellant she (respondent) was confronted by an unexpected peril by reason of appellant's failure to move out of the path of the automobile.

In *Dougherty v. Ellingson*, 97 Cal.App. 87, 96, 275 P. 456, 460, the court says:

"Appellants Ellingson assigned as error the court's refusal of their proposed instruction as to the duty of a driver when suddenly confronted with danger. The testimony of Edward Ellingson, above set forth, shows that he saw the other automobile in ample time to have prevented the collision, and was not suddenly confronted with peril."

In *Fraser v. Stelling*, 52 Cal.App.2d 564, 567, 126 P.2d 653, 654, the court says:

"The trial court refused the request (instruction on sudden emergency) 'because the driver (Stelling) had had the rider (plaintiff) in view for 1000 feet as shown by his own testimony.' The ruling was not erroneous."

[4] The case last cited in its facts is strikingly similar to that here. There the defendant was driving a truck and first saw the plaintiff who was riding a bicycle when the latter was approximately 1,000 feet ahead of him. The defendant continued to drive forward and when about 50 feet behind the plaintiff he sounded his horn. The plaintiff did not indicate that he heard the horn and he testified that he did not. The defendant continued forward "and when he was 2, 3, 4 or 5 feet to the rear of the bicycle he (defendant) testified that plaintiff swerved the bicycle across the path of the truck." Here, as we have seen, respondent saw the appellant in the middle of the street from the time she started to leave the service station, observed that appellant, who had her back turned toward respondent, was unaware of the ap-

proach of the latter's automobile, and nonetheless continued forward toward the appellant without warning until she was within a distance of not more than four feet from her, when she says appellant took one step and came into contact with the automobile. As said in 65 C.J.S., Negligence, § 17, p. 411: "A mere necessity for quick action does not constitute an emergency within the rule where the situation or the danger calling for such action is one which should reasonably have been anticipated and which the person charged with negligence should have been prepared to meet." Such we believe was clearly the situation here.

[5] We do not agree with appellant's further contention that the evidence establishes as a matter of law that appellant was not guilty of any negligence that proximately contributed to the accident. This issue was properly submitted to the jury. Neither are we prepared to accept appellant's contention that the trial court should have instructed the jury *as a matter of law* that, even though negligent, appellant was entitled to recover by virtue of the doctrine of the last clear chance. The trial court correctly instructed the jury with respect to this doctrine, and under the evidence it was for the jury to determine whether or not it should be applied.

In the light of the evidence we have concluded that the error in refusing appellant's requested instruction previously adverted to and in giving the instructions embodying the provisions of section 562 of the Vehicle Code and the doctrine of imminent peril, requires a reversal of the judgment appealed from. As previously indicated, respondent's own testimony strongly suggests if it does not affirmatively establish that she was negligent. Under the circumstances we cannot say that the jury would not have reached a different result but for the errors in the instructions previously mentioned.

The judgment is reversed and the cause remanded for a new trial.

DRAPEAU, J., concurs.

DORAN, Acting P. J., dissents.

116 Cal.App.2d 431

MULLER v. MARTIN et al.

Civ. 15378.

District Court of Appeal, First District,
Division 1, California.

March 3, 1953.

Suit, wherein defendant pleaded and proved tenancy in common and sought partition of realty. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment of partition, and confirmed the sale, and entered order awarding fee to referee who conducted sale, and to defendant for counsel fees expended or incurred for the common benefit, and plaintiff appealed from order relating to fees. The District Court of Appeal, Fred B. Wood, J., held that the order was supported by the evidence.

Order affirmed.

1. Partition **114(6)**

In suit where defendant obtained partition of realty, evidence, in nature of referee's accounting and report of sale, and of testimony that plaintiff and defendant had received from referee all of their purchase price money with interest, when coupled with judge's knowledge of such sales and of the earlier proceedings in the suit, sustained order allowing fees to referee and to defendant for attorney. Code Civ.Proc. § 796.

2. Partition **114(3, 4)**

In partition suit, where realty was sold for \$3,800 and, after referee had paid plaintiff and defendant their purchase price money, there remained \$2,167.64, award of fees of \$250 each to referee and to defendant for attorney, did not constitute abuse of discretion on part of trial court. Code Civ.Proc. § 796.

3. Partition **114(3, 4)**

In partition suit, the reasonableness of fees paid to referee and for attorneys is not determined on basis of any fixed percentage or range of percentages, the real question being the reasonable worth or value of the services rendered. Code Civ. Proc. § 796.

4. Appeal and Error **840(1)**

On appeal by plaintiff, in suit where defendant obtained partition of realty, from

order awarding fee to referee, contention that there was no need to appoint referee because plaintiff was willing to sell interest to cotenant or to place property with broker for sale was of no merit, in view of fact that there had been no appeal from judgment ordering partition by way of referee's sale or from intervening order confirming sale.

5. Partition **114(5)**

In suit, where defendant pleaded and proved the tenancy in common and sought partition of realty, defendant was in same relative position as that normally occupied by a plaintiff in a partition suit, and, therefore, services of his attorney were for the "common benefit" within meaning of provision of Code of Civil Procedure allowing the award of attorney's fees in partition suit. Code Civ.Proc. § 796.

6. Partition **114(4)**

In suit where defendant pleaded and proved tenancy in common and sought partition of realty, plaintiff, who did not perform any legal services after appointment of referee for sale that could be characterized as for the "common benefit", and did not claim that he "expended" money or incurred obligation for his own services in the action, was not entitled to fee for acting as his own attorney. Code Civ.Proc. § 796.

7. Partition **114(1)**

Code of Civil Procedure provision allowing award of the costs of partition, including reasonable counsel fees, expended for the common benefit, was made for the protection and reimbursement of the parties for such costs and attorneys' fees as had been paid, or at least incurred. Code Civ.Proc. § 796.

William Muller, in pro. per.

W. P. Caubu, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff William Muller has appealed from an order in a partition suit which awarded a fee of \$250 to the referee who conducted the sale of the property of the

parties and \$250 to defendant W. Knickerbocker as reasonable counsel fees expended or incurred for the common benefit.

In support of his appeal plaintiff claims (1) the order is not supported by any evidence, (2) the fees allowed were excessive, and (3) a counsel fee should have been awarded to plaintiff.

The record is in an unsatisfactory state. Plaintiff chose to present his appeal wholly on a settled statement. He prepared and filed a proposed statement. Defendant Knickerbocker filed amendments thereto. Plaintiff filed objections to the amendments. The trial court ordered these three and certain other documents engrossed as the Statement on Appeal and certified the statement as true and correct. The conflict between these three documents bears principally upon the oral proceedings at the hearing which resulted in the order appealed from. We have plaintiff's and defendant's conflicting accounts of what happened at that hearing but no settlement thereof by the judge who presided at the hearing.

Normally, the failure of the trial court to settle the record properly would require that it be returned to the trial court for settlement. However, it happens that we can use the record in its present state. Careful scrutiny convinces us that even if all differences concerning what happened at the hearing below were resolved in plaintiff's favor, the order appealed from must be affirmed.

The record, viewed in the light most favorable to the plaintiff, discloses the following facts: W. H. Girvin, sole referee in partition, filed his account showing \$2,167.64 as the balance remaining in his hands and petitioned the fixing of a reasonable fee for his services and a reasonable sum for attorney fees. On the hearing of that petition, the referee testified: This is a petition for the attorney's fee and referee's fee in partition; there was a sale of certain lots for \$3,800 and an order confirming the sale of this real estate by the referee in partition; there is in the hands of the referee approximately \$2,167 for disposal by the court. The judge was in-

formed that the referee had sold the real property, that the sale thereof had been ordered confirmed, and that the accounting thereof was now before the court. The court's attention was called to the fact that each of the tenants in common, as shown by the accounting, had received from the referee all of the purchase money paid by them to the County Treasurer of San Mateo County at a tax sale and at a sale on foreclosure of street bonds by which each of the parties acquired title to the lots, plus interest thereon from the dates of purchase to the date of sale by the referee; and that the profit resulting from the sale, subject to the fee for the referee and the defendant's attorney, was \$2,167.64. W. P. Caubu, counsel for defendant Knickerbocker, requested the court to allow him attorney fees and the referee his fees and suggested \$250 for each. Plaintiff Muller objected to those amounts, claiming them excessive, aggregating approximately 25% of the net proceeds left after deducting costs, expenses, and initial investments allowed to the parties concerned. The judge indicated approval of the amounts mentioned and disapproval of plaintiff's objection. Plaintiff then moved the court for an allowance for himself. Plaintiff William Muller was substituted for the original plaintiff Bessie Muller in August, 1950, prior to the trial of the action, and thenceforth acted as his own attorney.

The court ordered payment of fees in the amounts mentioned and distribution of the balance of the money in equal shares to the two parties in interest, plaintiff Muller and defendant Knickerbocker.

The following facts which defendant proposed to include in the statement were not questioned by plaintiff, save that in his "objections" he contended that these facts were not mentioned at the hearing either in the form of the testimony of a witness or statements by counsel or parties. Defendant Knickerbocker included in his answer a cross-complaint, setting forth his interest as a tenant in common with plaintiff and praying for partition of the real property. Following a trial of the action on or about December 8, 1950, the filing of written findings having been waived by the parties, a judg-

ment was prepared by defendant's counsel adjudging the existence of a tenancy in common of Muller and Knickerbocker and decreeing partition as prayed for by the defendant. W. H. Girvin was named therein as referee in partition, with authority and direction to sell the real estate at private sale and with directions given for the disposition of money including payment of referee's fees and a reasonable sum as attorney's fees. A certified copy of the judgment, prepared by defendant's attorney, was certified and recorded. The referee prepared and caused to be published, as required by law, a notice of sale, at private sale, of the three lots ordered to be sold. A sale of the lots by the referee was returned to the court. A hearing thereon was noticed by the attorney for defendant. At the hearing, all persons interested being present, the sale by the referee was ordered confirmed. The order confirming such sale was prepared by defendant's counsel. It was filed and a certified copy prepared and recorded. Following the filing of the order confirming the sale a deed by the referee to the purchaser was prepared by defendant's attorney. An accounting and report was thereafter filed by the referee and notice of the filing and of time of hearing thereon was given by the referee. This accounting was verified and contained a true statement of all receipts and disbursements by the referee who in his report requested an allowance to him for his services as referee and for allowance of an attorney's fee.

[1] (1) *As to the evidence adduced at the hearing*, it appears from this record that the trial judge had before him the referee's accounting and report of the sale supported by the referee's testimony that he had sold the property for \$3,800; that the sale had been confirmed, and that the referee had on hand a balance of \$2,167.64. It further appears that by way of refreshing the court's judicial knowledge, the court's attention was called to the fact that each of the tenants in common (the plaintiff and the defendant), as shown by the accounting, had received from the referee all of the purchase price money which they had paid to the County Treasurer at a tax sale and

at a sale on foreclosure of street bonds, together with interest thereon from the date of each purchase until the date of the referee's sale. That testimony and that information, coupled with the judge's own knowledge of the legal requirements in the conduct of such a sale and the work and responsibility involved upon the part of the referee and the attorney, was sufficient to enable the judge to make a proper determination. In addition, he had judicial knowledge of all of the earlier steps and proceedings in the action without the need of testimony to bring that information to his attention. See *Libby v. Kipp*, 87 Cal. App. 538, 544-545, 262 P. 68.

(2) *Were the fees claimed unreasonable in amount?*

[2] Considering the value of the property handled by the referee (indicated by its sale price, \$3,800) and the work and responsibility ordinarily involved, and the absence of specific evidence on the question, we can not say that the trial court abused its discretion in allowing \$250 each for the services of referee and of defendant's counsel.

Plaintiff challenges the reasonableness of those amounts upon the basis of a number of decisions which, according to his computation, approved attorney's fees in varying amounts ranging from 2% to 9% of the value of the property involved. He then adds the referee and counsel fees in our case and applies their sum, \$500, to the balance on hand, \$2,164, and contrasts the resultant 22% with his yardstick of 2% to 9%.

Plaintiff has mistakenly applied his own yardstick. He should start with the gross value of the property, \$3,800, instead of first deducting therefrom the amount of his and the defendant's investment in the property. He should then apply the amount of the counsel fee only, \$250, not the combined amounts of the fees of counsel and referee. That would give him slightly in excess of 6%, which is well within his range of 2 to 9 per cent.

[3] In making this analysis of plaintiff's computations, we are not holding that there is any fixed percentage or range of per-

centages for use as a formula in determining the reasonableness of fees to be paid for services of the type under consideration. The real question is the reasonable worth or value of the services rendered. The ratio that sum bears to the total value of the property involved will naturally vary as the conditions and circumstances attending the partition and sale vary.

[4] Plaintiff also argues there was no need to appoint a referee because plaintiff was willing to sell his interest to his cotenant or to place the property with a broker for sale. This argument overlooks the fact that neither the present appeal nor the record before us presents for consideration the propriety or impropriety of conducting the partition by way of sale by referee. That was determined by a judgment previously entered, not involved upon this appeal. Indeed, there was an intervening order confirming the sale, which order likewise is not involved upon this appeal. We have for review only the order fixing the fee of the referee and awarding costs to the defendant for counsel fees expended or incurred for the common benefit.

[5] Plaintiff further claims that defendant's counsel performed no services for the "common benefit" as that term is used in section 796 of the Code of Civil Procedure. In this, plaintiff overlooks the fact that it was defendant Knickerbocker who pleaded and proved the tenancy in common and sought a partition of the property. In effect, therefore, the defendant was in the same relative position as that normally occupied by the plaintiff in a partition suit. Many of the services rendered by the attorney for such a party (the moving party) in a partition suit inure to the benefit of all of the cotenants and, therefore, are for the "common benefit." This was well expressed by our Supreme Court in *Capuccio v. Caire*, 207 Cal. 200, at pages 207-208, 277 P. 475, at page 478, 73 A.L.R. 8, in these words: "It will thus be seen that from the inception of an action for partition instituted by any one or more of several cotenants having the right as such

and as plaintiffs to institute such an action there is a considerable succession of required procedural details which must be initiated and carried forward by the plaintiff or plaintiffs in the action and which at the final analysis inure to the common benefit of those parties to the action who shall be found to be respectively entitled to a share of the lands to be thus divided."

[6,7] (3) *Should the trial court also have awarded counsel fees to plaintiff?*

Plaintiff claims that the trial court erred in not awarding him counsel fees under section 796 of the Code of Civil Procedure in view of the fact that he acted as his own attorney.

We have been unable to find a sound basis for such a claim. Section 796 of the code declares that "The *costs of partition*, including reasonable counsel fees, *expended* by the plaintiff or either of the defendants, for the *common benefit*, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment." (Emphasis added.) Prior to the judgment which defined the rights of the parties and ordered partition, plaintiff, as we have seen, did not stand in the position of the plaintiff in a partition suit and therefore is not in the same position as is defendant Knickerbocker to claim that legal services performed by or for him prior to judgment were for the "common benefit." In addition, it does not appear that after the appointment of the referee plaintiff performed any legal services that under any theory could be characterized as for the "common benefit," nor does plaintiff claim that he "expended" any money or incurred any obligation for his own services in the action. Under similar statutes in Illinois and Florida the courts have held that a party who represents himself and performs legal services that are for the common benefit of the cotenants is not entitled to contribution for such services from the other parties to the action. See *Cheney v. Ricks*, 168 Ill. 533, 48 N.

E. 75, and *Girtman v. Starbuck*, 48 Fla. 265, 37 So. 731. We interpret our statute in like fashion. The following statement in *Chavez v. Scully*, 62 Cal.App. 6, 216 P. 46, expresses our view: "It will be observed, however, that the section [796 of the Code of Civ.Proc.] provides only that counsel fees may be included in the costs of partition expended by either plaintiff or defendant for the common benefit of all the parties to the action, and that they must be paid by the parties respectively entitled to share in the land divided. The fact that counsel fees are placed in the same category with other costs of suit expended by the parties would indicate that this provision of the Code was made for the protection and reimbursement of the parties, and then only after such costs and attorneys' fees had been paid or at least incurred." 62 Cal.App. at pages 7-8, 216 P. at page 47.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



116 Cal.App.2d 254

In re Adoption of KITCHENS.

STATE DEPARTMENT OF SOCIAL WELFARE v. THOMPSON et al.

Civ. 4611.

District Court of Appeal, Fourth District,
California.

Feb. 24, 1953.

A petition was filed for adoption of a child. The State Department of Social Welfare denied the petition, and the petitioners appealed. The Superior Court of Fresno County, George M. DeWolf, J., entered order in favor of pe-

tioners, and the department appealed. The District Court of Appeal, Griffin, J., held that where child is relinquished by parent to department, consent of department is a necessary prerequisite to order allowing adoption.

Order reversed.

Adoption

Where child is relinquished by parent to State Department of Social Welfare, consent of department is a necessary prerequisite to order allowing adoption of child. Civ.Code, §§ 221, 224, 224m, 226, 226a; Welfare and Institutions Code, §§ 701, 950-959, 1621.

Edmund G. Brown, Atty. Gen., Richard L. Mayers, Deputy Atty. Gen., Robert M. Wash, County Counsel of Fresno County and John E. Loomis, Asst. County Counsel, Fresno, for appellant.

William A. McGugin, Fresno, for respondents.

GRIFFIN, Justice.

The sole question here involved is whether the consent of a licensed adoption agency, to which a child has been previously relinquished under section 224m of the Civil Code, is a jurisdictional prerequisite to the granting of a valid adoption order.

James Kitchens, born June 25, 1941, was the legitimate child of Olan B. and Opal Kitchens. The mother became an inmate in a State Hospital for the insane and on October 10, 1950, the superintendent certified to the Department of Public Welfare that the mother was not and would not be capable of properly supporting or controlling said child. On November 9, 1950, the father duly executed a relinquishment of the child to said Department under section 224m, supra, for purposes of adoption. It was duly accepted and filed and a copy forwarded to the State Department of Social Welfare on November 22, 1950.

On August 8, 1951, petitioners Jess H. Thompson and his wife petitioned to adopt the child. Apparently he had been boarded

in petitioners' home by the Welfare Department when he was about 16 months of age. About two years ago he was placed in a boys' home at Pomona by the Welfare Department. It filed its refusal to consent to the adoption and filed its report and findings setting forth its reasons, and stated that it had not authorized the filing of the petition for adoption. A hearing was subsequently had before the court concerning the best interests of the child, and upon conflicting but competent and sufficient evidence, the court found that the welfare and interests of the child would be promoted by its adoption by petitioners, and on May 9, 1952, it made its order accordingly. Appellant, State Department of Social Welfare, does not question the sufficiency of the evidence to support the order, but has made it plain that the purpose of this appeal by it is to determine the question of law involved only, since this question has arisen in the past, and since there are other similar proceedings pending in other courts of this state.

Appellant relies upon opinions of the Attorney General for several years last past, in which the Director of the Department of Social Welfare has been given certain advice on related subjects which are in conflict with the trial court's ruling in the instant case. It argues that the uninterrupted interpretation by the Department in the preparation of manuals on that subject should be considered in determining the local question involved. (See, Ops. Cal. Atty. Gen. Vol. 10, p. 253 [No. 47-187, Dec. 8, 1947]; Vol. 11, p. 102 [No. 47-301, Mar. 10, 1948]; and No. 1-NS1600, Apr. 3, 1939; No. 7945, Mar. 2, 1932; No. 1-7524, May 12, 1931; and No. 1-6079, Aug. 23, 1927.) See, also, 3 Cal. Jur. Sec. 21, p. 360; and *In re Adoption of Parker*, 31 Cal.2d 608, 191 P.2d 420.

It argues that the position taken by the trial court indicates a misapprehension as to the basic distinctions made by the California Adoption Law between "independent" and "agency" adoptions; that an independent adoption, as defined by the Department of Social Welfare (Manual of Adoption Sec. 2030-00) is one in which the child is placed by the parent, who consents

to the adoption by specific individuals; that in an independent adoption the parent makes his or her own selection of adoptive parents and gives the child directly to persons of his or her own choosing and the natural parents retain a legal right to and responsibility for that child until the adoption is completed by court decree; that the child may be free for adoption only by the parents' written consent; that such consent, to be effective, must be signed in the presence of an agent of the State Department or of a licensed county adoption agency; and that the approval of the court is necessary before such a consent may be withdrawn, citing Civil Code, §§ 226 and 226a; that after the filing of the petition by the adopting parents and the taking by the Department of Social Welfare of the consent of the natural parents, the Department is required by law to ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child; that the Department must then file a "report" with the court; that such report is referred to in sec. 226 of the Civil Code as a "consent", a "recommendation" and "findings"; that the reading of that sentence makes apparent that two different meanings are ascribed to the word "consent"; that the word is employed to indicate the granting by the natural parents of their formal permission to the adoption of their child by specified petitioners; that the word is employed in reference to the action of the Department in refusing, after investigation and the making of findings, to acquiesce, assent, concur, support or approve the act of the natural parents in placing their child in the home of petitioners; that when the Department, as a result of the investigation, refuses to approve the proposed independent adoption, the law provides for an "appeal" to the Superior Court; that it may file a report of such findings; that this report is of an advisory nature only and is designed to aid the court in the exercise of its discretion, citing *In re Adoption of D. S.*, 107 Cal.App.2d 211, 236 P.2d 821; that the court thereafter may, if it deems the welfare of the child will be promoted, nevertheless allow the

signing of the consent of the natural parents in open court and issue a valid adoption decree.

It is then contended that an agency adoption, as defined by the Department, is one in which a child is relinquished by its parents to a licensed adoption agency and is placed for adoption by the agency, citing Manual of Adoption, sec. 2030-00; that in an agency adoption the agency constitutes the authorized intermediary between the natural parents who give their children up for adoption and the adopting parents who receive them; that the agency not only accepts the child physically from the parents but in accepting the relinquishment by the natural parents, assumes the role of parent, with full rights to and responsibilities for the care of the child; that the parents relinquish their child to a licensed adoption agency presumably because they wish to have their child placed in the best possible home, where full use of the facilities, training and experience of a licensed adoption agency is available, and where the agency is regulated and supervised by the State Department of Social Welfare.

The standard joint relinquishment form used by the Department reads:

"It is fully understood by me (the natural parent) that when this relinquishment is filed with the State Department of Social Welfare by said agency, all my rights to the custody, service and earnings of said minor child, and any responsibility for the care and support of said minor child will be terminated, and that said child cannot be reclaimed by me."

It is then pointed out that the relinquishment, once accepted, binds both natural parents and the agency; that it may only be rescinded by the mutual consent of the parties, citing Civil Code, § 224m; that thereafter, in the role of acting parent, the agency, rather than the natural parent, must give its consent to the adoption of the child before the court has jurisdiction to award it to the adopting parents.

Respondents rightfully argue that the procedure for the adoption of children

was unknown to common law and that this type of proceeding is prescribed by statute, and accordingly the authority of any agency created by such statute to investigate, recommend, consent to, or refuse to consent to any adoption, as well as the power and jurisdiction granted to the court, is purely statutory and, accordingly, the statute must be strictly followed. They therefore contend that a strict interpretation of the statutes involved grants respondents the right of appeal from the refusal of the Department to grant its consent to adoption in any case, and that the trial court is the final arbiter in respect to the granting of consent, even under an agency adoption, and it may exercise its independent judgment in the matter, citing *Adoption of Parker*, 31 Cal.2d 608, 191 P.2d 420; *In re Santos' Estate*, 185 Cal. 127, 195 P. 1055; *In re Adoption of D. S.*, supra; and *Adoption of Lingol*, 107 Cal.App. 2d 457, 237 P.2d 57.

In this connection they contend that under section 221 of the Civil Code "Any minor child may be adopted by any adult person, * * * subject to the rules prescribed in this chapter"; that section 224 thereof provides that "A legitimate child can not be adopted without the consent of its parents if living"; and that certain exceptions are then noted, including the exception: "3. Where such father or mother of any child has relinquished said child for adoption as provided in section 224m of this code; or where such father or mother has relinquished said child for adoption to a licensed or authorized child placing agency * * *"; that accordingly, parental consent is required unless the child has been declared abandoned, been deserted by its parents, or relinquished for adoption as indicated. It is argued that this section provides no basis for differentiation between those cases where parental consent is not required.

Section 226 of the Civil Code provides in part: "Any person desiring to adopt a child may for that purpose petition the superior court * * *. In all cases in which consent is required * * * the consent of the natural parent or parents to the adoption by the petitioners must be

signed", etc.; that "in all cases of adoption in which no agency licensed to place children for adoption is a party * * * it shall be the duty of the Department * * * to accept the consent of the natural parents * * * and to ascertain whether the child is a proper subject for adoption * * * prior to filing report with the court. In all cases in which the consent of the natural parent or parents is not necessary and an agency licensed to place children for adoption is not a party to the petition," the agency shall "file its consent to the adoption with the clerk of the superior court of the county in which the petition is filed. Such consent shall not be given by the Department of Social Welfare or the licensed county adoption agency unless the child's welfare will be promoted by the adoption. Except in the case of the adoption of a child by a stepparent * * * it shall be the duty of" the agency "to submit to the court a full report of the facts disclosed by its inquiry with a recommendation regarding the granting of the petition * * *. Whenever any report or findings are submitted to the court by the" agency "under any provision of this section, a copy of such report or findings, whether favorable or unfavorable, shall be given to the attorney * * *. If the findings of the * * * agency are that the home of the petitioners is not suitable for the child and it recommends that the petition be denied, the county clerk upon receipt of the report * * * shall immediately refer it to the superior court for review. * * * If * * * the * * * agency fails or refuses to accept the consent of the natural parent or parents to the adoption, or if said department or agency fails or refuses to file or to give its consent to an adoption in those cases where its consent is required by this chapter, either the natural parent or parents or the petitioner may appeal from such failure or refusal to the superior court of the county in which the petition is filed". Thereafter the agency shall "file a report of its findings and the reasons for its failure or refusal to consent to the adoption or to accept the consent of the natural parent. After the filing of said findings, the court

may, if it deems that the welfare of the child will be promoted by said adoption, allow the signing of the consent by the natural parent or parents in open court, or if the appeal be from the refusal of said department or agency to consent thereto, grant the petition without such consent."

Respondent argues that this section does not give the agency the authority to consent or refuse to consent to the adoption of a child to the same extent that it gives to parents; that this section gives to the Superior Court, upon review or appeal from the refusal of the agency to grant its consent in any case, the right to exercise its independent judgment in the matter, and that the agency cannot thereafter be heard to complain. No California cases have been brought to our attention bearing directly on this question. The cases cited by respondent do not involve the refusal to give a consent by the agency where there has been a relinquishment of the child to that agency by the parents. In the cases cited by appellant on this question that have arisen under statutes which are similar in tenor to ours, the courts have held that when parental rights have been terminated by proper action (that is, through court order or relinquishment) the consent of the custodian of the child is a jurisdictional prerequisite to a valid adoption.

In *Child Saving Institution v. Knobel*, 1931, 327 Mo. 609, 37 S.W.2d 920, 76 A.L.R. 1068, after the death of its mother, the father gave custody of the child to the institution, with power to it to consent to adoption. The court held that where the adoption decree was issued without notice to the institution the decree was invalid on the ground that there could be no valid adoption decree without the consent of the institution. This case was followed in *State ex rel. St. Louis Children's Aid Society v. Hughes*, 1944, 352 Mo. 384, 177 S.W.2d 474.

In *Re Bolling's Adoption*, 1948, 83 Ohio App. 1, 82 N.E.2d 135 the natural parents voluntarily executed a permanent surrender of their child to the "Children's Services" agency pursuant to an Ohio statute that set forth the right of parents by contract to surrender the care, custody and control of

their children. The contract authorized the institution, when the agreement was for the permanent care and custody, to appear in any proceeding for the legal adoption of the child, and consent to its adoption. The court held that there was a valid contract and that the agency was the only one authorized to give consent to adoption as long as the contract remained in full force and effect. It further held that such agency is a necessary party to such a proceeding and has the right of appeal.

In *Re Flora's Adoption*, 1935, 152 Or. 155, 52 P.2d 178, the statute gave the child placement agency involved therein guardianship of dependent and delinquent children and provided that where the agency deems the action desirable it may consent in *loco parentis* to the legal adoption of such wards. The child had been permanently committed to this agency. Later, both natural parents consented to the proposed adoption by the petitioners. The agency objected to the adoption. The court held that the minor could not be adopted because of the refusal of the agency to give its consent. See, also, *In re Dougherty's Adoption*, 1948, 358 Pa. 620, 58 A.2d 77, where it was held that the judge did not possess judicial power to compel the society to grant its consent to the adoption. To the same effect is *In re Whitcomb*, 1946, 271 App.Div. 11, 61 N.Y. S.2d 1.

In *State ex rel. Frederick v. District Court*, 1946, 119 Mont. 143, 173 P.2d 626, 627, the district court adjudged four children to be dependent and neglected and awarded their custody to the Division of Child Welfare Services. By virtue of this award the Department was authorized to appear in any court where adoption proceedings were pending and assent to the adoption of the said children. A petition to adopt two of the children was filed. The Welfare Department appeared and moved the court to dismiss the petition on the ground that the Welfare Department had withheld its consent to the adoption and that the court was without jurisdiction to proceed without such consent. The laws of that state were quite similar to the laws of

this state in this respect and the court there said:

"* * * when a child is found by a court decree * * * to be dependent and neglected, and their care and custody are awarded to a state agency by the court, such children are as free from parental supervision as when placed in the custody of adopted parents. * * * The care and custody of the children was entirely in the hands of the Welfare Department and that department alone is responsible to the state and to the law for the proper care of the minors.

"* * * We see no sound reason why the Legislature should not repose the same right relative to giving consent to the adoption of children placed in an agency of the state as the parents possess before the custody of the children is taken from them. The Welfare Department is in *loco parentis* to the children involved here. The Welfare Department has no power such as the district court possesses to approve the adoption of a child, but only to grant or withhold consent to the adoption of a minor legally in its custody."

The court there cited *Ex parte Chambers*, 80 Cal. 216, 22 P. 138, 139. This was a proceeding in habeas corpus. It involved an act of our legislature of April 1, 1878, Stats. 1878, chap. DCXXVI, p. 963, providing that managers of state orphan asylums "are hereby authorized * * * to consent to the adoption of any orphan child, or child abandoned by its parents, * * *." The managers of the asylum did not consent to the adoption of the child by the petitioners. The lower court found that petitioners were fit and proper persons to care for the child, and that the welfare of the child would be promoted by adoption by petitioners. Our Supreme Court held that inasmuch as the power to adopt is a creation of statute, there could, in this case, be no valid adoption in the absence of the consent on the part of the asylum managers. The court granted the writ, returning the child to the custody of the asylum.

There is a clear distinction between the authority of a court dealing with a case in which a child has been declared abandoned and free from custody and made a ward of the court pursuant to Welfare and Institutions Code, § 701, and the relinquishment to a licensed adoption agency under Civil Code, § 224m. A judge of the Juvenile Court is virtually the guardian of the wards of that court. In *re Hunter*, 45 Cal.App. 505, 188 P. 63. The matter of home finding and placement functions are vested exclusively in "adoption agencies" which have been duly licensed by the State Department of Social Welfare. Welfare and Institutions Code, §§ 950-959. A petition to adopt a child who has been abandoned is but an independent adoption proceeding in which a court declaration that the child be freed from the custody and control of his parents serves as a substitute for parental consent. See, *Matter of Cozza*, 163 Cal. 514, at page 523, 126 P. 161, at page 164, in which it is said:

"Nor is discretion committed under adoption proceedings to the superior court to make an order therefor, if it deems that the interest of the child will be promoted thereby, regardless of the consent or wishes of the parent, or the existence of the prescribed conditions dispensing with such consent."

It would appear, therefore, that the role of the State Department of Social Welfare is those cases in which the child has been abandoned and declared free from the custody and control of its parents is, as in other independent adoption proceedings, confined to the submittal to the court of an advisory report recommending or disapproving the proposed adoption.

The case of *In re Santos' Estate*, 185 Cal. 127, 195 P. 1055, 1057, relied upon by respondents, dealt with a petition to adopt an orphan child who was then in the legal custody of a court appointed guardian. The guardian withheld his consent to the adoption. The Supreme Court held that the consent of the guardian was not necessary to the validity of the order because "the minor is in reality—a ward of the court, and the guardian is in effect an arm

of the court, and is subject to the control of the court in the discharge of his duties as such guardian. * * *'" The State Department of Social Welfare is not so related that it may be said to be "an arm of the court". The functions are clearly prescribed by statute. (See, § 224m et seq. Civ.Code; and § 1621, Welfare and Institutions Code, which permit it to make rules and regulations for performance of any service.) Pursuant to these sections the Department has adopted elaborate rules for guidance of agencies in the performance of their obligations under a relinquishment agreement. There is no question but that the child involved was and is in the legal custody and under the control of a licensed adoption agency. The consent of the Department was a necessary prerequisite to an order allowing the adoption of the child. It was never made a ward of the juvenile court.

The only question remaining is whether petitioners had the right to appeal to the court, in that proceeding, from the order refusing such consent, and whether the court, notwithstanding such refusal, had the power to grant such consent. We conclude that the position assumed by the Department of Social Welfare is a proper interpretation of the provisions of the statute as it applies to the so-called "agency adoptions", where abuse of discretion of the Department or its arbitrary or capricious action is not claimed or placed in issue; that in other so-called independent adoption proceedings, the consent to be obtained from such agency, after an investigation, is nominally an approval or disapproval of the proposed adoption, and it is from this disapproval order that the section allows a review or appeal to the Superior Court. In such "independent adoption proceeding" the court, upon a proper showing, and notwithstanding such disapproval, may make an order for adoption.

There is presented no question of fraud or arbitrary action on the part of the Welfare Department or that it is withholding its consent capriciously or without reasonable justification as was the case in *McKenzie v. State Board of Control*, 197 Minn. 234, 266 N.W. 746, 104 A.L.R. 1460.

Whether, in an appropriate proceeding, a court may have jurisdiction to review the actions of the Department in refusing to consent to an adoption in an agency adoption proceeding, if the Department's refusal to consent is arbitrary or the result of an abuse of discretion, is not before us for consideration since the evidence in the instant case does not so indicate. *Morales v. Ingels*, 30 Cal.App.2d 182, 85 P.2d 907; *Adoption of Lingol*, supra. It was clearly stated that the court's finding was as to the best interests of the child, drawn from substantial conflicting evidence on that subject.

Order reversed.

BARNARD, P. J., and MUSSELL, J., concur.



116 Cal.App.2d 572

YOST v. YOST.

Civ. 19169.

District Court of Appeal, Second District,
Division 3, California.

March 6, 1953.

Wife's action for judgment declaring her rights under property settlement agreement. The Superior Court, Los Angeles County, Roy L. Herndon, J., rendered a decree favorable to the wife, and the husband appealed. The District Court of Appeal, Parker Wood, J., held that the trial court had properly construed the agreement.

Affirmed.

1. Husband and Wife ☞278(1)

In wife's action for judgment declaring her rights under property settlement agreement, evidence would not sustain husband's contention that agreement had been procured by menace or coercion.

2. Husband and Wife ☞279(1)

Property settlement agreement, requiring husband to pay \$150 per month but

giving him privilege of paying only \$50 per month while in Armed Forces and providing that when he got out of service and his earnings would warrant him in doing so he would "continue" to pay wife \$150 per month, plus arrearages on account of payments suspended during time he was in service, required husband to pay \$150 per month from time of discharge and suspended only obligation for arrearages during readjustment period.

James D. Garibaldi, and Iverson & Hogueboom, Los Angeles, for appellant.

Donald Paul Covert, Glendale, for respondent.

PARKER WOOD, Justice.

Action for declaratory relief. Defendant appeals from judgment in favor of plaintiff.

On April 14, 1944, appellant (husband) commenced an action against respondent (wife) for divorce. They entered into a property settlement agreement which provided, in part, that appellant would pay respondent \$100 per month for her support and the support of their child. The action was tried as a default. In the interlocutory decree of divorce which was granted to appellant, it was ordered that he pay to respondent \$100 per month for her support and the support of the child. The agreement was filed but it was not made a part of the decree.

In December, 1944, appellant married Miss Sandirfer in Mexico.

On May 15, 1945, respondent made a motion to set aside the interlocutory decree upon the ground that it had been procured through fraud.

On June 7, 1945, appellant and respondent entered into a property settlement agreement which provided, in the first three paragraphs thereof, that the property agreement of April 12, 1944, was thereby cancelled; that certain furniture and an automobile should be the separate property of respondent; that appellant would pay to respondent \$100 per month for the support of their child, and that respondent should have custody of the child.

In paragraph IV thereof (which is the provision in controversy here), it was provided:

"It Is Also Agreed that the Party of the First Part, *Ralph E. Yost*, will pay to the Party of the Second Part, *Nancy Colver Yost*, the sum of one Hundred Fifty (\$150.00) Dollars per month, commencing on the 1st day of July, 1945, and continuing until said *Nancy Colver Yost* shall remarry.

"It Is Further Provided, however, that as long as the Party of the First Part is in the service of the Government of the United States, as he now is, he shall have the privilege of paying the Party of the Second Part Fifty (\$50.00) Dollars or more per month on account of each and all of said monthly installments under this Paragraph IV set forth, and that when the said Party of the First Part is out of the service, and establishes a medical practice or other business sufficient so that his earnings will warrant him in doing so, he will continue to pay to the Party of the Second Part, *Nancy Colver Yost*, the sum of One Hundred Fifty (\$150.00) Dollars per month, plus arrearages on account of said suspended payments during the time he was in said service."

Paragraph V (which is not in controversy here) pertains to insurance policies. The remaining paragraphs (also not in controversy) contain general provisions regarding the release of rights and obligations of each to the other.

On June 8, 1945, respondent stipulated that her motion to set aside the interlocutory decree be denied. Said motion was denied. On June 15, 1945, appellant obtained a final decree of divorce.

After said agreement of June 7, 1945, was made, and during the time appellant was in the army, he paid the \$100 per month for the support of the child and \$50 per month for the support of respondent. His military service ended in August, 1945, and in the following September he began the practice of medicine in Vallejo. He continued to pay \$100 per month for the child and \$50 per month for respondent until October 1, 1950, when the court increased

the amount for the child to \$150 per month. Then he continued to pay said amount for the child. After said October 1st, he did not pay any amount for the support of respondent.

In October, 1949, she sought an order of court in the divorce proceeding requiring him to pay \$550 per month for the support of the child and herself. She alleged therein that he had the ability to pay that amount. The existing order was not modified. In August, 1950, she again sought such a modification and the court decided that the order for the support of respondent was invalid because she was the one against whom the divorce decree had been granted. It was in this last mentioned proceeding that the amount for child support was increased, as above stated, to \$150 per month.

In the amended complaint herein it is alleged that there is a controversy relating to the rights of the parties under paragraph IV of said agreement in that: (1) Plaintiff (respondent) claims that defendant (appellant) should pay \$150 per month for her support since September, 1945, when he established medical practice in Vallejo; (2) defendant claims that he is not bound to pay more than \$50 per month until such time as he has paid all of his debts and has sufficient money remaining to pay \$150 per month; (3) plaintiff alleges that the net earnings of defendant are now and for several years have been in excess of \$12,000 per year and are sufficient to warrant him in paying \$150 per month; (4) defendant claims that his net income does not warrant him in paying more than \$50 per month for the support of plaintiff, and that only \$50 per month for the support of plaintiff actually becomes due each month.

In the answer to the amended complaint it is alleged that the agreement of June 7, 1945, was entered into by defendant against his will and as a result of force and coercion on the part of plaintiff in that plaintiff contacted defendant's commanding officer and caused the officer to threaten defendant with a court-martial and discharge from the army if he refused to sign the agreement.

The court found that defendant entered into said amended agreement of June 7th freely and voluntarily and not against his will or as a result of force, menace or coercion; that defendant's conduct with regard to the amended agreement, during all times after its execution and prior to the filing of this action, evinces an intention to abide by the contract; that defendant has ratified said agreement; defendant made no attempt prior to the filing of this action to disaffirm the agreement; he claimed, for the first time, in 1949 and after plaintiff had begun court proceedings to force him to pay \$150 per month for her support, that the due date of \$100 of said amount was suspended until his financial ability was greater; said agreement provides in paragraph IV that defendant would pay plaintiff \$150 per month for her support commencing on July 1, 1945, and continuing until she remarried, the same being in addition to amounts to be paid by defendant for support of the child; said paragraph provides that defendant, as long as he remained in the service of the United States Government, would have the privilege of paying plaintiff only \$50 per month for plaintiff's support; he remained in said service until August 31, 1945, when he began the practice of medicine in Vallejo; he paid only \$50 per month for the support of plaintiff thereafter and through September, 1950, and he has paid nothing for her support since September, 1950; pursuant to the terms of said paragraph IV, the difference between \$150 per month to be paid by defendant for plaintiff's support and the \$50 per month actually paid by him for the months of July and August, 1945, referred to in the agreement as "arrearages," totaling \$200, was not to become due until defendant had the financial ability to pay such arrearages; he has not had such ability; the difference between the \$150 per month to be paid for plaintiff's support and the amounts paid by him after September 1, 1945 to October 17, 1951 (the date the matter was submitted for decision), is \$8,050, which amount is due to plaintiff. (There are findings regarding insurance policies, but there is no

question on appeal regarding those findings.)

Judgment was for plaintiff for \$8,050, and certain amounts for interest and attorney's fees. (The judgment included a provision regarding life insurance, but such provision is not material on this appeal.)

Appellant contends that the court erred in failing to find that said agreement is void because it was procured by menace. He argues that the evidence established that menace was practiced upon him to induce him to sign the agreement; that the evidence shows that: respondent went to see appellant's commanding general and filed charges against appellant; that although she was informed that he faced court-martial and dishonorable discharge, she refused to withdraw the charges; she told him that if he signed the agreement she would withdraw the charges; and immediately after signing the agreement the charges were dropped.

Appellant testified that on May 12, 1945, he received a telephone call from Dr. Colver, who is the father of respondent, and thereafter on that day he met Dr. Colver and had a conversation with him; on the following day he received a call from the commanding officer at Santa Ana where appellant, a major in the Medical Corps, was stationed; appellant then went to the general's office and the general "told me that because of the information he had received from Mrs. Yost and Dr. Colver, that I would have to get the difficulties straightened out without any publicity, or I would face a court-martial or discharge without honor from the service"; that at that time he was married to Harriet Sandifer, whom he had married in December, 1944, in Tijuana; he had been told by an attorney that it was permissible to marry outside California before he had a final decree of divorce; appellant, after having talked with the general, went to see respondent and told her that since she had gone to the general, he (appellant) probably would face a court-martial and dishonorable discharge, and he asked her to withdraw her complaint; she replied that she could

not withdraw it at that time; about that time a notice of motion to set aside the interlocutory decree was served on him; on one or two occasions thereafter, when he saw respondent, Dr. Colver was present; about June 1, 1945, he went to an attorney's office where he was asked to sign the said agreement in controversy here, and at that time he told respondent and Dr. Colver that he could not at that time pay the amount stated in the agreement; he had never practiced medicine before he entered the military service; about June 7th, he was called to an attorney's office where he signed an agreement between him and Dr. Colver. (That agreement was to the effect that Dr. Colver would pay to respondent the \$100 per month which appellant had agreed to pay under paragraph IV of said other agreement of June 7th, until appellant was out of military service and had established a medical practice sufficient to warrant him in making the said payments called for in paragraph IV; and that when appellant's financial status warrants it he would pay Dr. Colver the money which Dr. Colver had paid under said agreement.) He testified further that on the occasion of his signing the two agreements respondent said she would withdraw the charges; she withdrew them, and he had no more difficulty regarding a court-martial. He was the only witness at the trial.

[1] The evidence shows that the general told appellant that because of information he had received from respondent and Dr. Colver appellant "would have to get the difficulties straightened out without any publicity." The evidence does not show what information the general received from them. Presumably the difficulties, referred to, related to the fact that appellant had two wives. It does not appear that respondent or Dr. Colver gave information to the general that was unfounded in fact. In *Miller v. Walden*, 53 Cal.App.2d 353, at page 361, 127 P.2d 952, at page 957, it was said: "[D]uress and menace arise by virtue of unlawful action upon the part of some person * * *. His visit to the district attorney * * * and his demand for the return of his money were all certainly proper * *. If fear of prosecution resulted therefrom,

and the execution of the note followed from such fear, no inference of illegality could arise therefrom. * * * But it is the threat and not the apprehension which makes out the menace and that threat must be an unlawful and invalid one. A threat to exercise a valid legal right cannot be construed to be an act of duress." Respondent filed a notice of motion to set aside the interlocutory decree, but under the circumstances herein, where appellant remarried about six months after the interlocutory decree was granted, it cannot be said that it was not proper to make such a motion. Appellant did not attempt to disaffirm the agreement until this action was commenced, —about six years after the contract was made. The evidence was sufficient to support the finding that appellant did not enter into said agreement as a result of menace or coercion.

Appellant also contends that the court erred in holding that, by reason of lapse of time and ratification, appellant was barred from raising the defense of menace. It does not appear that the court ruled that appellant was not permitted to present such a defense. Evidence offered by appellant on that subject was received, but the court found, as above stated, that his conduct after the execution of the agreement and prior to the filing of this action evinces an intention to abide by the contract; and that he ratified the agreement.

[2] Appellant also contends that the court erred in construing paragraph IV of the agreement. He argues that the paragraph should be construed to mean that appellant was required to pay \$150 per month after his release from the army only if he had the financial ability to pay that amount. The first paragraph of said paragraph IV states clearly that appellant will pay respondent \$150 per month, commencing July 1, 1945, and continuing until she shall remarry. The second paragraph of said paragraph IV states that : "It is further provided, however, that as long as" appellant "is in the service * * * as he now is, he shall have the privilege of paying" respondent \$50 per month on account of said monthly installments, "and that when" appellant "is out of the service, and establishes

a medical practice or other business sufficient so that his earnings will warrant him in doing so, he will continue to pay to" respondent \$150 per month, "plus arrearages on account of said suspended payments during the time he was in said service." The findings and the conclusions of law show that the court interpreted the paragraph to mean that appellant was and is obligated to pay respondent, for her support, \$150 per month on the first day of each month from and after July 1, 1945; that said paragraph IV provides for suspension of \$100 per month of each of said payments during the time appellant was in the military service; that the amounts which were suspended during the time appellant was in the service were not to become due until he became financially able to pay them; that the payments of \$150 per month for the support of plaintiff were to become due when appellant was released from the service. In other words, full payment of \$150 per month was to be suspended only as long as appellant remained in the service, and the provision relative to the sufficiency of his earnings was intended to affect only his duty to pay arrearages on account of suspended payments during the time he was in service. Appellant construes the provision as if it read that he should have the privilege of paying \$50 per month until he is out of the service and establishes a medical practice so that his earnings will warrant him in starting to pay respondent \$150 per month. Appellant's argument is to the effect that it was intended by paragraph IV that he should be required to pay only \$50 per month until respondent carries the burden of proving that his income, when considered with all the debts that might be created by him, is sufficient to warrant him in paying \$150 per month to respondent. As above stated, the first part of the second paragraph of paragraph IV provides clearly that "as long as" appellant is in the service he shall have the privilege of paying \$50 per month. It is to be noted that in the last part of said second paragraph the words "continue to pay" are used. Those words are in the part of the sentence which is to the effect that when appellant is out of the

service and establishes a medical practice he will "continue to pay" \$150 per month, plus arrearages on suspended payments during the time he was in the service. Those words "continue to pay" indicate that it was contemplated that, at some time before establishing a medical practice, the suspension period would be over and he would have started to pay the \$150 per month. The phrase, regarding arrearages, at the end of said sentence indicates that it was the payment of arrearages, occurring during the time he was in the service, that was conditional upon the amount of his income. The trial court did not err in construing paragraph IV.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



116 Cal.App.2d 570

KIRBY v. ADCOCK.

Civ. 19317.

District Court of Appeal, Second District,
Division 2, California.

March 6, 1953.

Rehearing Denied March 23, 1953.

Hearing Denied April 30, 1953.

Action against police officer for assault and battery. The Superior Court, Los Angeles County, J. F. Moroney, J., entered judgment for general damages for plaintiff, and defendant appealed. The District Court of Appeal, Fox, J., held, *inter alia*, that the fact that the exemplary damage portion of the verdict did not have the required three-fourths favorable vote did not invalidate the entire verdict, and such portion would be treated as surplusage.

Affirmed.

1. Trial ☞336

Where exemplary damage portion of verdict did not have required three-fourths favorable vote, such portion would be considered as surplusage and would not invalidate entire verdict.

2. Trial ☞345

Failure of defendant to object or otherwise draw trial court's attention to fact that exemplary damage portion of verdict did not have required three-fourths favorable vote before jury was excused constituted "waiver" of the claimed infirmity in the verdict.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

3. Appeal and Error ☞218(1)

: Although court ordered further jury deliberations because of insufficiency of verdict on exemplary damages, where trial judge pointed out that nine jurors had voted to assess general damages of \$500 and stated he would accept such verdict, alleged infirmity in \$500 verdict because of insufficiency of exemplary damage portion of verdict was not before trial court, and, defendant having failed to draw such infirmity to court's attention before jury was excused, could not base appeal on such infirmity.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Robert B. Burns, Deputy City Atty., Los Angeles, for appellant.

George E. Bodle, Louis R. Stein, James Landye, Los Angeles, for respondent.

FOX, Justice.

In an action against defendant police officer for damages for assault and battery the jury returned a verdict in favor of plaintiff, assessing general damages at \$500 and exemplary damages at \$1,500. The jury being polled, the result was 9 to 3 for the \$500 general damages but only 8 to 4 on the question of exemplary damages. The court accepted the \$500 verdict. No objection was then made thereto, nor was any suggestion made on behalf of defendant of any irregularity or infirmity therein. The jury was thereupon excused. In due course judgment for \$500 was entered on the verdict. Defendant appeals on the ground that the \$500 verdict was invalid.

[1] It is perfectly clear that nine jurors agreed that plaintiff was entitled to general

damages of \$500. Their written verdict so stated and their interrogation in open court verified it. It is argued, however, that because the exemplary damage portion of the verdict did not have the required three-fourths favorable vote, that invalidated the entire verdict. To sustain this argument would be to give undue weight to procedural technique and to permit substance to become subservient to form. A more realistic approach to the problem is to consider the reference to exemplary damages as surplusage, since it was ineffective by reason of not having sufficient votes. This principle was applied in *Weddle v. Loges*, 52 Cal.App.2d 115, 125 P.2d 914, where the jury returned a verdict against joint tort feasons and then attempted to apportion the damages between them. *Martin v. Cambas*, 134 Or. 257, 293 P. 601, is another case illustrative of the principle here applicable. That was a suit for false arrest and imprisonment. The verdict was for \$5,000 general damages against one defendant and it also awarded punitive damages which were apportioned among several defendants. The portion of the verdict relative to punitive damages being ineffective was treated as surplusage and the verdict for general damages allowed to stand.

[2] Furthermore, failure on the part of defendant to object or otherwise draw the court's attention to the claimed infirmity in the verdict before the jury was excused, and a correction thus made impossible, constituted a waiver thereof. The infirmity here being a mere matter of form and not requiring any further deliberations on the part of the jury could have been corrected by it in a moment without leaving the jury box. This principle of waiver of defects in verdicts by failure to object before the jury is discharged has found frequent expression. *Mitchell v. Stringer*, 133 Cal.App. 207, 209, 23 P.2d 765; *Brown v. Regan*, 10 Cal.2d 519, 523, 75 P.2d 1063; *Ambrose v. Allen*, 113 Cal. App. 107, 118, 298 P. 169.

[3] Defendant argues, however, that because the court made comment on sending the jury out for further deliberations

when it was polled "the insufficiency or informality of the verdict" was before the court and he was thus not required to draw it to the court's attention and consequently there was no waiver. An examination of the reporter's transcript indicates that the court's observation as to further deliberations by the jury related to the insufficiency of the verdict on exemplary damages. The judge pointed out that nine of the jurors had voted to assess damages of \$500 against defendant. He concluded by saying, "I will accept that verdict." It is clear that the infirmity in the \$500 verdict, which defendant now asserts, was not drawn to the court's attention. The principle of waiver is therefore applicable.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



••6 Cal.App.2d 301

MIZE v. JORDEN et al.
Civ. 4393.

District Court of Appeal, Fourth District,
California.
Feb. 26, 1953.

Action for injuries sustained in collision between plaintiff's motorcycle and a truck driven by one defendant and owned by another. The Superior Court, Kern County, Warren Stockton, J., entered judgment for plaintiff, and the truck owner appealed. The District Court of Appeal, Barnard, P. J., held that the evidence supported the finding that the truck was being driven with the appellant's permission and consent at the time of the collision.

Affirmed.

1. Automobiles ⇨245(26)

Question as to whether or not vehicle was used with permission of owner was one of fact, to be determined by the trial court from circumstances in evidence and

inferences reasonably to be drawn therefrom.

2. Appeal and Error ⇨994(3)

Trial court is sole judge of credibility of witnesses.

3. Appeal and Error ⇨1010(1)

If there is any substantial support for trial judge's findings, such findings will not be disturbed on appeal.

4. Automobiles ⇨243(12)

On issue as to whether truck was being used at time of collision with permission of owner, court could consider truck driver's conflicting stories in light of fact that insurance company which had issued policy to his employer had gone into receivership.

5. Automobiles ⇨244(22)

Evidence sustained finding that truck was being driven with owner's permission and consent at time of collision giving rise to personal injury action.

Walter L. Maas, Jr., Bakersfield, for appellant.

Morris B. Chain, Dustin Jameson, Bakersfield, for respondent.

BARNARD, Presiding Justice.

The minor plaintiff was injured on June 18, 1950, in a collision between a motorcycle on which he was riding and a truck driven by the defendant Jorden and owned by the defendant Johnson.

The complaint alleges that Jorden was driving the truck with the permission and consent of Johnson, which was denied in the answer. Jorden defaulted and the case went to trial against Johnson before the court without a jury. Judgment was entered in favor of the plaintiff and Johnson has appealed on the sole ground that the evidence is not sufficient to sustain the court's finding that the truck was being operated with his permission or consent.

Citing such cases as *Herbert v. Lankershim*, 9 Cal.2d 409, 71 P.2d 220, and *Hall v. Osdell*, 102 Cal.App.2d 849, 228 P.2d 293, the appellant contends that the only evi-

dence of permissive use is found in the testimony of Jorden; that his testimony is obviously false and inherently improbable and should be disregarded; that his testimony thus becomes so unsubstantial as to furnish no reasonable support to the judgment; and that a reasonable view of the testimony necessarily leads to the conclusion that the respondent failed to prove permissive use by a preponderance of the evidence. The respondent contends that the question of permissive use was one of fact; that an inference of permissive use arises from Jorden's status as an employee of the appellant; that the credibility of the witnesses was a matter for the trial judge to determine; that there is no inherent improbability in the testimony of Jorden; and that the evidence was sufficient to support the finding in question.

Jorden testified that prior to June 18, 1950, he had used this truck about five or six times after working hours on his own personal business; that Johnson never said anything to him about this use or told him that he could not use it; that Johnson saw him with the truck on one occasion when he was "just socializing," and Johnson never said anything about it; that about a week before the accident Johnson told him he could use the truck on the day of the accident to go swimming at a park; that he had seen the other truck drivers who worked for Johnson use the trucks on their own business "lots of times"; that he had seen the other drivers use the trucks for "joy-riding" when Johnson was right there; and that he did not know whether Johnson had told the other drivers, at meetings, not to use the trucks "but he never did tell me that." He further testified that he used the truck to haul some potatoes on the morning of June 18, that he brought the truck back to the appellant's yard about noon and changed the oil in it, and that he then took the truck out to go to this park for the purpose of swimming.

Johnson testified that he knew the truck was brought back from work; that after the job of hauling potatoes was finished he did not give Jorden any permission to make any further use of the truck on that day;

that he had had no conversation with Jorden prior to that time about his using the truck to go swimming, and had not given him permission to do so; that he had never given Jorden permission to use the truck for his personal use, and had no knowledge that Jorden had ever so used it; that he had given none of the truck drivers permission to use the truck for personal matters; that he had meetings of the truck drivers every month, at which Jorden was present, and at which he told the drivers that the trucks were not to be used except on company business; and that he told Jorden "daily" not to use the truck for his personal use.

The appellant's foreman, Billingsley, testified that he was in charge of the yard that day; that Jorden, after finishing the work, brought the truck back into the yard about 11:00 A.M.; that he noticed Jorden working around the track, changing the oil; that he went in "back" for a few minutes; and that the first thing he knew the truck "was gone". He and four other employees all testified to the effect that at regular meetings Johnson had told the employees that they must not use the trucks for personal use; that Jorden was present at these meetings; and that they had not seen any driver use a truck after working hours or on his own personal business. However, two investigators testified that on October 11, 1950, they had a talk with Billingsley in which he stated that both he and Johnson had on many occasions noticed that the trucks were not on the parking lot during periods when there was no work for them, that on many occasions Jorden had driven the truck off the lot when there was no work for him to do, and that on these occasions no one said anything to Jorden about driving the truck for his own purposes; that they wrote this statement up and took it to Billingsley; that they read it to him and asked him to sign it; and that he said the statement was correct but he had thought it over and would not sign it. This unsigned statement was introduced in evidence.

There was some documentary evidence introduced by the appellant. Exhibit G is

a report to his insurance carrier dated June 19, the day after the accident, and signed by the appellant. On the first page appears a general description of the truck involved, the driver, and the circumstances of the accident. A question as to whether the driver was on business for the appellant at the time of the accident is answered "Yes". Another question as to whether the car was being used with appellant's permission is answered "Yes". On the second page of the report is set forth a statement made and signed by the driver Jorden. In describing this accident he there stated "I was driving Mr. Johnson's truck, & had been hauling spuds from Edison & I had lost a rope off of my truck and was going to look for it." Jorden testified that Johnson told him to tell this last rope story to the insurance man, saying that "he won't pay off for joy riding." Exhibit E is a statement given to an insurance adjuster on July 19, 1950, and signed by Jorden. In this statement he says it is his desire to retract any and all previous statements made by him concerning this accident; that the previous statement he made about taking the truck out to look for a rope was false; that on the evening of June 17, he phoned to Johnson and told him he wanted to use the truck; that Johnson replied that if he let him borrow the truck all the men would want to do so; that he said "Yeah, I know that"; that Johnson replied "Well, all right"; that he thought Johnson meant it was all right for him to use the truck; that Johnson did not know when he would use the truck; that on June 18, he started to haul the potatoes at 9:30 A.M., finished the job and returned to Johnson's place at 1:00 P.M.; that he then took the truck for pleasure without Johnson's permission; and that Johnson said nothing to him after the accident about his using the truck to go to a park. Exhibit F is a statement made by Jorden on July 26, 1950, and sworn to before a Notary Public on that date. In this Jorden states that it is his desire to retract any statement previously made by him concerning a telephone conversation with Johnson on June 17; that this conversation related only to the hauling of the potatoes; that at no time had he permission to use any of Johnson's

trucks for pleasure or other than business; that he had no expressed or implied permission for such use at any time, except once when he was allowed to haul some furniture for himself; that he especially had no permission to use the truck for pleasure on June 18; and that this present statement "is the only true happening as relating to the telephone conversation and permission to use the" truck. Johnson testified that he was with Jorden when Jorden made this statement, on July 26, and that he then took Jorden to the notary public for the purpose of having it sworn to. Johnson argues in his brief that it does not appear how this statement could have helped him since he would have been covered for any liability had his insurance company not gone into receivership.

[1-5] Ordinarily, the question as to whether or not a vehicle was used with the permission of the owner is one of fact, to be determined by the trial court from circumstances in evidence and the inferences reasonably to be drawn therefrom. *Casey v. Fortune*, 78 Cal.App.2d 922, 179 P.2d 99; the trial court is the sole judge of the credibility of the witnesses; and where there is any substantial support for a finding of permissive use, such a finding will not be disturbed on appeal. *Flemmer v. Monckton*, 73 Cal.App.2d 271, 166 P.2d 380. Obviously, Jorden was not telling the truth at all of the times involved in his statements and in his testimony. He told conflicting stories as to whether or not this was a business trip and with respect to the matter of permission, and the trial court was compelled to pass upon which of these stories should be believed. The other evidence would naturally throw considerable light on this, and assist the court in deciding which of Jorden's stories was to be accepted. When Johnson signed his report to the insurance company, the next day, he stated that the truck was being used at the time of the accident with his permission. While it might be argued that at that time he believed Jorden's statement that he had gone back to look for a rope, he had had a full day in which to find out what the facts were, and if the rope story had been

true the yard foreman would probably have known why the truck was again taken out. The evidence shows that Johnson had considerable to do with some of the statements made by Jorden, and justifies the inference that the fact that the insurance company had gone into receivership had affected the statements which were made at various times. The court could consider all of these matters in considering the conflicts and in weighing the credibility of the witnesses. There is no such inherent improbability in the evidence as would entitle a reviewing court to hold that the testimony of Jorden must be disregarded in its entirety. The entire matter was a factual one and while the evidence is conflicting it sufficiently supports the finding attacked.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



116 Cal.App.2d 373

PEOPLE v. PITTULLO.

Cr. 2340.

District Court of Appeal,
Third District, California.

Feb. 27, 1953.

Defendant was convicted in the Superior Court, Siskiyou County, Allen, J., of assault with a deadly weapon, and he appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Assault and Battery ⇨92

Evidence sustained conviction for assault with a deadly weapon.

2. Assault and Battery ⇨36

A gun capable of being instantly fired is a "deadly weapon" within assault statutes. Pen.Code §§ 240, 245.

See publication Words and Phrases, for other judicial constructions and definitions of "Deadly Weapon".

253 P.2d—45

3. Witnesses ⇨52(7)

In prosecution of defendant for an assault with a deadly weapon upon his wife and another, wife was a competent witness as to both the assault committed upon herself and that committed upon such other person. Code Civ.Proc. §§ 1881, subd. 1, 2048.

4. Assault and Battery ⇨88

In prosecution of defendant for assault with deadly weapon committed on his wife and another, testimony of wife as to prior threats by defendant to take her life was properly admitted when proximate in point of time to assault charged, since it tended to prove intent with which defendant acted. Pen.Code, §§ 240, 245.

5. Witnesses ⇨269(2)

In prosecution of defendant for assault with a deadly weapon committed upon his wife and another, refusal to permit defendant to cross examine his wife as to manner in which she was taken from scene of assault by sheriff's officers on their arrival and as to whether defendant had possessions in wife's home, was proper when the matters had not been touched upon in direct examination. Pen.Code, §§ 240, 245.

6. Criminal Law ⇨683(1)

In prosecution of defendant for assault with a deadly weapon committed upon his wife and another, wherein it appeared that wife was separated from husband, exclusion of testimony that notwithstanding the estrangement of the parties, marital relations continued between them up to the date of the offense was not an abuse of discretion, notwithstanding contention that such evidence would have rebutted wife's testimony that she was living separate and apart. Pen.Code, §§ 240, 245.

7. Witnesses ⇨282½

In prosecution of defendant for assault with a deadly weapon committed upon his wife and another, record disclosed that defendant was not unduly limited in his cross-examination of such other person as to relative position of various persons in room at time of assault and part they played in manhandling defendant during struggle over gun, but that examination was not

halted until it became repetitious. Pen. Code, §§ 240, 245.

8. Criminal Law ⇨341, 1169(5)

In prosecution of defendant for assault with a deadly weapon committed upon his wife and another, where it appeared that husband and wife were living separate and apart at time of the offense, admission in evidence of what purported to be restraining order issued as incident of action by wife against husband for divorce was improper, but did not constitute prejudicial error when court admonished jury to disregard the evidence. Pen.Code, §§ 240, 245.

9. Criminal Law ⇨596(2), 687(2)

In prosecution of defendant for assault with deadly weapon committed upon his wife and another, wherein defendant denied having made threats against his wife prior to the offense charged, refusal of continuance to permit presentation of testimony of witnesses who were coming from a distance, and refusal to reopen case for purpose of taking their testimony after arguments had been completed, but before the jury had been instructed, was not an abuse of discretion, when offer of proof disclosed that such testimony was merely in support of husband's contradiction of wife's testimony as to prior threats. Pen.Code, §§ 240, 245.

10. Criminal Law ⇨783½

In prosecution for assault with a deadly weapon committed on defendant's wife and another, wherein wife testified as to prior assaults upon her, refusal of instruction that so far as other victim of assault charged was concerned, testimony as to prior assault upon wife was to be disregarded, was not error when there was no evidence or anything from which jury might infer that other victim was in any way concerned with difficulties between defendant and his wife. Pen.Code, §§ 240, 245.

11. Criminal Law ⇨938(3)

Where evidence was introduced in prosecution of defendants for assault with a deadly weapon committed upon his wife and another, that entry into wife's house had been gained through breaking a bedroom window and that house had been left se-

curely locked, affidavits for new trial on ground of newly discovered evidence which merely disclosed that husband had key and that a key was in possession of third person, did not warrant new trial, since husband must have known that he possessed key and he had ample opportunity to testify concerning his possession of key and manner of making entry.

Jesse E. Fluharty, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., and Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was charged by information with two counts of assault with a deadly weapon, one against J. E. Davidson and the other against Elvira Pittullo, the wife of appellant. On trial the jury returned a verdict of guilty as to each count. Motions for new trial were made and denied and the appellant was sentenced to imprisonment in the state prison. He appeals from said judgment and order.

Appellant and Elvira Pittullo were married in May, 1951, and by August 18, 1951, the date of the alleged assaults, they had separated and Elvira was living in Yreka with her foster child. She testified that on the evening of that day she, in company with her foster daughter, her mother and Davidson, entered her home; that when she entered her front bedroom the door of the clothes closet flew open and appellant came out with a rifle aimed at her; that he said "I will git you, you s—s of b—es", whereupon she cried out "Oh my God, he has got a gun!"; that Davidson came in from the living room and grasped the gun by the barrel; that she also grasped the barrel of the gun; that Davidson pushed appellant backward onto the bed; that appellant maintained his hold on the stock of the gun and pulled the trigger, the shot going into the wall; that Davidson and she then succeeded in taking the gun from the appellant and she went with it to a neighbor's house, giving the gun to the neighbor, after which she called the sheriff.

Davidson testified that he heard a shout from the bedroom, got up from a chair in which he was sitting in the living room and as he got to the bedroom door found a gun aimed at him; that appellant was holding the gun; that he ducked and grabbed the end of the gun barrel with his left hand and shoved appellant back onto the bed with his right hand; that there then ensued a struggle for the gun; that Elvira and her mother were in the room as the struggle went on; that appellant held the stock of the rifle to his right shoulder with his hand and finger on the firing mechanism; that during the struggle a shot was fired from the gun; and that he then succeeded in wresting the gun from appellant.

[1,2] Appellant first challenges the sufficiency of the evidence to sustain the conviction as to the assault upon Davidson. There is no merit in the claim. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Penal Code Sec. 240. If the assault be committed with a deadly weapon the offense is punishable by imprisonment in the state prison or in a county jail. Sec. 245, Penal Code. A gun capable of being instantly fired is a deadly weapon. 5 Cal.Jur.2d "Assault and Battery" p. 226. The foregoing evidence from which it directly appeared or could be inferred that appellant entered the home of his estranged wife, concealed himself in a clothes closet, with a loaded rifle, lay in wait until she entered the bedroom, burst out and pointed the gun at her, declaring "I will git you, you s—s of b—es" and then, when at her outcry Davidson came in, aimed the deadly weapon at Davidson and during the struggle fired the gun, was ample to sustain the conviction as to each crime charged. *People v. Wells*, 145 Cal. 138, 78 P. 470.

[3] During the direct examination of appellant's wife, appellant objected to her evidence being admitted against him. It is difficult to understand this assignment. Mrs. Pittullo was a competent witness as to the assault against Davidson. She was also a competent witness as to the assault against herself, since even though she was

the wife of the appellant yet she could testify as to the assault upon her. By the express language of Section 1881, subdivision (1), of the Code of Civil Procedure the general disqualification of a spouse as a witness against the other spouse has no application in a criminal action for a crime committed against another person by such spouse while engaged in committing a crime against the other spouse. It is clear from the evidence that any assault committed against Davidson occurred during the assault against appellant's wife.

[4] Appellant contends there was error in admitting the testimony of his wife as to prior threats to take her life made against her by appellant. Mrs. Pittullo testified that shortly after their marriage in May of 1951 and while she was living with appellant he returned to their home intoxicated, compelled her to sit on the bed in their bedroom, took a rifle from the clothes closet and told her he was going to blow her brains out. She further testified that in July of 1951 and while the two were driving on the highway he pulled off to the side of the road, parked the car and said he had driven to Myrtle Point where she was, with the intention of killing her; he felt this was a good time to do it, and that he would dump her in the river below the road where there would be no way of finding her. These episodes, proximate in point of time to the assault charged in the information, were admissible as tending to prove the intent with which he acted at her home on the occasion covered by the information. *People v. Collins*, 80 Cal.App. 2d 526, 182 P.2d 585. There was no error in admitting the testimony objected to.

[5] Appellant complains that the trial court prejudicially limited him in his cross-examination of his wife. He sought to question her concerning the way in which he was taken from the bedroom by the sheriff's officers on their arrival, as to whether or not he had carpenter tools at her home and had purchased some furniture for use therein, and concerning conversations between himself and the other persons present after he had been subdued and prior to the time the officers arrived. These matters

had not been touched upon in direct examination and the court was therefore warranted in excluding them from cross-examination since the record does not show them to have been even inferentially connected with the matters covered on direct examination. C.C.P. sec. 2048; *People v. Melone*, 71 Cal.App.2d 291, 162 P.2d 505.

[6] Appellant complains that the court erred in excluding evidence that notwithstanding their estrangement, marital relations continued between himself and his wife up to the date of the alleged offense. The trial court was well within its discretion in excluding this evidence. Appellant's announced purpose in seeking to cross-examine his wife upon these matters was, as he put it, to rebut the wife's testimony that she was living separate and apart from her husband. There was no dispute in the record but that she rented the home in which the crimes were alleged to have been committed and that appellant did not live there with her. The matters sought to be elicited would not have rebutted her testimony that such was the fact. None of these matters had been touched upon in the direct examination and when objections were sustained appellant did not point out wherein the cross-examination attempted was proper although he now claims that he was endeavoring to rebut the testimony of Mrs. Pittullo. That it would rebut such testimony does not appear from the record and appellant is therefore in no position to claim the court was in error in its rulings which were based upon the proposition that the cross-examination was as to matters not touched upon in direct.

[7] Appellant contends that he was unduly limited in his cross-examination of Davidson as to the relative position of various persons when Davidson first became aware of the presence of the defendant in the bedroom and as to the part that Mrs. Pittullo and Mrs. Crewdson played in manhandling the appellant during the struggle over the gun. It is sufficient to say that the record discloses cross-examination upon these and related matters was full and complete for all practical purposes and the court did not halt the examination until it became repetitious. This ruling therefore was

within the discretion of the court. *People v. Smith*, 9 Cal.App. 224, 98 P. 546.

[8] Over appellant's objection the trial court admitted in evidence the contents of what purported to be a restraining order issued by the Superior Court in an action brought by Mrs. Pittullo against the appellant for divorce. The order purported to restrain appellant from visiting, molesting, annoying or harming his wife. This order should not have been admitted. It appeared it was granted ex parte and it appeared further that the order had been terminated prior to the date of the offenses alleged. Upon this coming to the court's attention the court admonished the jury to disregard the evidence. Under the circumstances the error in admitting the order cannot be regarded as prejudicial.

[9] Appellant denied that he had ever made any threats against his wife and particularly denied the incident she testified to when she said he stopped his car along the highway in July and threatened to kill her. Near the close of the trial appellant requested a few hours' continuance to permit certain witnesses to arrive who were coming from a distance. This was refused. These witnesses arrived after the case was closed and arguments had been completed, but before the jury had been instructed. The court refused to reopen the case for the purpose of taking their testimony. From the offer of proof it is made to appear that these witnesses would have directly or inferentially contradicted certain statements made by appellant's wife concerning the prior assaults she said had occurred. The weight of such testimony would clearly have been slight with respect to the merits of the cause, but undoubtedly had the witnesses been present their testimony would have been received. The court so stated. When they did arrive, however, the arguments had been closed and the court was ready to instruct the jury. Under the circumstances, therefore, we could not say that the court was required to reopen the cause to admit the testimony of these witnesses on such minor matters.

[10] Appellant offered an instruction which in effect told the jury to disregard,

so far as Davidson was concerned, the testimony as to one of the prior assaults upon her to which appellant's wife had given evidence. The instruction was refused. Appellant complains that such action of the court must have misled the jury into assuming that such evidence carried over to Davidson and therefore they could assume that appellant had conceived some scheme or plan to injure or assault Davidson. We think the jury could not have been so misled. There was no evidence that Davidson was in any wise concerned with or about the marital differences that arose between appellant and his wife and we think the jury could be safely entrusted not to consider the testimony as against Davidson. It must have been as apparent to them as it was and is to appellant that the testimony of the prior altercations between appellant and his wife had no effect so far as Davidson was concerned.

[11] In support of his appeal from the denial of his motion for a new trial the appellant relies upon the following matters: Considerable testimony had been introduced by the prosecution to the effect that the house had been left securely locked, that the keys were all in the possession or under the control of Mrs. Pittullo and that appellant had gained entry by breaking a bedroom window. The motion for new trial was based on the ground of newly-discovered evidence. Affidavits were presented showing that appellant on the day of the alleged offenses had in his possession a key to the front door. If this were true it could not constitute newly-discovered evidence since appellant must have known he had the key. It was likewise made to appear by affidavit that one other key was in the possession of a third person which would also unlock the front door of the dwelling. The appellant had testified that he had gained entrance to the house through the open front door. While the method of appellant's entry into the residence was material, as from the prosecution's witnesses the inference could be drawn that he broke into the dwelling, thus indicating wrongful intent, he had ample opportunity to testify during the trial concerning his possession of the key and did not do so. The court

was fully justified in denying the motion for new trial. *People v. English*, 68 Cal. App.2d 670, 157 P.2d 429.

The judgment and the order appealed from are and each of them is affirmed.

PEEK and SCHOTTKY, JJ., concur.



PEOPLE v. LA MACCHIA et al.*

No. 15080.

District Court of Appeal, First District,
Division 1, California.

Feb. 16, 1953.

Rehearing Denied March 18, 1953.

Hearing Granted April 15, 1953.

Eminent domain proceeding for condemnation of strip of land for use as freeway which would cut remainder of parcel off from highway except for access through limited number of 20-foot openings. The Superior Court, Santa Clara County, Byrl R. Salsman, entered judgment awarding damages for the taking and for severance, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held, *inter alia*, that there had been no procedural errors.

Affirmed.

1. Evidence ⇨502

In proceeding for condemnation of strip of land for freeway which would cut remainder of parcel off from highway except for access through limited number of 20-foot openings, trial judge allowed wide latitude in cross-examination of witnesses who testified as to possible uses of the property for purpose of showing extent of damages for severance, and exercised sound discretion in bringing some lines of inquiry to an end.

2. Witnesses ⇨267, 330(1)

The field of inquiry in cross-examination for purpose of testing credibility and weight of testimony is so extensive that trial court must be given wide discretion in order to keep such examination within reasonable bounds.

* Subsequent opinion 264 P.2d 15.

3. Appeal and Error ⇨971(3)

Where appellate court is called upon to decide whether discretionary power of trial court over cross-examination has been abused, inquiry is whether a sufficiently wide range has been allowed to test credibility and weight of evidence rather than whether some particular question should have been allowed.

4. Witnesses ⇨329

Importance of question on cross-examination as means of testing credibility of witness was question primarily for determination of trial court.

5. Evidence ⇨502

In proceeding for condemnation of strip of land for freeway, where witness, in regard to issue of damage caused by severance, testified that parcels under consideration were useful for gas stations and restaurants, and plaintiff's counsel on cross-examination asked witness several questions concerning a station that had been operated in the vicinity and then asked "what happened to it? It went broke, didn't it?", and court on objection ruled that counsel could ask witness if there were any stations in vicinity now, counsel's asking such question was, in effect, a withdrawal of question objected to.

6. Appeal and Error ⇨1050(1)

The admission of evidence which leads to conjectural speculations is equally harmful, whether on cross-examination or direct.

7. Eminent Domain ⇨262(5)

In proceeding for condemnation of strip of land for freeway, even if court erred in disallowing cross-examination as to whether fruit stand could be put on severed property so that property could be used for a going business, where like question had been answered in affirmative by another witness, such error was not prejudicial.

8. Evidence ⇨554

In proceeding for condemnation of strip of land for use as freeway, where state's counsel in cross-examination of valuation expert asked expert's opinion whether highway frontage on parcels in question would be of a certain value, af-

firmative answer which contained reference to offer to buy which had been made was responsive and admissible.

9. Eminent Domain ⇨255

Objection that answer of valuation expert to question regarding value of severed property was incompetent or irrelevant could not be raised for first time on appeal.

10. Evidence ⇨558(12)

In proceeding for condemnation of strip of land for use as freeway, where state's counsel on cross-examination of valuation expert had elicited statement that certain offer to buy had been made for certain lot, further testimony on redirect as to size of lot and purpose for which it would be used by offeror was explanatory and definitive of evidence that had come in during cross-examination, and admission thereof was not error.

11. Evidence ⇨502

Permitting condemnee to testify as to reason for his opinion as to value of property involved on direct examination was not error. Code Civ.Proc. § 1872.

12. Eminent Domain ⇨202(4)

In proceeding for condemnation of strip of land for use as freeway, where evidence concerning purposes which motivated defendants in buying land or in planting certain crops was part of statement or description of uses to which property was adapted, and was not tendered or used as independent proof of value, admission thereof did not violate principle that market value of land, not its value for particular use or to particular person, furnishes test of damage sustained by condemnation, and was not error.

13. Evidence ⇨502

In valuation proceeding, where plaintiff had put in evidence by cross-examination of witnesses the prices at which various other properties in vicinity had been sold, admission of evidence of other sale upon redirect examination was not error. Code Civ.Proc. § 2050.

14. Eminent Domain ⇨262(5)

In valuation proceeding, in view of instructions given on effect of interrogation of witnesses as to their knowledge of sales of other property in the vicinity, admis-

sion of testimony as to such sales, if error, was not prejudicial.

15. Eminent Domain ⇨222(1)

In proceeding for condemnation of strip of land for use as freeway which would separate highway from property previously abutting the highway, instruction concerning right of access of owners of abutting property to highway was proper.

16. Eminent Domain ⇨222(1)

In condemnation proceeding, instruction that property owners were presumed to know value of their property and that their evidence was entitled to be weighed and considered by jury was proper.

17. Trial ⇨296(11)

In condemnation proceeding, instruction to reconcile, if possible, conflicting testimony as to values and severance damages and to give it all due weight was not improper, in view of other instructions.

18. Trial ⇨296(11)

In condemnation proceeding, instruction defining just compensation and permitting consideration of purpose for which condemnation was sought to be considered in determining market value was not prejudicial error in view of instruction to fix just compensation in accordance with evidence and to exclude special value to state as element of market value, in absence of evidence of capability or value of property for use as highway.

Robert E. Reed, Sacramento, Holloway Jones, Jack M. Howard, Roger Anderson and Edward L. Doyle, San Francisco, for appellants.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Marvin E. Lewis and Goldstein, Lewis & Barceloux, San Francisco, for respondents.

FRED B. WOOD, Justice.

This is an appeal by the state from that portion of a judgment in eminent domain which awarded compensation to the several owners of five parcels of land abutting

highway 101, lying between points situate 1.9 and 3.5 miles, respectively, south of Gilroy.

The proposed taking is for the purpose of converting this section of the highway into a freeway. In each instance a relatively narrow strip is taken. That cuts the remainder of the parcel off from the highway with access only through a limited number of 20-foot openings. Thus, Parcel 4¹ will have one such opening along a frontage of 1580.12 feet; Parcel 6, one opening along a frontage of 857.61 feet; Parcel 7, one opening in 267.48 feet; Parcel 14, one opening in 367.2 feet; and Parcel 19, three openings (and a "connection" near the southerly end) in 5040 feet.

The damages for the taking and for the severance were separately assessed. The valuation witnesses of the plaintiff and the defendants, respectively, were not far apart on the damages for the taking. Where they differed, markedly, was on severance damages. That stemmed in part at least from the fact that plaintiff's witnesses considered agriculture the highest use whereas defendants' witnesses included commercial uses among those to which the property was adapted.

Plaintiff claims the severance damages were grossly excessive and that this resulted from errors in evidentiary rulings made and instructions given by the trial court. Our examination of the record in the light of the applicable principles of law convinces us that there has been no miscarriage of justice and that the judgment should be affirmed.

(1) *Did the trial court erroneously and prejudicially curtail plaintiff's cross-examination of defendants' valuation witnesses?*

In support of its contention that "the court's severe restriction of plaintiff's examination of defendants' witnesses violated the requirement of widest latitude for cross-examination of experts," plaintiff has cited seven rulings in some 240 pages of the cross-examination of three experts.

[1] Scrutiny of these rulings, each in its own setting, demonstrates that this point

1. These are the numbers by which the five parcels were severally identified at the trial.

is not well taken. The trial judge allowed plaintiff a wide latitude in the cross-examination of these witnesses and exercised a sound discretion in bringing some lines of inquiry to an end.

[2, 3] In appraising the questioned rulings we must bear in mind that the "field of inquiry in cross-examination for the purpose of testing the credibility of a witness and the weight of his testimony is so extensive that the trial court must be given a wide discretion in order to keep such examination within reasonable bounds; otherwise the trial of cases would be overlong. When an appellate court is called upon to decide whether such discretion has been abused, the inquiry is whether a sufficiently wide range has been allowed to test such credibility and weight rather than whether some particular question should have been allowed. [Citation.]" *East Bay Municipal Utility Dist. v. Kieffer*, 99 Cal.App. 240, 261, 278 P. 476, 279 P. 178, 179.

[4] Defendants' witness Hulting testified that these properties were useful for agricultural and commercial purposes, including motels. Plaintiff's counsel asked him if he had occasion to go down to the local chamber of commerce and check up on the present financial condition of motels in the county. In explanation of the question counsel said "I merely asked him, because he testified here * * * that people, buyers in the market, would buy that with the idea of building a motel. Therefore I asked has he checked? I was going to ask him, 'Upon the basis of investigation what was the financial condition [of motels] in the County?'" Such a question could be justified only as a means of testing the qualifications of the witness and the soundness of his opinion. If allowed, it would almost certainly lead into further inquiries that had no direct bearing upon the major issue, the market value of the property. Its importance as a means of testing the witness Hulting, in view of the very considerable latitude accorded the plaintiff (but one questioned ruling in 90 pages of the cross-examination of this witness), was quite doubtful. That was a

question primarily for the determination of the trial court. We find no abuse of discretion in the denial of that inquiry.

Defendants' witness Weiner testified, as to Parcel No. 4, that he valued the land along the highway at \$3,000 an acre for commercial uses, but as the frontage was but a portion of the whole tract that figure was reflected in his appraisal of the entire tract at a smaller rate per acre. Asked by plaintiff, if he sold off that frontage, what would be the highest and best use of the remainder, he said that would be getting into speculation; if sold off for a motel, the remainder might be used as agricultural for the time being, with a potential development for further improvement. He was then asked how many acres he would sell off for a motel, which upon objection by defendants was ruled immaterial and speculative. Plaintiff then asked what area lent itself to the development of a motel site and received the answer that it would depend on the particular motel operator, varying from 4 to 20 acres. Plaintiff then asked what size of motel purchasers would construct at this location; disallowed as too speculative. We find no error in those rulings.

Concerning Weiner's opinion that people would not buy such a parcel for a motel site with only 20 feet of access to the highway, plaintiff asked Weiner if he had talked to owners of motels in the vicinity of San Jose and got their opinions as to the type and width of opening they wanted. The witness had not talked to motel owners in the vicinity of San Jose but had talked to them up and down the coast. He was asked if he was familiar with a certain motel on or near First Street, San Jose. He said he had noticed it. Asked if he had talked to Mr. Brown (apparently the owner of the motel), he said "No." He was then asked if he knew that Mr. Brown was on the Board of Directors of the National Motel Association. At this point, defendants objected that this would be going into collateral matters and was speculative in nature. In sustaining that objection the trial court acted well within the sound discretion vested in it.

[5] Defendants' witness Challen testified that the parcels under consideration were useful for gas stations and restaurants. Upon cross-examination plaintiff's counsel asked him a number of questions concerning a gas station that had been operated in the vicinity and then asked "what happened to it? It went broke, didn't it?" to which defendant objected. Counsel explained that the witness had testified there were possibilities of filling stations and that he was asking the witness "whether within this freeway project, consisting of seven miles, there are any motels, any filling stations and so forth." The court ruled "you can ask him if there are any there now. You haven't asked him that." Plaintiff's counsel, without further discussion, asked the questions indicated by the court. That was, in effect, a withdrawal of the question whether or not the gas station "went broke." The questions asked and answered developed the fact that the service station was not operating at the time of the "taking" but that the restaurant on the same property was still operating. Upon redirect, the witness testified, *without objection*, that the service station was not operating because the owner, Mr. Lillard, was injured and not able to operate it, but that the restaurant was still operating because Mrs. Lillard ran the lunch counter and bar. Upon recross, after plaintiff's counsel had asked a number of questions concerning the Lillard restaurant, defendants objected to any line of questions going into specific facts concerning the Lillard property (not one of the parcels involved in this suit), as having no probative value on any of the issues before the court. Plaintiff's counsel then stated that the witness went into the fact that there was a restaurant and filling station and "I'm going into the fact that the thing did not make any money, as he well knows." The court asked plaintiff's counsel what he then offered to prove and he replied that prior to the taking of access rights that particular restaurant and filling station was losing money. The objection to the offer of proof was sustained, but plaintiff was allowed to elicit from the witness the fact that at the time of the taking of access rights no gaso-

line was being sold from that property. Again upon redirect, the witness testified the reason was because of the illness and injury of Mr. Lillard. Again, plaintiff did not object. Its counsel merely commented "There we go again." We find no basis for reversal in the denial of plaintiff's offer to prove the Lillard filling station did not make money. We see no analogy between this ruling and the allowance of proof of long non-user and abandonment, as a railway roadbed, of the very property being taken in *People v. Ocean Shore Railroad*, 32 Cal.2d 406, 426, 196 P.2d 570, 6 A.L.R. 2d 1179.

[6,7] Plaintiff asked defendants' witness Challen a number of questions concerning the various fruits that could be grown here and sold at roadside stands but for the loss of access. Plaintiff then asked him if he felt he could put a fruit stand out in front and put some one to run it or run it himself and have a "going business." An objection that this question was speculative was sustained. We deem that a correct ruling. "The admission of evidence which leads to conjectural speculations is equally harmful, whether on cross-examination or direct." *East Bay Municipal Utility Dist. v. Kieffer*, supra, 99 Cal.App. 240, 250, 278 P. 476, 481, 279 P. 178. Moreover, what prejudice could plaintiff suffer from not getting an answer to that question from this witness? It asked defendants' witness Hulting a like question and he said a fruit stand would be a "profitable business venture."

Weiner valued at \$4,000 per acre the front 4.31 acres of Parcel 6 for commercial uses. Plaintiff asked him if the sale of that front portion as of the date the suit was filed would have depreciated the value of the remainder of Parcel 6. The witness said the answer would be speculative; he knew that if any of the owners made such a sale he would reserve the right of ingress and egress to the remainder, and so there would probably be no depreciation in value of the remainder of the parcel; streets would lead to the rear of that front strip, and the land behind that strip would be available for subdivision. Asked what type of subdivision, the witness said:

Any type; I suggest the very nice G.I. type of homes. Plaintiff then asked: "How many [homes] could you construct back there?" Defendants objected, as leading into "all kinds of speculation," and the trial court properly sustained the objection.

[8,9] (2) *Was evidence of offers to purchase the subject property erroneously admitted to the prejudice of the plaintiff?*

Plaintiff asked defendants' valuation expert Challen concerning one of the parcels. Challen gave a valuation of \$1750 per acre. Asked how many acres, if placed upon the open market for sale, would be purchased and devoted to commercial uses, he said about four acres. Asked if those four acres were worth \$1750 an acre, he said approximately \$7,000 to \$8,000 an acre. Plaintiff repeated the question several times in different forms and then asked, somewhat argumentatively, "so do I understand that in your opinion this highway frontage on these parcels would be worth around seven, \$8,000 dollars an acre if placed upon the open market for sale." The witness replied, "I investigated one parcel there that I had heard an offer had been made on it, I understand Mr. Pelliccione's piece, —" Plaintiff's counsel interrupted, objecting that the answer was not responsive. The court ruled that the witness had not yet answered and that plaintiff could move to strike after the answer was made, if not responsive. The witness answered, "yes, as a matter of fact, Mr. Pelliccione was offered \$7,000 for 200 feet." Plaintiff's counsel thereupon said "I think, for the record, I'll move the latter be stricken." The court denied the motion, saying "it's explanatory of his answer." That, we think, was a correct ruling in response to the particular objection made. It is too late now for plaintiff for the first time to urge that the answer was incompetent or irrelevant.

[10] Upon redirect examination of the same witness, defendants' counsel asked him, concerning this offer, the acreage and the type of use involved. Plaintiff objected as incompetent, irrelevant and immaterial. The court allowed the question on the

ground that evidence of the offer came in on cross-examination. The witness answered that the offer was for an area about 200 by 200 feet for a service station. This was explanatory and definitive of evidence that came in during the cross-examination and added nothing except that the particular commercial use for which the offer was made was for a service station. We do not think it materially affected the jury's verdict.

The witness next testified that the Shell Oil Company tried to buy a piece of that frontage for a service station and that the owner was approached for a motel site on that property, without mentioning the price, if any, that was offered; and that as to all of these frontages everyone has refused to sell them even at the prices they were offered, because they wanted free ingress and egress. Plaintiff did not object to this new line of questions. When the court overruled his objection to questions concerning the particular offer which came out on cross-examination, plaintiff's counsel asked and the court allowed the "same objection * * * to the whole line of questions." That "whole line" ended when defendants' counsel and the witness turned to other offers for this and other parcels. It is too late now for plaintiff to object. Moreover, this witness' testimony concerning other offers was largely cumulative of evidence that had already gone in, without objection, by cross-examination of defendants' witness Hulting. He testified: the owner of Parcel 6 was approached by people to purchase a motel site; the owner of Parcel 19 probably has received offers many times by somebody who would like to put in a motel or a drive-in restaurant; these properties have been very closely held for many years, which does not indicate there would not be a motel if anybody could have secured one of these properties. The witness understood that offers had been turned down for such uses.

The next assignment of error presents a more difficult question. Upon direct examination defendant Pelliccione testified that he considered his property worth \$105,000. Asked the reason for that opin-

ion, he said "the reason is the frontage, its almost 700 feet * * * that's all business property. The people, they asked in 1947, they wanted to buy it," to which plaintiff objected as irrelevant and incompetent. Defendants' counsel supported the question and the answer upon the basis of Long Beach City High School Dist. v. Stewart, 30 Cal.2d 763, 185 P.2d 585, 173 A.L.R. 249, and the court overruled the objection. The witness then described the offer as made in 1947 for one acre for a motel site at a price of \$7,000.

That was clearly erroneous if the law as enunciated in some of the earlier decisions still obtains. According to those decisions valuation witnesses "can not, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the company have been compelled to pay in other and like cases—notwithstanding those transactions may constitute the source of their knowledge. If this was allowed, the other side would have a right to controvert each transaction instanced by the witnesses, and investigate its merits, which would lead to as many side issues as transactions, and render the investigation interminable. Upon cross-examination, however, the knowledge of the witnesses, and, therefore, the value of their opinions, may be tested in that mode, if desired by the party in whose interest the examination is conducted." Central Pac. R. Co. v. Pearson, 35 Cal. 247, 262. See also Santa Ana v. Harlin, 99 Cal. 538, 544-545, 34 P. 224, and Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 478-479, 284 P. 1072.

That rule was modified as to "expert witnesses" when in 1937 a statute was enacted which expressly declares that "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state [his] reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel." Code of Civ.Proc., § 1872. (Emphasis added.)

The old rule was, in effect, declared inapplicable to a defendant landowner valuation witness in a condemnation suit when in 1947 the Supreme Court held it error not to permit such a witness, upon direct examination, to give the reasons for his opinion. Long Beach City H. S. Dist. v. Stewart, supra, 30 Cal.2d 763, 185 P.2d 585, 173 A.L.R. 249. The court in that case did not find it necessary to determine whether the witness was an "expert witness" within the meaning of section 1872 of the code. The court found other grounds for holding it proper to ask a landowner valuation witness, upon direct examination, to state the reasons for his opinion on market value. "It is a general rule that an opinion is worth no more than the reasons upon which it is based. [Citations.] It has long been the rule in will contests that non-expert witnesses may give their opinions on the issue of competency, but it has been consistently held that 'it is not the mere opinions which are of importance but the reasons given in support of such opinions.' See Estate of Buthmann, supra, 55 Cal.App.2d 585, 591, 131 P.2d 7, 10, and cases there cited. While there are circumstances in which an opinion, given without a statement of reasons, may be properly considered by the trier of the facts (Lumbermen's Mutual Casualty Co. v. Industrial Acc. Comm., 29 Cal. 2d 492, 500, 501, 175 P.2d 823), the weight to be ordinarily given to such opinions depends entirely upon the reasons given in support thereof. Accordingly, we hold that appellant should have been permitted to state the reasons for his opinion on market value. If there is any language in County of Los Angeles v. Signal Realty Co., 86 Cal.App. 704, 261 P. 536, which would tend to indicate that an owner of property cannot give the reasons upon which his opinion as to market value is based, such language cannot be approved." 30 Cal.2d at page 773, 185 P.2d at page 590, 173 A.L.R. 249.

That would seem quite clearly to sanction the very question asked of Pelliccione in this case: "What is the reason for that opinion?" Yet, in Heimann v. City of Los

Angeles, 30 Cal.2d 746, 185 P.2d 597, an action for damages caused by the construction of a viaduct, the Supreme Court held that the "trial court properly refused to allow witnesses for plaintiffs to testify on direct examination to prices paid by the city [the condemnor] for neighboring property." 30 Cal.2d at page 754, 185 P.2d at page 602. Perhaps in the Heimann case the rejected offer was in the nature of a tender of independent evidence of value instead of a statement of the "reasons," good or bad, for the witness' opinion. That would be in harmony with *City of Los Angeles v. Cole*, 28 Cal.2d 509, 516-518, 170 P.2d 928, which sanctions evidence of such sales by way of cross-examination when followed by instructions that the price paid the condemnor for other property is not a proper basis for determining the market value of the property in question and is to be considered for the limited purpose of testing the fairness or honesty of the opinion given by the witness. That would also harmonize with the situation which obtained in *Re Estate of Buthmann*, 55 Cal.App.2d 585, 131 P.2d 7, cited with approval in *Long Beach City H. S. Dist. v. Stewart*, supra, 30 Cal.2d 763, 773, 185 P.2d 585, 173 A.L.R. 249. In the Buthmann case non-expert witnesses gave their opinions as to the competency of the testatrix and also their reasons for those opinions. Both the trial and the reviewing courts deemed those reasons insufficient support for the opinions expressed. That suggests that a landowner valuation witness may be asked, on direct examination, to state his reasons and if he states any that do not furnish a proper basis for determining market value, they are available for the use of the jury in appraising his opinion, under appropriate instructions comparable to instructions concerning the use of such evidence when developed on cross-examination.

Even if the rule expressed in the *Cole* and *Heimann* cases is one of absolute exclusion it should not be extended beyond its scope, that of excluding evidence of sales of other properties to the condemnor. We say this in view of the following comment in *Bagdasarian v. Gragnon*, 31 Cal.

2d 744, 192 P.2d 935: "It must be recognized that in California a line of decisions has held the value of *real* property may not be proved by evidence of particular sales of *other similar* real property. See, for example, *In re Estate of Ross*, 171 Cal. 64, 151 P. 1138, and cases there cited. This is the minority view in the United States, and it has been severely criticized. See 118 A.L.R. 869-914; 32 C.J.S., Evidence, § 593, p. 444 et seq.; 2 Wigmore on Evidence, 3d Ed. 1940, § 463, p. 503 et seq. Although this court has recently held that a party in an eminent domain proceeding may not put in evidence the amount paid by a *condemning party* to the owners of similar adjacent lands (*City of Los Angeles v. Cole*, 28 Cal.2d 509, 170 P.2d 928; *Heimann v. City of Los Angeles*, 30 Cal. 2d 746, 185 P.2d 597), these decisions do not necessarily constitute a reiteration of the general rule of absolute exclusion, since a sale to a condemning party may be affected by factors not present in an ordinary private sale. As appears from the annotation in 118 A.L.R. at p. 893, the *Cole* and *Heimann* cases are in accord with the weight of authority in holding that evidence of this particular type of sale is not admissible to prove value." 31 Cal.2d at page 756, 192 P.2d at page 942.

Plaintiff has not suggested that the court gave an erroneous instruction or that plaintiff requested any instruction on this subject.

[11] We do not find a basis for reversal of the judgment in the testimony concerning offers to purchase portions of the subject property.

[12] (3) *Was evidence of the uses the owners intended to make of their properties erroneously admitted to the prejudice of the plaintiff?*

Plaintiff complains of the admission of certain evidence concerning the purposes which motivated defendants in buying the land or in planting certain crops. Plaintiff claims this violated the principle that the market value of the land, not its value for a particular use or to a particular person, furnishes the test. We find no violation of that principle. The questioned evidence

was really a part of a statement or description of the uses to which the property is adapted, not tendered or used as independent proof of value.

Defendant Ernest E. Filice, one of the owners of Parcel 4, described upon direct examination the uses he had been making of the property. His counsel then asked him if the fact that this property was located on this highway was a factor which entered into his decision to purchase it. He answered "That is right, that was the sole purpose." Plaintiff objected to it as incompetent, irrelevant and immaterial (he did not move to strike) and the objection was overruled. The witness then described the accessibility of the property to the highway prior to condemnation and stated he considered both agricultural and business uses the highest and best use of the property. Asked to explain what he meant by that, the witness said the main reason for buying it was that frontage and the good visibility, he having in mind at some future date to take advantage of the commercial uses. Thereupon plaintiff objected to it as incompetent, irrelevant and immaterial, saying "it is what is the fair market value in the eyes of purchasers generally, not what he bought it for nor what he plans to do or has in mind." Defendants' counsel said he understood the witness was talking about the highest and best uses of the property, that he did not want any testimony as to some personal idea on the thing and asked the witness if he understood that, and the witness said he did. Plaintiff's motion to strike was denied.

Later, explaining how he arrived at the amount of the severance damage, Filice again said that when he bought the property with the idea in mind of the long frontage and good visibility, he had in mind at some future date to erect some kind of business on that frontage, whether a gas station or restaurant or fruit stand, but the construction of the fence eliminates all that. Plaintiff objected on the same ground as before. Defendants' counsel contended that the witness was really speaking about the highest and best uses and that it was proper for the owner to have those uses in mind. He also in-

voked Long Beach City H. S. Dist. v. Stewart, 30 Cal.2d 763, 185 P.2d 585, 173 A.L.R. 249, claiming it sanctioned such a witness giving the reasons upon which his opinion is based. The court overruled plaintiff's objection and denied its motion to strike.

Of similar import was the testimony of defendant Ercole Pelliccione. Upon direct examination he was asked to state the reason for the value he had put upon his Parcel 6. He said, "all of the frontage it's all in business property, a person could put a gasoline station, store, restaurant, anything, a fruit stand; that is why I planted two acres of cherries in 1942-'48."

Upon cross-examination, defendants' expert Challen described the uses made of Parcel 7, mentioning the various crops. Asked what acreage other than prunes were devoted to fruits, the witness said, "I couldn't tell you the exact acreage. I know that he planted diversified fruit for the purpose of selling—for the purpose of retailing right from his property there." Plaintiff moved that the answer go out as not responsive. The court denied the motion saying "well it might not technically be responsive, Counsel, but those matters should not be stricken from the record. You have every opportunity of continuing your cross-examination to clear up anything that might need it." Plaintiff's counsel responded "All right" and continued with his questions concerning the other types of fruit planted. It is now too late for the first time to claim that this evidence of the stated purpose of the diversified planting was incompetent and irrelevant. Nor does it appear that such evidence would be vulnerable to such an objection if timely made. It is descriptive of one of the uses to which the property is adapted.

Moreover, this testimony is but cumulative of evidence that went in without any objection from the plaintiff. See *Mullanix v. Basich*, 67 Cal.App.2d 675, 679, 155 P.2d 130. Upon cross-examination defendants' expert Hulting testified that one of the reasons strawberries were planted on Parcel 6 was that they could be marketed from the property. He also said that most

of the growers all through this area are putting in mixed orchards, "so they could be sold" on the highway, a use that is being taken away. In respect to Parcel 4, Challen testified upon direct, without objection by plaintiff, that the owner had put in a diversified orchard in order to sell his commodities on the highway, "which proves the fact that that property does have commercial value; and the rest of them [landowners] have the same reasons, or others, when they bought their property," the "selling of fruit on the highway."

Finally, the jury was instructed that whatever purposes the defendants had in connection with the future use of the property could add nothing to its market value; the defeat of any such purpose by condemnation was not a matter of compensation; a use existing or contemplated is distinct from the market value of the property; value in use is not to be considered in determining market value; a plan which defendant may have had for improvement of the property adds nothing to its market value and, if affected by condemnation, however much a disappointment, is not a matter of compensation. Presumably, the jury observed those instructions in making the awards.

The judicial decisions invoked by plaintiff are not inconsistent with the views we have expressed. *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 408, 104 P. 979, stands for the broad general principle that market value is the test, not value to the owner or condemnor, hence that value in terms of money for a particular use is not admissible. In *San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson*, 63 Cal.App. 767, 220 P. 427, the evidence deemed improper was of an elaborate scheme for the irrigation and reclamation of the land, including the details and the estimated costs of construction and maintenance. Nothing of that sort is involved here. In *City of Los Angeles v. Kerckhoff-Cuzner Co.*, 15 Cal.App. 676, 115 P. 654, the trial court excluded a diagram of the area involved, showing existing and contemplated improvements. The reviewing court approved that ruling but "made

it quite clear that evidence of proposed improvements may be admissible to show adaptability of the land for that use * * *." *City of Daly City v. Smith*, 110 Cal.App.2d 524, 532, 243 P.2d 46, 51. *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 P. 372, 376, 3 L.R.A. 83, sanctioned evidence of the value of the defendant's property "as a reservoir site" but not the inclusion of the increase in value, if any, arising from the condemnor's proposed improvements. *Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co.*, 128 Cal.App. 743, 18 P.2d 413, furnishes an excellent discussion of the difference between value in use and value in exchange, 128 Cal.App. at pages 753-756, 18 P.2d at page 419, and treats "market value of the land for its highest available use" the "same as the market value of the land." 128 Cal.App. at page 759, 18 P.2d at page 419.

In our case, the evidence of the owners' plans for the use of the property was really a part of the description of the uses to which the land is adapted, and was not expressed in terms of money value. In view of these factors and the instructions given, we do not see how the plaintiff could have suffered any possible prejudice.

(4) *Was evidence of sales of other property erroneously admitted to the prejudice of the plaintiff?*

By cross-examination of defendants' expert Hulting, plaintiff put in evidence the prices at which various other properties in the vicinity had been sold. Those prices, seemingly, were at variance with the valuation which Hulting had placed upon the defendants' properties. Upon redirect, over plaintiff's objection, Hulting narrated the various factors which tended to reconcile those prices with his valuation. For example, one sale occurred several years before and prices had risen since then. Upon the cross-examination of defendants' expert Weiner, similar information concerning sales of other properties was developed and upon his redirect examination similar explanations of those particular sales were put in evidence.

Plaintiff claims it was error to allow any such questions of either witness upon

redirect even though confined, as in this case, to the specific sales and sale prices brought out by the plaintiff upon cross-examination of the same witness. We are aware of no such legal principle. It would, indeed, be an artificial and inequitable rule which would permit a cross-examiner to put in evidence the price realized at a forced sale and not permit the witness, upon redirect, to inform the trier of the facts that it was a forced sale. The purpose of allowing questions concerning sales of other properties upon cross-examination is that of testing the honesty or fairness of the witness' opinion. The similarity of such other properties to those in suit, and the circumstances under which sold (as reflecting market value at the time of the taking, or not) would seem part of the test, for development upon redirect if not brought out upon cross-examination.

These are factors which the appellate court probably had in mind in *East Bay Municipal Utility Dist. v. Kieffer*, supra, 99 Cal.App. 240, 278 P. 476, 279 P. 178. One of the defendant's witnesses was asked, upon cross-examination, regarding sales of land at another reservoir site than the one in suit. In an effort to account for the low prices paid for land at the other site, the witness testified it had been necessary to move a railroad at a cost of \$5,000,000. On redirect, he was asked why he included the \$5,000,000 in the cost of that reservoir. The plaintiff objected and its objection was sustained. "While the objection might well have been overruled, no prejudice was sustained by appellant by reason of the ruling made. The reason sought to be shown * * * is perfectly obvious and one which every juror must have inferred from the facts already proved." 99 Cal.App. at page 252, 278 P. at page 481, 279 P. 178. If the reason had not been obvious, then doubtless it would have been prejudicial error to rule out the inquiry.

The principle here involved is of general application. It finds statutory expression in section 2050 of the Code of Civil Procedure: "A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon

which he has been examined by the adverse party."

An illustration of the application of this principle in a valuation, although not eminent domain, case is furnished by *Pedley v. Doyle*, 177 Cal. 284, 170 P. 602. One of the plaintiff's witnesses was of the opinion that \$15.00 per acre per year was the fair rental value of certain land and upon cross-examination he said he based his opinion largely on the possibility that the land had been renting to Chinese for vegetable purposes at \$15.00 per acre, or possibly more; he did not know whether it could be rented for that much in the open market. On redirect it developed that according to his present knowledge and information gathered by him, an even higher rental had been obtained from some of the Chinese gardeners. The defendant, appealing, predicated error upon this redirect examination. The Supreme Court held that such evidence was properly admitted. "The subject was introduced by defendant himself, and it was perfectly proper for plaintiff to bring out on redirect examination testimony tending to demonstrate how much dependence the witness, in reaching his estimate of reasonable rental value of this particular tract, had placed upon the knowledge he had obtained of prices paid by a certain class of renters, namely Chinese gardeners." 177 Cal. at pages 288-289, 170 P. at page 603.

With one exception, none of plaintiff's California cases involves facts comparable to those here involved, that is, redirect examination confined to explanation of other sales which the opposite party had developed upon cross-examination. In *City of Los Angeles v. Hughes*, 202 Cal. 731, 736, 262 P. 737, it was deemed error to allow a witness, on direct examination, to give evidence of specific sales upon which his figures were based. In *Reclamation Dist. No. 730 v. Inglin*, 31 Cal.App. 495, 160 P. 1098, a witness for the plaintiff valued the land taken at \$50 an acre. Upon cross-examination his attention was called to several sales at higher prices. On redirect he testified that six named landowners sold to the district for \$50 an acre. Upon re-cross, he said he fixed his valua-

tion simply by the standard of valuation which prevailed in the transfers to the district mentioned by him. The reviewing court held that defendant's objection to the question on redirect and his motion to strike out all of that witness' testimony, should have been granted. Quite obviously, in the Hughes and the Inglin cases the evidence concerning sales of other lands was improperly offered as independent proof of value and was in no way limited to explanation of sales and sales prices brought out during cross-examination.

The evidence of sales of other properties was given or tendered upon direct examination in *Re Estate of Ross*, 171 Cal. 64, 69, 151 P. 1138, and in *Hibernia Sav., etc., Soc. v. Ellis Estate Co.*, 132 Cal.App. 408, 411, 22 P.2d 806. Such evidence was tendered as independent proof of value in *Dickey v. Dunn*, 80 Cal.App. 724, 728, 252 P. 770, and *Merchants Trust Co. v. Hopkins*, 103 Cal.App. 473, 284 P. 1072. In *Thompson v. Stoakes*, 46 Cal.App.2d 285, 292-293, 115 P.2d 830, there was an attempt, upon direct examination, to show the price at which the subject property had been sold.² In *City of Los Angeles v. Deacon*, 119 Cal.App. 491, 7 P.2d 378, evidence of net profits, deemed improper, was given upon direct examination. *Palladine v. Imperial Valley F. L. Ass'n*, 65 Cal.App. 727, 225 P. 291, stands for the principle that it is error to refuse to instruct a jury that in determining the fair market value of the land in question, they should not consider whether land of similar character could have been purchased at a lower price in other localities, even though such evidence was properly introduced upon the cross-examination of a valuation witness.

In *Atchison, T. & S. F. Railway Co. v. Southern Pac. Co.*, 13 Cal.App.2d 505, 57 P.2d 575, it appeared that the trial court allowed certain valuation witnesses upon redirect examination to testify concerning the significant features of the sales of certain other properties which had been de-

veloped upon cross-examination of those witnesses. The court treated such explanatory testimony upon redirect as if it were erroneous, apparently assuming without detailed analysis that the problem upon redirect is precisely the same as upon direct, regardless of what may have been developed upon cross-examination. It gave considerable attention to the question whether the evidence was prejudicial and concluded that it was not, saying "In a case where as much testimony was taken as in the case at bar, we cannot conceive that such an irregularity was emphasized in the minds of the jury to prejudice them." 13 Cal.App.2d at page 512, 57 P.2d at page 579. Under those circumstances we do not deem the decision in that case determinative of the issue now under discussion.

Finally, in our case the jury was instructed concerning the interrogation of these witnesses as to their knowledge of sales of other property and was advised that such questions were permitted only for the purpose of testing the fairness or honesty of their opinions as to market value of the properties in question and were not to be considered by the jury for the purpose of arriving at the actual market value of the properties in question. The jury, presumably, observed this instruction.

[13, 14] We consider that it was not error to admit the evidence of other sales upon the redirect examination of the witnesses mentioned and that if any error were involved that evidence could not have loomed sufficiently large in the minds of the jury to prejudice them.

[15] (5) *Was the jury erroneously instructed concerning the existing right of access to the highway, to the prejudice of the plaintiff?*

Concerning the defendants' right of access the court advised the jury: "The owner of land abutting on a street or highway has a private right in such street or highway distinct from that of the public for the purpose of access to and egress

2. Disapproval of this extension of the "exclusionary rule to evidence of sales of the identical property in question"

has been expressed in *Bagdasarian v. Gragnon*, supra, 31 Cal.2d 744, 758, 192 P.2d 935, 943.

from his land which cannot be taken nor materially interfered with without just compensation and this is so although another owns the fee in the highway. An abutting owner has the right to a free and convenient use of and access to the highway on which his property abuts. This right of ingress and egress attaches to the land and is a right of property as fully as is the land itself, and any act by which that easement is destroyed or substantially impaired, for the benefit of the public is a damage to the land itself, within the meaning of the constitutional provision under which the owner is entitled to compensation."

Plaintiff claims that this instruction erroneously (1) ignored the thought that the right of access is confined to that which is reasonable for the purpose to which the property is adapted, (2) omitted the fact that such a right is not unlimited but is subject to public control and regulation and is generally subordinate to normal highway uses to which the public may devote its highway, and (3) described the right as unqualified and absolute.

On this subject plaintiff requested and the court refused the following instruction: "Before the taking of access rights by the State an abutting owner did not have the right to insist that the authorities construct and repair roads in such a manner that he might travel unobstructed directly from the highway to any portion of his adjoining land. Generally speaking, an abutting land owner on a public highway has a special easement and user in the public road for access purposes, and this is a property right which can not be damaged or taken from him without due compensation. But an owner is not entitled, as against the public, to access to his lands at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property and his means of ingress and egress are not substantially interfered with by the public, he has no cause for complaint."

The instruction given comports with the concept of "the abutting property owner's

right to a free and convenient use of * * * the highway on which his property abuts" as defined in *People v. Ricciardi*, 23 Cal.2d 390, 397-398, 144 P.2d 799, 803. See also *Rose v. State of California*, 19 Cal. 2d 713, 727-733, 123 P.2d 505; *Bacich v. Board of Control*, 23 Cal.2d 343, 349-355, 144 P.2d 818; *Holloway v. Purcell*, 35 Cal. 2d 220, 229, 230, 217 P.2d 665. It would have been well had the jury also been told that the "extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted." See *Bacich v. Board of Control*, supra, 23 Cal.2d 343, 352, 144 P.2d 818, 824. However, that thought is reasonably inferable from the instruction given, that the abutting owner has the right to a "free and convenient use of and access to the highway." The requested instruction was no better in that regard. It, too, used the words "free and convenient access." Additionally, it would have told the jury that an abutting owner does not have access "at all points" in the boundary between his land and the highway, "although entire access can not be cut off," and that he does "not have the right to insist that the authorities construct and repair roads in such a manner that he might travel from the highway to any portion of his adjoining land," neither of which concepts is appropriate to the facts of this case. Plaintiff's requested instruction was based upon comments of this court made in *Genazzi v. County of Marin*, 88 Cal.App. 545, 263 P. 825. The subject there under discussion was the construction, along the highway, of a ditch which the abutting landowner could bridge at any convenient point. That bears no analogy to the construction of a steel fence which permanently blocks access along the entire frontage save for the 20 foot openings, a permanent blockage of approximately 98.8% of the frontage of one parcel and of 97.7%, 94.6%, 92.6%, and 88.1%, respectively, of the frontages of the others. Plaintiff's instruction could not have helped, would only have confused, the jury.

[16] (6) *Was the jury erroneously instructed concerning the defendant landowners as valuation witnesses?*

Plaintiff complains of an instruction that "Owners are presumed to know the value of their property, and being permitted under the law to testify thereto, their evidence in that regard is entitled to be weighed and considered by the jury."³ Plaintiff says that the court thereby improperly enhanced the credibility of such witnesses in the eyes of the jury.

The court informed the jury of the need of submitting evidence of values to the jury through the testimony of persons qualified to express opinions thereon. It then stated that where witnesses qualified as experts in a particular field of knowledge give their opinions, those opinions are for the assistance of the jury, not to invade its functions; the responsibility of decision rests with the jury; it is its duty to evaluate and appraise the testimony of witnesses who express opinions. It was natural and appropriate next to tell the jury that the defendant landowners were also qualified to express their opinions as to the value of their own properties, evidence to be weighed and considered by the jury. That is what the court did by means of the questioned instruction. Although that instruction might have been more aptly worded, we do not think the jury was misled, especially in view of the fact that the awards made were far below the amounts given in evidence by the defendants as witnesses.

[17] (7) *Was the jury erroneously instructed to reconcile the irreconcilable?*

Plaintiff claims that the opinions expressed as to values and severance damages were irreconcilable and, therefore, it was prejudicial error to instruct the jury "if possible to reconcile the conflicting testimony and to give it all due weight."

The quoted words correctly define the duty of the jury in that regard. *Darling v. Pacific Electric R. Co.*, 197 Cal. 702, 708, 242 P. 703; *Boens v. Bennett*, 20 Cal.App. 2d 477, 483, 67 P.2d 715.

There is nothing misleading or confusing about those words, especially when read in their context. They occurred at the end of

the following instruction. "Determine on the one hand if witnesses have unduly diminished values, or the elements of value or injury which enter into their estimates, or whether they may have omitted altogether elements of value or of injury which in fact do exist, and should be considered. Determine on the other hand if witnesses have exaggerated the values which they have placed on the land, or any part of it; or have exaggerated the elements of injury which have entered into their estimates of depreciated value, or whether they have included estimates of injury which do not exist, or which should not have been considered. Determine if the theory upon which the witnesses on either side proceeded in reaching their conclusions were sound or fallacious. Apply these and similar tests in order that you may be able, if possible, to reconcile the conflicting testimony and to give it all due weight, and to arrive at a just verdict."

That was not, as plaintiff contends, an instruction "to cut somewhere in between" the divergent amounts in evidence, especially in view of other instructions which impressed upon the jury its duty to determine the credit that should be given the testimony of each witness and instructions concerning burden of proof, preponderance of evidence, and other related subjects.

[18] (8) *Did the court erroneously advise the jury that in ascertaining market value they could consider the purpose for which the property was being taken by the State?*

The questioned instruction read as follows: "Just compensation which is guaranteed to the owner whose property is to be taken or damaged for public use, is its market value and the market value of property is determined by a consideration of all of the uses to which it may be applied, as well as the purposes for which it is adapted. For the purpose of ascertaining its value, it is proper to show its condition and surroundings, the uses to which it has been applied, and its capabilities for other uses, including that for which its condemnation

3. This instruction finds support, as a statement of the law, in *Los Angeles*

County F. C. Dist. v. Abbot, 24 Cal.App. 2d 728, 737-738, 76 P.2d 188, 193.

is sought. Its value is not limited either by that of its present use or by the use for which it is sought, since either of these may be less than its actual market value. The owner is entitled to its highest market value for any use to which it is adapted, and any advantage that the property has, present or prospective, by virtue of its position, and for which it may be available, constitutes an element in its value, which is to be considered by the Jury in determining the compensation to be awarded the owner, and which the owner is entitled to show to the Jury by any competent evidence." The asserted error was more academic than real. Under the circumstances of the case we do not see how plaintiff could have been prejudiced by the court telling the jury that for the purpose of ascertaining market value it was proper to show the condition and surroundings of the property taken, the uses to which it has been applied and *its capabilities for other uses*, "including that for which its condemnation is sought." Appellant points to no evidence of the capability or value of this property for use as a highway. Respondents assert there is no such evidence, and we have found none. The court admonished the jury to fix the just compensation "in accordance with the evidence given in this case" and that it was proper to consider "the evidence that has been introduced as to the uses to which the property may be put" in determining the market value, but that "its special value to the State as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value."

Obviously, there was here involved no such question as that involved in *City of Redding v. Diestelhorst*, 15 Cal.App.2d 184, 189, 59 P.2d 177, invoked by plaintiff herein. In the *Diestelhorst* case the reviewing court approved an order which struck certain volunteer testimony that was based "solely upon the ground that the city of Redding [the condemnor] needed it [the property condemned] to carry out the terms of its contract with the California Highway Commission [to provide a bridge site], and that there was no potential demand for

bridge sites from any other source." 15 Cal.App.2d at pages 193-194, 59 P.2d at page 181.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



116 Cal.App.2d 174

HOPKINS v. HOPKINS,

Civ. 19165.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1953.

Rehearing Denied March 9, 1953.

Hearing Denied April 15, 1953.

Action by divorced wife for monthly payments allegedly due under property settlement agreement, which had been incorporated in haec verba in divorce decree. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment for wife, and husband appealed. The District Court of Appeal, Patrosso, J. pro tem., held that, where complaint anticipated defense of limitations and revealed that most of claim was barred by limitations, refusal to allow amendment of answer by inserting applicable subdivision of sections of statute of limitations pleaded in original answer constituted an abuse of the trial court's discretion.

Judgment reversed and remanded for new trial with directions.

1. Divorce ⇐271

Plea of laches would not lie in action at law by divorced wife for monthly payments allegedly due under property settlement agreement, which had been incorporated in haec verba in divorce decree.

2. Limitation of Actions ⇐184

In action by divorced wife for monthly payments allegedly due under property settlement agreement, which had been incorporated in divorce decree, refusal to allow amendment of answer in so far as it undertook to plead limitations to first

count of complaint was not error in view of fact that, under such count, recovery was sought only for five years immediately preceding commencement of action. Code Civ.Proc. §§ 336, 337.

3. Limitation of Actions ⇨183(2)

Statute pertaining to manner in which statutes of limitation are to be pleaded is permissive and not exclusive, and, therefore, statutes of limitation can be properly pleaded by alleging facts which show that claim sued on is barred and by alleging intention to rely upon such defense without a specific reference to the applicable statute of limitations. Code Civ.Proc. §§ 336, 337, 458.

4. Limitation of Actions ⇨183(2)

In action by divorced wife for monthly payments allegedly due under property settlement agreement which had been incorporated in divorce decree, answer which alleged that, although due, no payments had been made since September 1, 1943, and that any right to such payments was barred by statute of limitations, designated by section numbers but not by subdivisions thereof, sufficiently alleged defense of limitations. Code Civ.Proc. §§ 336, 337, 458.

5. Limitation of Actions ⇨184

In action by divorced wife for monthly payments allegedly due under property settlement agreement, which had been incorporated in prior divorce decree, where complaint anticipated defense of limitations and revealed that most of claim was barred by limitations, refusal to allow amendment of answer by inserting applicable subdivision of sections of statute of limitations pleaded in original answer, so that answer would comply with statute pertaining to pleading of limitations, constituted an abuse of discretion. Code Civ.Proc. §§ 336, 337, 458.

6. Limitation of Actions ⇨184

Pleading ⇨256

In determining whether a refusal to permit an amendment of pleading constitutes an abuse of discretion, test applicable is same whether proposed amendment refers to plea of the limitations or to any other meritorious defense.

7. Pleading ⇨235

Only very rarely will a court be justified in refusing leave to amend pleadings so that party can properly present his case.

8. Appeal and Error ⇨948

Where complaint had anticipated defense of limitations, upon appeal following trial court's refusal to allow defendant to amend his answer to make it comply with statute pertaining to pleading of defense of limitations by remedying defendant's mechanical error in failing to specify the particular subdivision of admittedly proper sections of statute of limitations pleaded, plaintiff had burden of establishing that denial was in furtherance of justice. Code Civ.Proc. §§ 336, 337, 458.

9. Appeal and Error ⇨1212(4)

Upon retrial of action by divorced wife for monthly payments allegedly due under property settlement agreement, which had been incorporated in divorce decree, which did not direct compliance therewith by husband, trial court would be required to specifically find whether contract was merged in decree and render judgment upon either decree or contract. Code Civ.Proc. §§ 336, subd. 1, 337, subd. 1, 458.

Geo. B. Bush, Los Angeles, for appellant.

Courtney A. Teel, East Pasadena, for respondent.

PATROSSO, Justice pro tem.

Plaintiff instituted this action on September 19, 1950 by filing a complaint in two counts. The first alleges that on October 18, 1926 plaintiff and defendant, being then husband and wife, entered into a written property settlement agreement under the terms of which defendant agreed to pay plaintiff a sum of \$120 per month for so long as she lived or until she remarried, and \$30 per month for the support of the three minor children of the parties; that plaintiff has not remarried; that on May 9, 1927 the marriage between the parties was dissolved by a decree of divorce of the District Court of the State

of Colorado in and for the City and County of Denver; and that the property settlement agreement was approved "and incorporated in *hacce verba*" in said decree. It is then alleged in paragraph IV: "That no part of said judgment accruing within five years last past and next preceding the commencement of this action, to-wit: the sum of \$7,200.00 has been paid." The second count incorporates all of the allegations of the first except those contained in paragraph IV thereof, last quoted, and then proceeds to allege that no payments have been made on account of said judgment since February 23, 1932," and there is now owing and unpaid to plaintiff upon *said contract and said judgment* the sum of \$26,760.00." (Emphasis added.)

In answer to the first count, in addition to denying any indebtedness to plaintiff, defendant alleges as follows: "that no payments have been made by plaintiff because of or under the terms of said contract in writing since on or about September 1, 1943, although, according to the terms of said written contract, such monthly payments as were agreed to have been paid were due and payable on the first day of each and every month thereafter. * * * This defendant further specifically alleges that any right to recover any sum or sums of money whatsoever have been and are fully and completely barred by the laches of plaintiff and the statute of limitations, and more specifically by sections 336 and 337 of the Code of Civil Procedure." The foregoing is incorporated by reference in answer to the second count, as to which it is further alleged: "This defendant more specifically alleges that no sum or sums are now due, payable or collectible, and that any right to recover any sum or sums have been long since abandoned and waived by the conduct and laches of plaintiff, and are completely barred by the statute of limitations, and more specifically by sections 336 and 337 of the Code of Civil Procedure".

Although no demurrer was interposed to the answer, at the opening of the trial counsel for plaintiff moved to strike therefrom the pleas of laches and the statute of limitations upon the grounds (1) that lach-

es does not constitute a defense to an action at law, and (2) that the plea of the statute of limitations was defective in that, while setting forth the code sections, it failed to specify the particular subdivisions thereof which were relied upon. Counsel for defendant thereupon requested leave to amend his answer as to indicate that subdivision 1 of each of the sections mentioned was intended. Plaintiff's motion to strike the plea of laches was granted as was also the motion to strike the plea of the statute of limitations. As to the latter, however, the trial court stated that its ruling was without prejudice to defendant's right to renew his motion to amend at the conclusion of the trial. When so renewed, however, the motion was denied and judgment was rendered in favor of the plaintiff for the sum of \$46,575.30.

[1,2] Appellant does not complain of the trial court's ruling striking from his answer the plea of laches, and it was clearly correct as such a plea does not lie in an action at law. *Brownrigg v. DeFrees*, 196 Cal. 534, 539, 238 P. 714; *Smith v. City of Los Angeles*, 66 Cal.App.2d 562, 586, 153 P.2d 69. Likewise, no error may be predicated upon the refusal of the trial court to permit an amendment to the answer insofar as it undertook to plead the statute of limitations to the first count of the complaint. Inasmuch as this cause of action sought to recover only the instalments which accrued upon the decree sued upon within five years immediately preceding the commencement of the action, no portion thereof was barred by the statute. A more serious question, however, is presented by appellant's contention that the trial court erred in striking the plea of the statute of limitations to the second count, and that its refusal to permit an amendment to his answer with respect thereto constituted an abuse of discretion.

[3] At the outset it may be noted that prior to the adoption of section 458 of the Code of Civil Procedure it was held that the defense of the statute of limitations might not be pleaded by a mere reference to the particular statute relied upon

but that facts had to be alleged from which it was made to appear that the cause of action sued upon was barred. *Schroeder v. Jahns*, 27 Cal. 274, 279. Since the adoption of section 458 it has been held that in pleading the statute in the manner therein authorized it is necessary to specify not only the applicable section but, if it is divided into subdivisions, the particular subdivision or subdivisions thereof which are relied upon. *Wolters v. Thomas*, 3 Cal. Unrep.Cas. 843, 32 P. 565; *Overton v. White*, 18 Cal.App.2d 567, 574, 64 P.2d 758, 65 P.2d 99; *Hart v. Slayman*, 30 Cal. App.2d 556, 558, 86 P.2d 861; *Davenport v. Stratton*, 24 Cal.2d 232, 246, 149 P.2d 4. Compare, however, *St. Paul Title & Trust Co. v. Stensgaard*, 162 Cal. 178, 180, 121 P. 731, 39 L.R.A.,N.S., 741; *Tipps v. Landers*, 182 Cal. 771, 776, 190 P. 173. The method permitted by section 458 however is permissive and not exclusive. Despite this section it is proper to plead the statute by alleging facts showing that the claim sued upon is barred and an intention to rely upon this defense without specific reference to the applicable statute. *Franklin v. Southern Pac. Co.*, 40 Cal.App. 31, 33, 180 P. 76; *Manning v. Dallas*, 73 Cal. 420, 421, 15 P. 34.

As to the sufficiency of a plea of the statute of limitations under the former method (by alleging facts rather than by reference to the section of the code) it was held in *Franklin v. Southern Pac. Co.*, *supra*, which was an action for damages and an injunction to abate a nuisance consisting of the erection and maintenance of dikes by means of which waters were obstructed, that an allegation in the answer that the dikes described in the complaint had been "erected more than five years prior to the institution of this action, and the cause of action attempted to be set up by plaintiff, if any, is now barred by the statute of limitations of this state; said statute * * * being hereby pleaded as a bar to this action" [40 Cal.App. 31, 180 P. 77] was sufficient. In *Adams v. Patterson*, 35 Cal. 122, 125, which was an action to recover for certain lumber alleged to have been sold and delivered to the defendants over a period of time, an an-

swer alleging that except as to certain items sued for "no action has accrued to said plaintiffs by reason of the matter mentioned and set forth in said complaint at any time within two years next preceding the commencement of this action" was a sufficient pleading of the statute of limitations. And in *Caulfield v. Sanders*, 17 Cal. 569, 572, the court said: "To be available, the plea (statute of limitations) must aver the facts which bring the demand within the operation of the statute—as that the alleged cause of action has not accrued within certain designated years previous to the filing of the complaint." Likewise, in *Boyd v. Blankman*, 29 Cal. 19, 44, the answer was held sufficient as pleading the statute where it alleged "that the pretended cause of action in said complaint set forth did not accrue at any time within five years next before the commencement of this action and he sets up and relies upon the statute in such case made and provided in bar of said action, as if herein specially pleaded".

[4] Conceding that the answer of the appellant here was insufficient as a plea of the statute by the method prescribed by section 458 in that it failed to specify the particular subdivision of the sections therein referred to, we consider first whether or not, in the absence of a demurrer addressed thereto, it was sufficient as alleging facts showing that some portion of the plaintiff's claim at least was barred by limitation. In the light of the decisions last above cited, we believe that it was. It was specifically alleged "that no payments have been made by plaintiff because of or under the terms of said contract in writing since or about September 1, 1943, although according to the terms of said written contract, such monthly payments as were agreed to have been paid were due and payable on the first day of each and every month thereafter" and then proceeds to allege that "any right to recover any sum or sums of money whatsoever have been and are fully and completely barred by the statute of limitations and more particularly by sections 336 and 337 of the Code of Civil Procedure." Conceding, as contended by respondent, that the

latter portion of the answer is a mere conclusion of law, it does allege what is admittedly a fact, namely that no payments thereon have been paid since 1943, and evidences an intent to plead the bar of the statute. If as the authorities cited indicate, it would have been sufficient if appellant had pleaded that except as to all payments accrued within a period of four or five years immediately preceding the filing of the complaint the same was barred, we fail to see why the pleading here is insufficient as alleging that at least all payments which accrued prior to September 1, 1943 were so barred. That the appellant's pleading was deficient if tested by demurrer may readily be conceded but we do not believe that it was so devoid of allegations of fact as to compel us to say that it was a nullity or fatally defective in the absence thereof.

[5] However, if we are in error in the foregoing, we nonetheless are of the view that under the circumstances here it was an abuse of discretion for the trial court to refuse appellant's request to permit a simple amendment necessary to conform the pleading to the requirements of section 458.

[6] Unlike the view obtaining at an earlier date, the defense of the statute of limitations is now regarded as a meritorious one. Indeed it has been said that "Statutes of limitation are vital to the welfare of society, and are favored in the law," *Shain v. Sresovich*, 104 Cal. 402, 406, 38 P. 51, 52, and that "they find their justification in reason and experience." *Medley v. Hill*, 104 Cal.App. 309, 312, 285 P. 891, 893. See also *Seid Pak Sing v. Barker*, 122 Cal.App. 93, 100, 10 P.2d 92; *Moore v. United States F. & G. Co.*, 122 Cal.App. 205, 210, 9 P.2d 562. Mention is here made of this because thereby it is made apparent that in determining whether a refusal to permit an amendment constitutes an abuse of judicial discretion, the same test is to be applied where the proposed amendment has reference to the plea of the statute of limitations as obtains in the case of any other meritorious defense. *Stoops v. Pistachio*, 70 Cal.App. 772, 777, 234 P. 423.

In support of her contention that the trial court did not abuse its discretion in denying appellant's request for leave to amend its pleading of the statute, respondent relies upon a number of cases later to be noticed. However, whether or not refusal of leave to amend a defective pleading constitutes an abuse of discretion is not governed by any hard and fast rule applicable to every case regardless of its particular facts. Thus, under varying circumstances, it has been held that it is not an abuse of discretion to permit an amendment pleading the statute of limitations for the first time after the close of the case or the submission thereof. *Stoops v. Pistachio*, supra; *People ex rel. Webb v. Honey Lake Valley Irr. Dist.*, 77 Cal. App. 367, 374, 246 P. 819; *Wrightson v. Dougherty*, 5 Cal.2d 257, 265, 54 P.2d 13; *Trower v. San Francisco*, 157 Cal. 762, 769, 109 P. 617; *Lilly-Brackett Co. v. Sonnenmann*, 157 Cal. 192, 197, 106 P. 715. On the other hand it has been held not to be an abuse of discretion for a trial court to refuse to permit an amendment to an answer pleading the statute of limitations for the first time, *Cooke v. Spears*, 2 Cal. 409, 413; *Stuart v. Lander*, 16 Cal. 372, 375; *Rudd v. Byrnes*, 156 Cal. 636, 637, 105 P. 957, 26 L.R.A.,N.S., 134.

The question presented here, therefore, is a concrete one: Was it an abuse of discretion for the trial court to refuse permission to make the requested amendment where it involved merely the insertion or addition of the particular subdivision of the sections pleaded in the original answer and where, although it appeared from an inspection of the plaintiff's complaint that all but \$7,200 of the principal amount of her claim was barred, the denial of the right to amend would subject the defendant to liability in a sum many times greater?

A reading of the complaint makes it apparent that the plaintiff fully appreciated the fact that her demand was stale and that she would be confronted with the plea of the statute of limitations, for this is the only explanation for stating her single cause of action in two counts, one for instalments which accrued upon the

decree within a period of five years immediately preceding the commencement of the action, and the other for all instalments alleged to have accrued "upon said contract and said judgment" prior thereto which remained unpaid. Moreover, although the defendant's answer made it abundantly clear that he intended and undertook to plead the statute, albeit perhaps defectively, counsel for respondent made no objection thereto, either by demurrer or otherwise, and waited until the day of the trial to urge the technical objection as to the deficiency of defendant's answer in this respect. The observation of counsel for respondent that the defense is a technical one would, under the circumstances, seem to apply with equal force to his objection to the defendant's pleading. Unless we are now to revert to a day long past when the rights of parties were made to depend upon the technical skill of their respective pleaders rather than the merit and justice of their causes, we cannot give our approval to the action of the trial court here.

[7] The question before us may be placed in its true perspective if we assume that the plaintiff had interposed a demurrer to the answer and the same had been sustained without leave to amend, for this is precisely the effect of the trial court's ruling. Few there are, we believe, who would undertake to sustain such a ruling upon appeal. Certain it is also that such a ruling is incompatible with the philosophy underlying our entire system of pleading, under which, as our Supreme Court has well said: "It can very rarely happen that a court would be justified in refusing a party leave to amend his pleading so that he may properly present his case." *Crosby v. Clark*, 132 Cal. 1, 8, 63 P. 1022, 1024. A practical application of the rule of liberality respecting amendments which is the spirit of our code, is afforded by the case of *Marr v. Superior Court*, 30 Cal.App.2d 275, 276, 86 P.2d 141. That was an action upon a promissory note instituted in a justice's court. During the trial, defendant sought to introduce in evidence proof of his discharge in bankruptcy. "That attempt was opposed because he had

not pleaded a discharge. His attorney took the position that the failure to plead the discharge was his own fault and not that of his client. He made a motion to be allowed permission to plead the discharge in bankruptcy, the motion was denied and thereafter judgment was entered against" defendant. 30 Cal.App.2d at page 277, 86 P.2d at page 142. After the action had been appealed to the Superior Court defendant again applied for leave to amend his answer in this particular and the motion was again denied. Thereupon, defendant applied to the District Court of Appeal for a writ of mandate to compel the Superior Court to permit the requested amendment. In granting the writ the court said in 30 Cal.App.2d at page 278, 86 P.2d at page 143: "The general rule is that amendments are allowed in furtherance of justice when it can be done without prejudice to substantial rights of others, and not simply to give one a technical advantage. Under such circumstances it has been held to be reversible error to deny a motion to file an amended complaint. *Hurley v. Lake County*, 133 Cal.App. 219, 23 P.2d 838. The remaining question of law is whether pleading a discharge in bankruptcy is a meritorious defense. In the instant case that question does not seem to be debatable. In so far as the suit of Bay Cities Loan Company was a claim against Robert L. Marr based on his promissory note, it is patent the discharge in bankruptcy was a meritorious defense."

We now come to a consideration of the authorities relied upon by respondent. Before discussing these in detail however, we desire to point out that in none of them did the answer, as here, undertake to plead any facts tending to show that plaintiff's cause of action was barred in whole or in part by the statute of limitations. Without exception, the answers therein involved pleaded the statute by way of conclusion as authorized by section 458. For this reason alone, if for no other, we believe them distinguishable from the case at bar.

All of the cases cited by respondent have their genesis in *Wolters v. Thomas*, 3 Cal.

Unrep.Cas. 843, 3 P. 565, decided in 1893, and which, prior to *Overton v. White*, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99, decided in 1937, had been cited but once. *Tipps v. Landers*, 182 Cal. 771, 190 P. 173. There, however, the Supreme Court, having affirmed the judgment of nonsuit, found it unnecessary to consider the correctness of the ruling in *Wolters v. Thomas*, but that it seemingly entertained some doubt with respect thereto is evidenced by its comment, later repeated in *St. Paul Title & Trust Co. v. Stensgaard*, 162 Cal. 178, 180, 121 P. 731, 39 L.R.A.,N.S., 741, as follows: "It may be observed, however, that the only subdivision of that section (Code of Civil Procedure, § 337) which could apply to the plaintiff's cause of action would be subdivision 2." 182 Cal. at page 776, 190 P. at page 175. The *Wolters* case, however, may be dismissed with the statement that no question with respect to the right to amend a defective pleading of the statute of limitations was there involved.

Despite this, however, in *Overton v. White*, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99, the District Court of Appeal based its ruling to the effect that it was not an abuse of discretion to deny a request for permission to amend a plea of the statute of limitations where only the section and not the subdivision thereof was specified solely upon the holding in the *Wolters* case that such a pleading was insufficient. The only other authorities referred to by the District Court of Appeal in its opinion dealing with the question of the right to amend are *Wells, Fargo & Co. v. McCarthy*, 5 Cal.App. 301, 90 P. 203; *Rudd v. Byrnes*, 156 Cal. 636, 105 P. 957, 26 L.R.A., N.S., 134; and *Cooke v. Spears*, 2 Cal. 409, all of which involved a refusal to permit an amendment to an answer setting up a defense to the statute of limitations for the first time. They did not involve a situation where, as here, the original answer undertook to plead the statute as a defense but did so imperfectly.

Respondent next refers to *Hart v. Slayman*, 30 Cal.App.2d 556, 86 P.2d 861, but examination thereof readily discloses that

it is without application here for no request to amend was there made.

We have reserved for the last *Davenport v. Stratton*, 24 Cal.2d 232, 149 P.2d 4, for this is the case upon which respondent places greatest reliance. While there is considerable discussion in the course of the majority opinion as to whether it is an abuse of discretion for a trial court to deny leave to amend a pleading of the statute of limitations where only the section and not the particular subdivision thereof is specified, the court did not directly decide the question. It refers in passing to *Overton v. White*, *supra*, and those authorities already mentioned wherein it was held that an abuse of discretion does not necessarily appear where a trial court refuses to permit an amendment setting up the defense of a statute for the first time, and concludes its discussion on this phase as follows, 24 Cal.2d at page 249, 149 P.2d at page 13: "It thus appears that the trial court did not base its denial of defendant's application to amend his answer on the ground that such amendment would not be in furtherance of justice, but upon the ground that the statute of limitations had no bearing upon the case." It then proceeds to hold that the trial court's action in refusing to permit the amendment upon this ground was erroneous. Thereafter, it is said, 24 Cal.2d at page 252, 149 P.2d at page 14: "As the judgment in this case for other reasons must be reversed and the case remanded for a new trial, the court upon a retrial may then rule upon the defendant's application to amend [his] plea of the statute of limitations, and in so ruling decide whether in the opinion of the court, the granting of said application would be in furtherance of justice." From the foregoing it would appear that much, if not all, of the discussion in the opinion with respect to the particular question here present is obiter. It is to be noted also that while all of the justices concurred in the judgment of reversal, Mr. Justice Schauer in a concurring opinion in which the Chief Justice and Mr. Justice Traynor joined, expressly disapproved of so much of the discussion contained in the majority opinion as is related to the ques-

tion of whether it was an abuse of discretion for the trial court to refuse defendant's request to amend its answer in the particular stated. In the course of his opinion, Mr. Justice Schauer said, 24 Cal.2d at page 257, 149 P.2d at page 16:

"After the trial was entered upon, plaintiff objected orally to consideration of that defense. Under the circumstances, since the pleading of the statute was not a nullity, the objection necessarily went to the *form* of the pleading rather than, strictly, to its substance. In response to such objection defendant asked leave to amend the pleading by inserting the subdivision he relied upon. This was not a request for leave to amend to initially plead the statute as a defense—it had already been pleaded sufficiently in the absence of objection—but was a mere request, *as timely as was the objection*, to amend the *form* to cure the defect pointed out by the objection. The trial court refused to permit the amendment and refused to submit to the jury the issues raised by the plea. Both rulings were in my opinion erroneous.

"In making such rulings the court disavowed the defect in the pleading as a ground thereof and declared that it so ruled because 'the statute of limitations has no bearing upon this case.' That position is untenable. The statute pleaded appears to be a meritorious defense *to at least a part of the cause of action sued upon*. The court should have considered defendant's request for leave to amend upon its merits, and, in the circumstances shown, it was an abuse of discretion not to grant such request and thereupon submit the issues to the jury." (Emphasis added.)

[8] If the true test be, as the authorities unite in declaring, that amendments to pleadings are to be liberally allowed in the furtherance of justice, how may it with reason be said that justice was furthered by denying the right to amend where the effect thereof is to deprive defendant of the benefit of a meritorious defense simply because, in undertaking to avail himself

of it, his counsel makes the mechanical error of failing to specify the particular subdivision of the admittedly proper section of the Code of Civil Procedure upon which it is predicated? In answering this question we emphasize the fact that it affirmatively appears from the complaint itself that the defense sought to be pleaded in better form was one which plaintiff anticipated when she commenced her action. In such circumstances we believe that the burden of establishing that the denial of the right to amend was in the furtherance of justice rests upon one who undertakes to sustain the trial court's action rather than, as counsel for respondent suggests, upon the party against whom the ruling operates. Our Supreme Court at a comparatively early date said: "The court refused to allow the plaintiff to amend the complaint. This is generally a matter of absolute right, and, when it is refused, the court must be able to see that the complaint cannot be so amended as to state a good cause of action." *People ex rel. Loy v. Mt. Shasta Mfg. Co.*, 107 Cal. 256, 257, 258, 40 P. 391. If this be true in the case of a defective complaint, it must likewise be true of a defective answer, and certain it is that it cannot be said here that the defendant's answer 'cannot be amended as to state a good' defense of the statute of limitations. Likewise, apposite is the language of the court in *Hanna v. Hirschhorn*, 112 Cal. App. 438, 296 P. 891, hearing in the Supreme Court denied, where, in reversing the action of the trial court in refusing plaintiff right to amend his complaint so as to remedy a defective pleading therein of waiver, Mr. Justice Houser, speaking for the court says, 112 Cal.App. at page 441, 296 P. at page 892: "However, since it is apparent that the cause of action may have been 'imperfectly pleaded' (*Norton v. Bassett*, 158 Cal. 425, 427, 111 P. 253); that by the proposed amendment the issues in the action as originally presented would not have been radically or at all changed; that defendants could not have been taken by surprise by the proposed amendment; that, if permitted, it would have worked no delay; that, by permitting such amendment, no rights of defendants would have been

jeopardized; but, to the contrary, that it would have been in furtherance of justice—it follows that, in refusing leave to plaintiffs to amend their complaint as requested, prejudicial error was committed by the trial court."

[9] There remains one other matter discussed by counsel which requires consideration as it will necessarily arise upon a retrial affecting as it does the determination of whether the five-year period prescribed by subdivision 1 of section 336 or the four-year period prescribed by subdivision 1 of section 337, is applicable here.

In an earlier portion of this opinion we adverted to the rather unusual manner in which respondent undertook to plead her cause of action in that in the first count she alleges that the property settlement was approved and incorporated in the decree of divorce which would have the effect of merging the agreement into the judgment, while in the second count she seemingly predicates her cause of action upon the contract rather than the judgment. An examination of the decree which was introduced in evidence discloses that while it incorporates therein the property settlement agreement in its entirety and approves the same, it contains no provision directing compliance therewith by the defendant. See *Howarth v. Howarth*, 81 Cal.App.2d 266, 269-273, 183 P.2d 670, and compare *Hough v. Hough*, 26 Cal.2d 605, 160 P.2d 15; *Flynn v. Flynn*, Cal.App., 252 P. 358. The trial court found the allegations of the first count of the complaint to be true, thus implicitly determining that the agreement was merged in the judgment. In this aspect the agreement was completely superseded by the decree with the result that no action could thereafter be maintained upon the agreement as such. *Hough v. Hough*, supra. The findings, however, then proceed to refer to said "contract and judgment" with the result that we are left in doubt as to whether the court predicated its judgment upon the decree or the agreement. If upon the latter, the court was in error in awarding judgment upon the decree. *Howarth v. Howarth*, supra. Without undertaking to de-

cide which view is correct, we desire to point out that upon a retrial the court will be required to specifically find upon this issue, as any judgment rendered must be either upon the decree or the agreement—not both, and such finding will also serve to determine the applicable period of limitation.

The judgment is reversed and remanded for a new trial, with directions to the trial court to permit defendant to amend his answer, in accordance with his motion therefor.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 473

BRYANT v. LOS ANGELES TRANSIT LINES.

Civ. 19322.

District Court of Appeal, Second District,
Division 2, California.

March 3, 1953.

The trial court, Irvin Taplin, J., entered a judgment adverse to plaintiff, and plaintiff appealed. The Court of Appeal, Fox, J., held that notice of intention to move for a new trial, filed before signing and filing of findings of fact and conclusions of law, is invalid and ineffectual and does not operate to extend time for filing notice of appeal.

Appeal dismissed.

1. Appeal and Error ⇨425

A timely notice of appeal is essential to appellate jurisdiction. Rules on Appeal, rule 2(a).

2. Appeal and Error ⇨428(2)

A late filing of notice of appeal is a nullity, requiring dismissal of appeal. Rules on Appeal, rule 2(a).

3. Appeal and Error ⇨428(2)

New Trial ⇨153

Notice of intention to move for new trial, filed before signing and filing of

findings of fact and conclusions of law, is invalid and ineffectual for any purpose and does not operate to extend time for filing notice of appeal. Rules of Appeal, rules 2 (a), 3(a).

4. Appeal and Error ⇨428(2)

Where court orally announced on February 19 that judgment would be for defendant, and on March 21, prior to entry of judgment, plaintiff filed notice of intention to move for new trial, and findings of fact and conclusions of law were not signed until March 27, and judgment was entered March 28, and motion for new trial was argued on April 15 and was denied on May 28, and plaintiff filed notice of appeal on June 4, notice of appeal was not timely, and appeal would be dismissed, since notice of intention to move for new trial was premature and did not operate to extend time for appeal from judgment. Rules on Appeal, rules 2(a), 3(a).

George E. Cannady and Edward Carter Maddox, Los Angeles, for appellant.

Trippet, Newcomer, Yoakum & Thomas, Robert C. Carlson and Henry F. Walker, Los Angeles, for respondent.

FOX, Justice.

This is a motion to dismiss plaintiff's appeal.

This case was tried on February 19, 1952, at which time the court orally announced judgment would be for defendant. On March 21st, prior to entry of judgment, plaintiff's notice of intention to move for a new trial was filed. Findings of fact and conclusions of law were signed and filed on March 27. Judgment was entered the next day. Plaintiff's purported motion for a new trial was argued on April 15th and denied on May 28th. Plaintiff's notice of appeal was filed on June 4, 1952.

[1,2] A timely notice of appeal is essential to appellate jurisdiction and a late filing of such notice is a nullity, requiring

dismissal of the appeal. Estate of Hanley, 23 Cal.2d 120, 122-123, 142 P.2d 423, 149 A.L.R. 1250.

By the terms of Rule 2(a), Rules on Appeal, notice of appeal (except as otherwise specifically provided by law) must be filed within 60 days from the date of entry of the judgment, unless the time is extended as provided in Rule 3(a). By the latter rule, when a valid notice of intention to move for a new trial is served and filed within 60 days after entry of judgment, the time for filing notice of appeal is extended until 30 days after either entry of the order denying the motion, or its denial by operation of law. In this connection it is to be noted that a *valid* notice of intention to move for a new trial must be filed in order to bring into operation the extension of time provisions of Rule 3(a). Middle Fork Gold Min. Co. v. Green, 79 Cal.App.2d 350, 351, 199 P.2d 363; King v. Wilson, 101 Cal.App.2d 242, 243, 225 P.2d 270.

[3] A notice of intention to move for a new trial, filed before the signing and filing of the findings of fact and conclusions of law, is invalid and ineffectual for any purpose and does not operate to extend the time for filing notice of appeal. Tabor v. Superior Court, 28 Cal.2d 505, 506-507, 170 P.2d 667; Fong Chuck v. Chin Po Foon, 29 Cal.2d 552, 553-554, 176 P.2d 705; Crillo v. Curtola, 91 Cal.App.2d 263, 277, 204 P.2d 941.

[4] Applying these principles, it is clear that plaintiff's notice of intention to move for a new trial was premature and did not operate to extend the time for appeal from the judgment, which expired in May, 1952. The notice of appeal not having been filed until June 4, 1952, this court has no jurisdiction. Root v. Daugherty, 201 Cal. 12, 14, 255 P. 181; Estate of Hanley, *supra*.

The appeal is dismissed.

MOORE, P. J., and McCOMB, J., concur.

HOPSON v. NATIONAL UNION OF MARINE COOKS AND STEWARDS.

Civ. No. 15246.

District Court of Appeal, First District,
Division 2, California.

Feb. 27, 1953.

Rehearing Denied March 28, 1953.

Hearing Denied April 27, 1953.

Mandamus proceeding by expelled union member seeking reinstatement and damages for loss of earnings resulting from expulsion. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., rendered judgment for expelled member and union appealed. The District Court of Appeal, Patterson, J. pro tem., held that member of labor union expelled by union trial committee which was selected by lot and not by election, as required by union constitution, did not waive right to be tried by properly constituted trial committee by failing to object on that ground at time of committee's selection or at time he appeared before it.

Judgment affirmed.

1. Estoppel ⇨52

A "waiver" is intentional relinquishment of known rights or such conduct as warrants an inference of relinquishment of such rights and may result from express agreement or be inferred from circumstances indicating intent to waive.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

2. Labor Relations ⇨109

Member of labor union expelled by union trial committee which was selected by lot and not by election as was required by the union constitution did not waive right to be tried by properly constituted committee by failing to object on that ground at time of committee's selection or at time he appeared before it.

3. Labor Relations ⇨109

Objection of member of labor union expelled by union trial committee, which was selected by lot not by election as was required by the union constitution, to being tried by committee on ground it was not composed of requisite number of members would not necessarily constitute waiver

of right to object on ground that committee was not properly selected.

**4. Abandonment ⇨4
Estoppel ⇨52**

To make out case of abandonment or waiver of legal right there must be a clear, unequivocal, and decisive act of the party showing such purpose or acts amounting to estoppel on his part.

5. Estoppel ⇨119

Waiver is ordinarily a question of fact.

6. Mandamus ⇨143(2)

Where expelled union member on consulting attorney within three months of expulsion was advised to wait until case involving same issues as his was decided by court and he filed his mandamus proceeding seeking reinstatement of his union membership almost four years after date of expulsion, action was not barred by laches.

7. Limitation of Actions ⇨24(2)

Mandamus proceeding brought by expelled union member, seeking reinstatement in union and damages for loss of earnings resulting from expulsion was an action for breach of contract and where brought within four years from date of expulsion was not barred by statute of limitations. Code Civ.Proc. §§ 337, 339, 340, 343.

8. Labor Relations ⇨103, 117

Union members have contract rights by reason of their membership in union and union member wrongfully expelled is entitled to bring action for breach of contract.

9. Labor Relations ⇨117

Fact that wrongfully expelled union member had previously worked as chief steward, cook, assistant cook, scullery man and pantryman and that it would be difficult to determine how continuous his employment would have been and in what classification he would have been employed, if not expelled, did not prevent recovery of damages.

10. Labor Relations ⇨116, 117

Where proceedings expelling member from union were before committee which

was not selected in accordance with provisions of union constitution, court judgment granting reinstatement and damages in place of remanding case to union for further proceedings was proper.

Gladstein, Andersen & Leonard and George R. Andersen, San Francisco, for appellant.

Allan L. Sapiro, G. C. Ringole, San Francisco, Aaron Sapiro, Los Angeles (McNeil, Markley & Sapiro and Elinor R. Carson, San Francisco, of counsel), for respondent.

PATTERSON, Justice pro tem.

Plaintiff was a member of the defendant union and was purportedly expelled. Defendant appeals from a judgment in a mandamus proceeding directing the reinstatement of plaintiff in the union and awarding him damages for loss of earnings which resulted from the expulsion.

The plaintiff joined with other members of the union in opposing the adoption of a new constitution. This group published a paper which was highly critical of the union's officers and their conduct of the union. As a result of this, charges were filed against the plaintiff and he was expelled from the union. The court found that the trial committee was not drawn in the manner provided in the constitution of the union. The provisions of the constitution read as follows: "Article VIII. Section 1. In case of an accusation brought by one member against another, the membership shall elect a committee of five (5) members, two (2) of whom, in so far as possible, shall be of the same classified grade as the accused, the balance to be selected at large, whose duty it shall be to investigate and try such charges and report their findings together with recommendations for disposition of the case at the next regular meeting of the Headquarters or Branch electing such committee. The punishment to be administered shall be finally determined by the decision of such meeting at Headquarters or at Branches except as otherwise provided in this Constitution. * * *

"Article XIV. Section 5. Members may be expelled from this Union only by vote of a Supreme Quorum, after such action has been recommended by a Trial Committee. To expel a member requires a two-thirds majority of the Supreme Quorum."

[1,2] Instead of the Trial Committee being elected as required by the union constitution, it was drawn by lot. The committee was the same committee, appointed at the same time, and drawn in the same manner, as that which heard the charges against two of the defendants in *Harris v. Nat. Union etc. Cooks and Stewards*, 98 Cal.App.2d 733, 221 P.2d 136, 139. The Court there disposed of defendant's contention that the committee was properly drawn in the following language: "As to the other two plaintiffs it is admitted that the Trial Committee which heard the charges against them was not elected by the union as expressly required by section 1 of art. VIII above quoted. The original members of that committee were drawn by lot and later some members were succeeded on the committee by others who were selected by a single officer of the union. The provision of the constitution that 'the membership shall elect a committee' is too clear to need construction and was as clearly violated. No custom of the union to choose the committee in another fashion can alter the plain meaning of the plaintiffs' contract right to be tried by a committee *elected by the membership*. A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning."

Defendant seeks to distinguish this case from *Harris v. Nat. Union etc. Cooks and Stewards*, supra, on the grounds that the impropriety in the selection of the trial committee was waived by the failure to object either at the time of its selection or at the time the plaintiff first appeared before it. After the committee was selected by lot the Chairman announced that this was the committee as elected and if there was no objection it would be the trial committee. The contention is that the plaintiff being present should have objected and his failure to do so constituted a waiver.

A waiver is defined in *Bastanchury v. Times-Mirror Co.*, 68 Cal.App.2d 217, 240, 156 P.2d 488, 500, as "the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive." The record shows that the plaintiff was a man of limited education and had difficulty in understanding even rather simple terms. It would be manifestly unjust to find that through a technical parliamentary maneuver the plaintiff has relinquished a substantial right affecting his livelihood and which the record does not disclose he knew he was relinquishing.

[3-5] Plaintiff appeared before the committee at the time appointed but refused to proceed because there were only three members present. He claimed the constitution required the presence of five members. He left and returned the next day and again refused to proceed for the same reason, there being only three members of the committee present. No witnesses were called by the committee. The committee did recommend expulsion. It is urged that three members of the committee constituted a quorum legally entitled to act. When the plaintiff objected to a trial by the committee solely because there were not five members present, it is claimed he thereby waived any other objection which he might have as to the manner in which the committee was selected. This does not follow. His objection to being tried by this committee on one ground would not necessarily constitute a waiver of his right to object on other grounds. The defendant has cited cases for the rule that where a party submits himself to the jurisdiction of a committee which is improperly selected and is tried by it without objection, he may not later complain. These cases are not in point here because the plaintiff did object to the committee and did not submit to its jurisdiction. "To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on

his part." *Stewart v. Leasure*, 12 Cal.App. 2d 652, 55 P.2d 917, 919. Waiver is ordinarily a question of fact. *Lyons v. Brunswick-Balke etc. Co.*, 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173. The circumstances disclosed by the record support the trial court's finding that the defendant did not waive his right to a trial before a committee elected in accordance with the provisions of the union constitution.

[6] Defendant further claims that the action is barred by laches. The plaintiff was expelled on September 27, 1945, and filed his petition for a writ of mandate six days short of four years from the date of his expulsion. In December, 1945, he placed the matter in the hands of his attorney, John A. Foley. Mr. Foley advised him that he would have to look into the case and see what could be done. Thereafter the plaintiff was at sea on various voyages and spent some time on the Island of Guam. In September, 1947, he returned to San Francisco and Mr. Foley advised him that the Harris case was being litigated and he was waiting the outcome of this case. He again went to sea. On some of the occasions when he returned from sea he saw his attorney, and on some occasions he was unable to see him. In August or September, 1949, he was advised that Mr. Foley had died. He thereupon employed his present attorneys who without delay filed this action within the four year period and before the final determination of the Harris case. We think it clear that in a mandamus proceeding relief may be denied upon the ground of laches. *Griffin v. Internat. Longshoremen's Union*, 109 Cal.App.2d 823, 241 P.2d 552. However, "speaking generally, we think it must be said that there is no hard and fast rule as to the length of time that would bar such an action as this, that much depends upon the peculiar circumstances of the case; that a large discretion is confided to the trial judge, and the disposition of an appellate court is and should be to respect that discretion and not to interfere with his conclusion unless manifestly an injustice has been done." *Pratt v. Pratt*, 43 Cal.App. 261, 279, 184 P. 956, 963. The application

of the doctrine is stated in *Newport v. Hatton*, 195 Cal. 132, 147, 231 P. 987, 992, as follows: "Each case where laches is depended upon must rest upon its own facts. It is difficult to state, as a general proposition, what period will bar relief * * * and there is wide scope for the exercise of the discretion of the chancellor. *Dufour v. Weissberger*, 172 Cal. 223, 225, 155 P. 984; 10 Cal.Jur., p. 526, par. 64. Where an express statute of limitations applies to a suit in equity, mere delay to commence a suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding, and a party cannot be refused a hearing if he shall bring his action within the prescribed period. *Lux v. Haggin*, 69 Cal. 255, 267, 4 P. 919, 10 P. 674. It is as well settled, however, that courts of equity will often refuse relief if there has been such delay and passive neglect on the part of the complainants as, coupled with facts amounting to acquiescence in the acts complained of, will render the granting of the relief inequitable. *Stevenson v. Boyd*, 153 Cal. 630, 636, 96 P. 284, 19 L.R.A.,N.S., 525. In determining whether or not the delay has been unreasonable, regard will be had to any circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendants, or of other persons, have been prejudiced by the delay." The precise issues involved in the plaintiff's case, except for the amount of damages, were being litigated in the *Harris* case. It would not seem unreasonable for the plaintiff to assume that the determination of that case would determine the primary issue of liability here and that it would not have to be relitigated. Having in mind all the circumstances we cannot say that the delay resulted in a manifest injustice to the defendant or that the trial court abused its discretion.

[7,8] Defendant further urges that the action is barred by Sections 337, 339, 340 and 343 of the Code of Civil Procedure. The contention is made that the action is one in tort rather than contract and the one year statute of limitations applies. We think

it is settled, however, that the action is one for breach of contract. As stated in *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal.2d 134, 142, 231 P.2d 6, 10, 21 A.L.R.2d 1387, "Plaintiff likewise had contract rights by reason of his membership in the union, and he was entitled to bring an action for breach of that contract if he was wrongfully expelled." In *Harris v. Nat. Union etc. Cooks and Stewards*, supra, 98 Cal.App.2d at page 736, 221 P.2d at page 138 the Court said, "The constitution of the union constitutes a contract with the members and is the measure of the authority conferred upon the organization to expel or otherwise discipline them. *Smetherham v. Laundry Workers' Union*, 44 Cal.App.2d 131, 136-137, 111 P.2d 948; *Dingwall v. Amalgamated Ass'n etc.*, 4 Cal.App. 565, 569, 88 P. 597; *Bush v. International Alliance*, 55 Cal.App.2d 357, 364, 130 P.2d 788; *Weber v. Marine Cooks' & Stewards' Ass'n*, 93 Cal.App.2d 327, 334-335, 208 P.2d 1009." This action being upon a contract in writing it is governed by the provisions of Section 337 of the Code of Civil Procedure which prescribes a four year period. Having been brought within four years the action is not barred.

[9] Cases of this character present a rather difficult problem in the matter of the assessment of damages. It is difficult to determine how continuous the employment of plaintiff would have been and in what classifications he would have been employed if he had not been expelled. In the period previous to his expulsion he had worked as a chief steward, cook, assistant cook, sculleryman and pantryman depending upon the kind of work available. The same problem was presented in *Harris v. Nat. Union etc. Cooks and Stewards*, supra. We think the correct rule applicable to the facts here was stated in that case, 98 Cal.App.2d at page 738, 221 P.2d at page 139 as follows: "Appellants are in no position to complain that it is not certainly established by the evidence that if plaintiffs had not been expelled from the union their employment would have been continuous. 'One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape

liability because the damages could not be measured with exactness.' Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297-298, 149 P.2d 177."

[10] Upon the authority of Cason v. Glass Bottle Blowers Ass'n, supra, defendant complains that the form of judgment was in error in not remanding the case to the defendant union for further proceedings. In that case the court was dealing with a procedural matter before a duly constituted committee. In the present case the proceedings were before a committee which was not selected in accordance with the provisions of the union constitution, and therefore its action was a nullity. The rights of the union to proceed in accordance with its constitution does not require an order of the court.

Judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



EMPLOYERS MUT. LIABILITY INS. CO.
OF WISCONSIN v. INDUSTRIAL
ACC. COMMISSION et al.*
Civ. 19373.

District Court of Appeal, Second District,
Division 3, California.
Feb. 26, 1953.

Hearing Granted April 23, 1953.

Proceeding on application for writ to review an order of the Industrial Accident Commission awarding compensation for personal injuries sustained by employee in fall, solely as result of an idiopathic seizure. The District Court of Appeal, Shinn, P. J., held that when injury resulted from the striking of employee's head upon cement floor after fall by such seizure, injury was not compensable, such cement floors being common outside the industry and not constituting an instrumentality creating a special risk of employment.

Award annulled.

1. Workmen's Compensation ⇐649

An employee who suffers a fall, solely by reason of an idiopathic seizure, and who is injured by striking his head upon a cement floor, sustains a compensable injury if in falling the employee comes in contact with some instrumentality which creates a special risk of the employment. Labor Code, §§ 3208, 3600.

2. Workmen's Compensation ⇐710

Injuries are not compensable for sole reason that the service being performed required the employee to be where he was when the injury occurred. Labor Code, §§ 3208, 3600.

3. Workmen's Compensation ⇐608

Repeal of provision for payment of compensation if, at time of accident, employee is performing service growing out of and incidental to his employment, and is acting within line of his duty or course of his employment as such, and subsequent enactment of statutes providing liability for accidental injuries arising out of and in the course of the employment, disclosed legislative intent that compensation should not thereafter be awarded for sole reason that injury arose in the course of employment, but that additional requirement was that injury must have arisen out of the employment. Labor Code, §§ 3208, 3600.

4. Workmen's Compensation ⇐649

Employee who suffered a fall, solely by reason of an idiopathic seizure, and who was injured by striking his head upon a cement floor, had not suffered the injury because of any instrumentality which created a special risk of his employment, such floors being common outside industry as well as within it, and consequently the injury was not compensable. Labor Code, §§ 3208, 3600.

5. Workmen's Compensation ⇐3

Workmen's compensation is not a system of accident or health insurance. Labor Code, §§ 3208, 3600.

6. Workmen's Compensation ⇐612

An injury which occurs under conditions which the employee encounters daily, away from his work, which conditions do not create a special hazard of the employ-

ment, is not an "industrial injury" arising out of employment within the concept of that term in the Workmen's Compensation statutes. Labor Code, §§ 3208, 3600.

See publication Words and Phrases, for other judicial constructions and definitions of "Industrial Injury".

Spray, Gould & Bowers, Los Angeles, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, for respondents Industrial Acc. Commission.

SHINN, Presiding Justice.

On August 23, 1951, Fred E. Gideon, an employee of Douglas Aircraft Company, suffered an idiopathic (epileptic) seizure while at work, fell to the concrete floor, and in the throes of seizure struck his head several more times on the floor until a fellow employee cushioned his head. For this injury he was awarded compensation by respondent commission, reversing the finding and conclusion of the referee that the injury did not arise out of Gideon's employment.

Petitioner, the employer's compensation insurance carrier, seeks annulment of the award, contending that the injury was not a compensable one under §§ 3208 and 3600 of the Labor Code, in that it did not "arise out of" the employment. Nothing had occurred in Gideon's work which induced the seizure. It was due solely to the condition from which he was suffering.

[1] The present proceeding squarely presents the question whether an employee who suffers a fall, solely by reason of an idiopathic seizure, and is injured by striking his head upon a cement floor, thereby sustains a compensable injury. It is settled that such an injury is compensable if in falling the employee comes in contact with some instrumentality which creates a special risk of the employment. *National Automobile & Casualty Ins. Co. v. Industrial Acc. Comm.*, 75 Cal.App.2d 677, 171 P. 2d 594 (falling against a sawhorse). This rule is now recognized in other jurisdictions. *Barath v. Arnold Paint Company*, 238 N.Y. 625, 144 N.E. 918 (fall from a

scaffold); *Mausert v. Albany Builders' Supply Co.*, 250 N.Y. 21, 164 N.E. 729 (fall out of a truck).

The reason for the rule was stated in the *National Automobile* case, supra, 75 Cal. App.2d at page 681, 171 P.2d at page 596, "The respondent commission, under the evidence quoted, was justified in concluding that the sawhorse against which the applicant fell constituted a *special* risk of the employment and that his traumatic injuries were to be attributed to its presence at his place of work." (Emphasis added.) There is, however, a sharp division of authority where the injury is not caused or contributed to by any instrumentality used in the industry which constitutes a special hazard of the service. Such is the situation in the present case. The following are typical cases in which awards of compensation were for this reason denied. *Lander v. British United Shoe Machinery Co. Ltd.*, (Ct.App.England & Wales 1933), 102 L.J. (K.B.) 768, 26 B.W.C.C. 411; *Andrews v. L. & S. Amusement Corporation*, 1930, 253 N.Y. 97, 170 N.E. 506; *Cinmino's Case*, 1925, 251 Mass. 158, 146 N.E. 245, 37 A.L.R. 769; *Bibb Mfg. Co. v. Alford*, 1935, 51 Ga.App. 237, 179 S.E. 912; *Stanfield v. Industrial Commission*, 1946, 146 Ohio St. 583, 67 N.E.2d 446. In other jurisdictions such injuries have been held to be compensable. *Wright & Greig, Ltd. v. M'Kendry*, (Scottish Ct. of Session 1919), 56 S.L.R. 39, 11 B.W.C.C. 402; *New Amsterdam Casualty Co. v. Hoage*, 1932, 61 App.D.C. 306, 62 F.2d 468; *Savage v. St. Aeden's Church*, 1937, 122 Conn. 343, 189 A. 599; *Barlau v. Minneapolis Moline Power Implement Co.*, 1943, 214 Minn. 564, 9 N.W.2d 6; *Protectu Awning Shutter Co. v. Cline*, 1944, 154 Fla. 30, 16 So.2d 342; *Pollock v. Studebaker Corp.*, Ind.App.1951, 97 N.E.2d 631. These conflicting conclusions were reached by the courts under statutes which did not differ in material respect from our own. The reasoning in the first line of cases is that if the condition in which the employee receives injury is one which the general public encounters daily at places other than places of employment, and is therefore not peculiar to the employment, it does not arise out of the employment and is therefore not

compensable. This view is well stated in the majority opinion in *Andrews v. L. & S. Amusement Corporation*, 253 N.Y. 97, 170 N.E. 506, 507. The facts were that Andrews, while walking on an alleyway at the corner of a building where he was employed to do some painting, "had an epileptic seizure which caused him to fall, and in falling his head struck the cement sidewalk, whereupon he sustained injuries in the nature of a fractured skull, from which he died on the same day." It was said 170 N.E. at page 507: "The epileptic seizure caused him to fall to the sidewalk, striking his head and fracturing the skull. Where was there any added risk due to the employment? The same result might have followed if he had been coming to or going from his employment, or even in his own house, if he had fallen and struck his head on a chair, table, or other hard substance. If the epileptic fit itself had killed him, like an attack of heart disease, all concede that there would be no recovery. The risk of falling to the pavement in such a fit was not due to the employment. * * * There was no accident; he fell because of internal disorders, and the injury resulted from no added risk because of his employment. This distinction runs through many cases." The court annulled an award of the State Industrial Board and held that the accidental injuries did not arise out of the employment. After a discussion of numerous cases, including those of the courts of Scotland and England, the court said 170 N.E.

at page 508: "Following, therefore, the distinction which has been drawn by this line of cases, and realizing that the Workmen's Compensation Law has not yet been extended to diseases which cause a man's death, unaccompanied by any *added* risk due to the employment, the order of the Appellate Division [226 App.Div. 623, 236 N.Y.S. 625] should be reversed and the claim dismissed, with costs against the State Industrial Board in this court and in the Appellate Division." (Emphasis added.)

We think there will not be found a more thorough or able discussion of the problem than it received in *Lander v. British United Shoe Machinery Co., Ltd.*, supra, (Ct.App. England & Wales 1933), 102 L.J. (K.B.) 768; 26 B.W.C.C. 411. A workman had fallen on the brick floor of a lavatory in his place of employment during an epileptic fit and died as a result of his injuries. The county court judge had awarded a death benefit to the widow, which judgment was reversed on appeal. Each of the Lords who heard the appeal affirmed the proposition announced by Lord Russell in the case of *Lawrence v. George Matthews (1924), Ltd.*, (1929) 1 K.B. 1; 21 B.W.C.C. 345, at p. 362: "If a workman is injured in an accident resulting from a risk to which every one is subject, but which is not necessarily incident to the performance of his work or to which he is not by his work abnormally subjected, the accident does not arise out of his employment." Excerpts from the opinions appear below.¹

1. Lord Hanworth, M.R.: "But Lord Haldane, in the case of *Upton v. Great Central Railway Company* (supra), says this at p. 273; 'A direct physical cause will, of course, fall among those which are included in sect. 1 of the Workmen's Compensation Act, but the scope of the Act and the inquiry which it enjoins appear to extend also to the general conditions under which the workman has been directed to act. If he simply dies of heart disease the effect of which has not been aggravated by anything which his employment led to his doing, or if he is struck by lightning in a place where the conditions of his employment rendered him no more exposed to danger than any member of the public not so employed, the injury will not have resulted from the conditions under which he was

being employed.' But then he goes on: It is not easy to lay down conditions which must be fulfilled whenever a man falls to bring him within or take him outside the statute. The mere fact that the incidents of his accident have arisen in the course of the employment is not in itself sufficient. 'They must be such that the accident has some sort of causal relation with them, although not necessarily an active physical connection.'"

[p. 418]: "It seems almost grotesque to say that in order to avoid a possible fall by a possible epileptic person some provision for a soft floor should have been made in this particular locality of the world. * * * If the locality to which the man is induced to go by his employment is one which contains a danger, and that danger becomes active, and the

The reasoning of the cases which take the opposite view was stated in the dissenting opinion of Judge O'Brien in the Andrews case, *supra*, 170 N.E. 506, who said 170 N.E. at page 510: "The question always is: Did the workman's employment require

him to be in the place, whether a floor or a walk or other structure, which caused his injury?" This notion that an injury is compensable if the employment caused the employee to be present at the time and place of the accident has support in the majority

man is injured, as in the case of *Lawrence v. George Matthews (1924), Ltd.* (*supra*), then he can recover. But if the man is in perfect safety upon premises adequate and proper for that purpose, and then he without any extra strain to be imputed to his work, or any other inducement thereto, falls down entirely from a cause which is particular and peculiar to himself, I do not think there is evidence which can impose liability upon the employer."

Lawrence, L. J.: "Speaking for myself, and apart altogether from the authorities cited to us, I cannot conceive how it can reasonably be said that the fatal injury which this unfortunate man sustained was an injury by accident arising out of his employment within the meaning of sect. 1 of the Act. His fall was caused by a fit which he might have had at any time and in any place, and which was not in any way caused by or brought on by his employment. That the employer should be held liable because the fit happened to come on whilst the workman was on his premises would, I think, be extending the liability of employers under the Act beyond all reasonable bounds.

* * * The lavatory floor was no more dangerous than the pavement in the street, or in fact any hard floor. The evidence shows that a man in an epileptic fit usually falls backwards and is, of course, liable to fracture his skull if the fit should occur whilst he is walking or standing on a hard surface. * * * The workman was as safe on the brick floor of the lavatory as he would have been on the stone floor of his own kitchen, or would have been in the street, or in fact at any other position in which a man ordinarily has to stand or walk. I agree with Lord Salvesen that if it were enough in circumstances like the present to say that the fall was the accident, and that this was the proximate cause of the injury, and that it was unnecessary and irrelevant to inquire further, the words 'arising out of the employment' might as well be erased from the Act. * * * The only evidence here is that the accident happened in the lavatory; but there is no evidence that it resulted from any danger connected with the lavatory as a lavatory. I confess that I am glad to be able to come

to this conclusion, as a contrary decision would have the effect of preventing men like the deceased who suffered from occasional fits of epilepsy from getting any employment."

Slessor, L. J.: "I agree that this appeal must be allowed. When we look at the first section of the 1925 Act—and these words are contained in the 1906 Act and in the 1897 Act—we find that it is necessary, in order that a workman shall succeed, to show that personal injury by accident arose out of and in the course of the employment. In listening to the argument which we have heard, and in considering the award of the learned judge, it seems to me, as has been suggested by Lord Salvesen in the case of *Wright & Greig, Ltd. v. M'Kendry (1918)*, 11 B.W.C.C. 402, that if those contentions be right, the words 'arising out of' do not in any way limit the ambit of the phrase 'in the course of'; for what in substance is said is this: Any man meeting with any accident in any place where there are not alleged any circumstances of special or peculiar danger, may recover compensation because he has in that place met with an injury. That seems to me far too wide if one had to consider the matter afresh now for the first time; but there is ample authority, in my opinion, which shows us that such a conclusion would be an improper one, and where the accident falls, as it does fall, if it falls at all in any way to be considered within the classes which have been so clearly stated by Russell, L. J., as he then was, in *Lawrence v. George Matthews (1924), Ltd.*, [1929] 1 K.B. 1; 21 B.W.C.C. 345, it falls within the fourth of his classes, and it would have here to be shown that the accident had occurred to the workman by reason of his employment bringing about his presence at the particular spot and so exposing him to a danger which is in fact proved to exist at that particular spot. * * * There was no exposure to danger at a particular spot on the facts of this case except because this man was an epileptic. The fact of his epilepsy had no relation to his employment, and in my view all nexus of any kind between the unhappy casualty which occurred and the man's employment is completely lacking."

opinion in *Wright & Greig, Ltd. v. M'Kendry*, supra, 56 S.L.R. 39, Vol. 11, B.W.C.C. 402, which adopted the rule that had been previously stated as follows (p. 408): "In my opinion if the conditions of the workman's employment obliged him to work in a particular building and thereby exposed him to the risk of the accident which has happened, this may be described as a peculiar danger to which from the nature of the employment the workman is exposed." *This is merely saying that if the injury occurs in the course of the employment it is compensable.* The cases do not all confess to this concept but they nevertheless utilize it. It cannot be denied that they have allowed compensation for the reason that the service being performed required the employee to be present at the time and the place of the accident, although there was no special hazard involved. If liability exists whenever the employee is injured while at work, namely, in the course of the employment, the requirement that it must also arise out of the employment means nothing. We consider the reasoning in the non-liability cases to be sound and without logical answer in the cases which have imposed liability. The rule we approve gives effect to the provisions of the several statutes of our state that the injury, to be compensable, must arise out of the employment, whereas the cases which hold to the contrary rule have in effect read that condition out of similar statutes. Our Supreme Court, speaking through Justice Meyers, in *Storm v. Industrial Acc. Comm.*, 191 Cal. 4, 7, 214 P. 874, 875, in rejecting the latter view, gave approval to the doctrine: "It is not sufficient for a workman to say, 'I should not have been injured unless I had been where I was and doing the work which I was employed to do.'" This is to say it is not sufficient that the injury occurred in the course of the employment. To the present time the California cases have approved and followed this principle.

[2] A study of the history of our several compensation laws also leads to the conclu-

sion that compensation is not provided for injury for the sole reason that the service being performed required the employee to be where he was when the injury occurred.

Our first compensation law, the Roseberry Act, § 3(2), Stats, 1911, Ch. 399, p. 796, provided workmen's compensation "Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment and is acting within the line of his duty or course of his employment as such." There was no requirement that the accident arise out of the employment in order to impose liability upon the employer.

Section 21, Article XX of the Constitution, being a new section adopted October 10, 1911, authorized the legislature to enact legislation to "create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party." Likewise, the amendment of § 21, adopted November 5, 1918, empowered the legislature to enact legislation "to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party."

[3] It was therefore competent for the legislature, under the authority thus delegated, to create a liability of employers for any injury incurred in the course of employment even though it did not "arise out of" the employment. The legislature repealed the Roseberry Act and passed the Boynton Act (Stats. 1913, Ch. 176, p. 279). As stated in its title, it related to accidents "causing the injury or death of employees in the course of their employment," and it provided in § 12 as set out below.² The liability thus created was not as broad as that envisioned by the Constitution. It will

2. "Sec. 12. (a) Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an em-

ployer for any personal injury sustained by his employees by accident arising out of and in the course of the employment and for the death of any such employee

be noted that in the first sentence of § 12 the injury must be caused by accident "arising out of and in the course of the employment", whereas in paragraph (3) one of the conditions of liability was: "Where the injury is proximately caused by accident" etc. If these two provisions, when read together, were at all ambiguous or conflicting, they were brought into harmony by the amending act, Stats.1915, Ch. 607, p. 1079. It substituted in § 12(a), subdivisions (1) and (2), the word "injury" for the word "accident" and amended subdivision (3) to read as set out below.³ In this subdivision the word "employment" was substituted for the word "accident." Thus it was made crystal clear that liability should exist for injury sustained in the course of the employment only in case it arose out of the *employment*. The next act was Statutes of 1917, Ch. 586, p. 831. Section 6(a) of the act followed without substantial change the above provisions of the 1915 Act, as did also the amendments of 1923 and 1929.

Sections 3208 and 3600 of the Labor Code read as set out below.⁴

Except for the Roseberry Act none of the workmen's compensation acts which

preceded adoption of the Labor Code provided liability for accidents or injuries other than those *arising out of* and in the course of the employment. We think there is no reason to doubt that the terms "arising out of" and "proximately caused by" the employment whenever found in a single statute were used in the same sense.

If we were to be guided by the former Roseberry Act, or if the present law was of the broad scope authorized by the Constitution, there would be no reason for questioning the propriety of the award. If we were in doubt as to the purpose of the legislature in imposing the condition that the injury must arise out of the employment, from a consideration of the phraseology of §§ 3208 and 3600 of the Labor Code, it would be dispelled by the fact that our original compensation act contained no such requirement and that it has been incorporated in all subsequent acts. The award in question here could be supported only upon the theory that "arising out of the employment" means no more than that the employee in the course of his work was at the place of the injury at the time the injury occurred. No more than this was required by the Roseberry Act, but that concept of

if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

"(1) Where, at the time of the accident, both the employer and employee are subject to the compensation provisions of this act.

"(2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment as such.

"(3) Where the injury is proximately caused by accident, either with or without negligence, and is not so caused by the intoxication or the wilful misconduct of the injured employee."

3. "(3) Where the injury is proximately caused by the employment, either with or without negligence, and is not so caused by the intoxication or the wilful misconduct of the injured employee."

4. § 3208. "Injury" includes any injury or disease arising out of the employment, including injuries to artificial members."

§ 3600. "Liability for the compensation provided by this division, in lieu of any

other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

"(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

"(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

"(c) Where the injury is proximately caused by the employment, either with or without negligence.

"(d) Where the injury is not caused by the intoxication of the injured employee.

"(e) Where the injury is not intentionally self-inflicted." (Based on Stats.1917, ch. 586, § 6, p. 834).

the proper scope of workmen's compensation has been consistently rejected by the legislature beginning with the act of 1913. This has not been due to any real or supposed constitutional limitation for, as we have said before, the legislature under § 21 of Article XX at any time could have created a liability of employers for injuries occurring in the course of the employment. When the legislature discarded the broad basis of compensation of the Roseberry Act it intended that those who should administer the subsequent laws should not award compensation for the sole reason that the injury arose in the course of the employment, or as some courts have stated it, because the employee was required in his work to be at the place when and where he was injured. To say that an injury arises out of the employment if the employee was required to be at the place where the injury occurred would effectively read out of our law the requirement that the injury must arise out of the employment, as well as in the course of the employment, and would, in our opinion, set at naught the expressed will of the legislative branch of our government.

[4] It is clear to us that the claimant Gideon did not suffer an injury which arose out of his employment. The place where he was working had a cement floor, but this was not a condition peculiar to the employment. Cement floors or other hard floors are as common outside industry as within it. The floor did not create a hazard which would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or a hard floor existed. Had Gideon fallen in the same manner upon such a floor or surface at any place other than the place of his employment he would have suffered the same injury and the hazard would never have been less, except when he was in a place where he might fall upon something so soft or resilient that the blow would not result in injury. We would know of few such

places where humans might ordinarily be found.

[5, 6] Workmen's compensation is provided as a part of the cost of industrial injuries which should be borne by business and the general public. It is not a system of accident or health insurance. We have seen that our statutory law, except for the Roseberry Act, has never recognized as a charge upon industry compensation for any and all injuries which occur in the course of employment. In summary, the phrase, "arising out of the employment," means that there must be a causal connection between the nature of the service, or the hazards of the employment, itself, and the injury. Otherwise it would mean nothing. An injury which occurs under conditions which the employee encounters daily, away from his work, and which do not create a special hazard of the employment, is not an industrial injury within the proper concept of that term or the scope of the Workmen's Compensation Law as we understand it.

There is a passage in the opinion of Lord Lawrence, L. J., quoted above, which might well be pondered by those who would extend the coverage of workmen's compensation to any and all cases, however extreme, to which it might be applied upon the most tenuous theories. That statement is: "I confess that I am glad to be able to come to this conclusion, as a contrary decision would have the effect of preventing men like the deceased who suffer from occasional fits of epilepsy from getting any employment." Extending the coverage of workmen's compensation to non-industrial injuries, while favoring a few, may yet, if carried to unreasonable lengths, render many afflicted persons unemployable. It would be a short sighted policy, and one which should not be developed by decisions of the commission or the courts.

The award is annulled.

WOOD and VALLÉE, JJ., concur.

116 Cal.App.2d 266

**McNICHOLS v. NELSON VALLEY BLDG.
CO. et al.
Civ. 4387.**

District Court of Appeal, Fourth District,
California.

Feb. 25, 1953.

Hearing Denied April 23, 1953.

Action to set aside conveyance to defendants and for damages on ground that conveyances had been procured by duress and illegal business compulsion. The Superior Court of Fresno County, Milo Popovich, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that fact that partnership between plaintiff and defendants for development of subdivision had not procured a general contractor's license, did not render the partnership agreement void ab initio and make defendants' action for an accounting and dissolution of partnership wrongful.

Judgment affirmed.

1. Licenses ⇨39.44

Partnership agreement with respect to building of dwellings and development of subdivision was not void ab initio by fact that partnership did not, at time of making the oral agreement, have a general building contractor's license, and partners who were contractors and builders were not on such theory acting wrongfully when they brought suit for dissolution of partnership and for an accounting, with resultant filing of lis pendens against the realty. Business and Professions Code, § 7025 et seq.

2. Partnership ⇨262

A partnership at will may be dissolved at any time by agreement of the parties.

3. Cancellation of Instruments ⇨47

In suit to set aside conveyance of lots to defendants, and for damages, wherein it was contended that defendants, who had constructed dwellings on realty in plaintiff's name, had fraudulently caused notice of lis pendens to be recorded in connection with their suit for dissolution of purported partnership at time when plaintiff had entered into agreement for conveyance of lots to third party, thereby forcing plaintiff to settle defendants' suit by conveying lots in question to defendants, evidence warranted

finding that conveyance to defendants had been made as part of dissolution of partnership by agreement of parties. Business and Professions Code, § 7025 et seq.

4. Appeal and Error ⇨991

In suit to set aside conveyance of certain lots to defendants, and for damages, wherein it was contended that defendants, who had constructed dwellings on realty in plaintiff's name, had fraudulently caused notice of lis pendens to be recorded in connection with their suit for dissolution of purported partnership at time when plaintiff had entered into agreement for conveyance of lots to third party, thereby forcing plaintiff to settle defendants' suit by conveying lots in question to defendants, question whether stipulation dismissing defendants' suit was signed under duress and illegal business compulsion, and whether deeding of lots to defendants was not an act of a reasonable and prudent man, were factual and were for determination of the trial court. Business and Professions Code, § 7025 et seq.

Jerrell Babb, Los Angeles, for appellant.

Ralph Robinson, Fresno, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant, in a second amended complaint, alleges that on February 21, 1948, he orally agreed to engage defendant and respondent Daniel Nelson, as a building contractor to erect dwellings upon certain real property owned by plaintiff; that he accepted and rendered specific charges for labor performed by him, which charges were paid in full; that on February 23, 1949, plaintiff opened an escrow in Los Angeles and obligated himself to purchase a motel from the owner and agreed, as part of the consideration, to convey ten lots in Fresno, being part of the property above mentioned; that the escrow was to be completed on April 25; that although plaintiff had settled all of his accounts with defendant he, on March 3, 1949, fraudulently commenced an action in Fresno County entitled Nelson Valley Building Co. et al. v. McNichols, seeking a dissolution of a claimed

partnership. A copy of that complaint is set forth as an exhibit in the instant complaint. The exhibit alleges that a partnership existed between plaintiff and Daniel Nelson, Sr., and Daniel Nelson, Jr. It sought a dissolution of the partnership and asked for an accounting. Plaintiff now charges in this complaint that in fact there was no partnership existing between the parties, and that the Nelsons fraudulently caused a notice of lis pendens in that action to be recorded for the unlawful purpose of placing plaintiff here in a position of breaching his escrow agreement and subjecting him to a damage suit and forcing him to settle with the Nelsons unjustified claims made by them; that to avoid such damage action plaintiff McNichols, under duress, conveyed to them four of the lots here involved, valued at \$6,000; that the Nelsons then released the lis pendens notice upon stipulation, made under duress, and in which plaintiff stated that the subject-matter of the dissolution action had been fully settled out of court, and that such action had been dismissed with prejudice. It is then here alleged that due to the fact that the lis pendens was not released until after April 25, the owner of the motel property did, on May 2d, 1945, bring an action to recover \$500 damages for the alleged breach of the escrow agreement by McNichols. The prayer is that the conveyance to defendants be set aside, and for judgment that the Nelsons reconvey title to the four lots or that plaintiff recover damages for their value. Damages for attorneys' fees claimed to have been paid by plaintiff in the damage action are sought as well as exemplary damages for \$10,000. For further details see McNichols v. Nelson Valley Building Company, 97 Cal.App. 2d 721, 218 P.2d 789.

By way of answer, the Nelsons alleged that they were experienced contractors and builders, having been duly licensed as such by the State of California, and were interested in acquiring a tract of land for subdivision purposes, upon which to build homes for resale; that they were unable to completely finance said transaction; that they contacted plaintiff, who indicated his willingness to enter into an oral copartner-

ship arrangement with defendants; that in accordance with that understanding, the property here mentioned was purchased for these defendants in plaintiff's name, and necessary proceedings were taken by the parties to subdivide the tract into 21 building lots; that a map was duly recorded; that as a part of the partnership transaction it was agreed that the Nelsons would devote their time to the activities of the copartnership and would be paid for their personal services performed by them as contractors and builders at the regular building scale of wages; that plaintiff would be paid at the same rate for any services performed by him; that McNichols would advance all money and that the profits would be divided one-half to the Nelsons and one-half to the plaintiff; that the subdivision was laid out; that defendants constructed an office building; prepared 12 sets of plans and specifications for buildings, and that plaintiff advanced the cost thereof on October 1st; that the Nelsons formed a corporation known as Nelson Valley Building Co., with plaintiff's consent, and assigned to it all their right in the partnership agreement; that the Nelsons conferred with various financial agencies for the purpose of obtaining construction loans; that after grading the streets, etc., plaintiff failed and refused to furnish the money agreed upon to construct the buildings, refused to sell the land or permit defendants to sell it; refused to make any accounting or to divide the assets, and refused to continue the business of the partnership; that defendants fully complied with their part of the agreement; that without the knowledge and consent of defendants, plaintiff entered into the escrow agreement and attempted to sell all of the lots; that as a result, defendants did file the dissolution action; that as a result of the stipulation entered, defendants released the lis pendens by way of settlement of all their claims under the dissolution action, as alleged, and that plaintiff did, as a result thereof, deed the four lots to them. They denied that the actions of plaintiff were the result of any duress, fraud, or business compulsion. The remaining allegations of the complaint are specifically denied.

The court found generally against plaintiff's contentions and in accord with the allegations of defendants' answer. It specifically found that defendants had an interest in the land purchased by plaintiff; that said interest was their share of the profits from the sale of the land over and above advances made by plaintiff and other costs accruing in the venture. Judgment was for the defendants. Plaintiff appealed under an engrossed settled statement, under Rule 7, Rules on Appeal, and a partial transcript of the testimony was made a part thereof by reference.

[1] The first point is the claim of plaintiff that the alleged partnership agreement was void *ab initio* because, at the time it was made, defendants did not possess a general contractor's license, and accordingly defendants here were without justification in filing an action for dissolution of the partnership and seeking an accounting, citing such cases as *Bowline v. Gries*, 97 Cal. App.2d 741, 746, 218 P.2d 806; *Loving & Evans v. Blick*, 33 Cal.2d 603, 608, 204 P.2d 23; *Miller v. Kraus*, Cal.App., 155 P. 834. But see *Miller v. Kraus*, Cal.Sup., 155 P. 838; *Hooper v. Barranti*, 81 Cal.App.2d 570, 184 P.2d 688; *Moon v. Goldstein*, 69 Cal.App.2d Supp. 800, 158 P.2d 1004; and Sec. 7025 et seq., Business and Professions Code.

In the first place, the pleading of plaintiff in the instant action does not directly raise this issue. The claim is based on defendants' allegation in their dissolution proceedings that the parties entered into an oral agreement of copartnership wherein it was agreed "That plaintiffs Daniel Nelson and Daniel Nelson, Jr. were experienced contractors and *building*, having been duly and regularly licensed as such by the State of California", etc. Plaintiff merely denied in his complaint that there was such a copartnership formed. Apparently there was no answer filed by McNichols in the dissolution proceedings, either admitting or denying the allegation pertaining to the license. In the present action, however, the answer of defendants alleged that defendants were "experienced contractors and builders, having been duly and regularly licensed as such by the State of California,

and as such were interested in acquiring a tract of land for subdivision upon which to build homes * * * for resale."

In this respect the court found as true that on July 21, 1948, the defendants were "experienced contractors and builders and as such were interested in acquiring a tract of land for subdivision upon which to build homes * * * for resale." There is no direct finding that defendants did or did not have the license claimed. The evidence produced on the subject was that "Daniel Nelson was not a licensed contractor under the classification B-1, (General Building Contractor) from January 1, 1948, to October 1, 1948, but that the Valley Building Company (Mabel Luella Nelson, owner, and Daniel A. Nelson [husband], responsible managing employee) was issued a contractor's license No. 71115, classification C-8 (Cement and Concrete) on January 2, 1941, and this license has been renewed to January 30, 1950"; that "Daniel A. Nelson, as responsible managing employee, qualified for a supplemental classification of B-1 (General Building Contractor), which license was granted October 1, 1948, and changed to Valley Building Company, and was in effect on June 30, 1950". We see no merit to the argument that the claimed oral partnership agreement was void *ab initio*.

In *Norwood v. Judd*, 93 Cal.App.2d 276, 209 P.2d 24, 28, involving a similar question, many of the cases cited by plaintiff are distinguished. It is there said:

"The rule in license cases is most frequently applied to those situations where a firm or person required to be licensed fails to secure a license and sues a third person for services rendered or material furnished. In such event the unlicensed firm or person cannot recover because to do so would be to defeat the very purpose of the licensing statute." See, also, *Gatti v. Highland Park Builders, Inc.*, 27 Cal.2d 687, 166 P.2d 265; *Citizens State Bank of Long Beach v. Gentry*, 20 Cal.App. 2d 415, 67 P.2d 364. Certain exceptions to this rule are noted in the *Norwood* case and the court said: "* * * equity can and will grant relief where

the court is not required, in granting the relief, to lend its aid in enforcing a transaction illegal only because a permit that could have been secured was not secured." (Citing cases); that "When a business, which has been illegally conducted for lack of license, as distinguished from an unlawful and forbidden enterprise, has been completely terminated and one of the parties subsequently expressly agrees to divide in a specified manner the assets in his possession, courts will entertain suits for accounting, in assumpsit, or based on an implied trust, to recover the property belonging to the claimant. * * *"

It appears here that the oral partnership agreement was not void on its face. It provided that plaintiff should furnish the money; that the real property purchased with it should be held in plaintiff's name for the benefit of the partnership and that the partnership would build homes on the property after the subdivision improvements were in. The fact that the partnership did not, at that time, have a general building contractor's license, did not affect the validity of the agreement if it was a lawful one and not against public policy.

In *Radich v. Cernokus*, 65 Cal.App. 452, 224 P. 124, it is said, quoting from the syllabus:

"A listing contract, by which an owner appoints another as his agent to sell certain real property, is not void because such agent does not have a real estate broker's license at the time of its execution. It is sufficient if he has such license at the time he procures a purchaser."

To the same effect is *Fewel & Dawes, Inc. v. Pratt*, 17 Cal.2d 85, 90, 109 P.2d 650; *Houston v. Williams*, 53 Cal.App. 267, 200 P. 55 and *Brenneman v. Lane*, 87 Cal.App. 414, 262 P. 400. A general contractor's license, if required, might well have been obtained before any general contractor's building license was required. In addition, the partnership might well have let the general contract for building the homes to a general licensed contractor or to the

Nelson Valley Building Company, if and when it was properly licensed. There is evidence that such a contract for the building of the office and the grading and oiling of streets in the subdivision was let by the partnership to one Woof, a licensed general building and paving contractor. The Nelsons worked on this contract and were allowed Union wages at \$2.15 per hour.

[2] There is this additional observation, that a partnership, at will, may be dissolved at any time by agreement of the parties. *Shuken v. Cohen*, 179 Cal. 279, 176 P. 447; *Lytle v. Kroenke*, 67 Cal.App.2d 596, 154 P.2d 919.

[3] It clearly appears from the evidence that if a partnership did exist it was dissolved by agreement of the parties, and there was a winding up of the partnership affairs. The profits from the sale of the property by plaintiff were distributed in accordance with the agreement of the parties by delivering to defendants a deed to the four lots involved and by the retention by plaintiff of the remaining lots. The nature of the action filed, the subsequent stipulation and dismissal of the proceedings, and the liquidation and transfer of the property by recorded deed clearly indicated an agreement of dissolution and winding up of the partnership affairs, as found by the court. No legitimate claim may now be made that the partnership agreement was void and the stipulation of no effect because defendants were not, at the time, licensed contractors.

[4] The claim that the evidence conclusively shows that the stipulation dismissing the partnership dissolution and accounting action was signed under duress and illegal business compulsion, and that plaintiff's act in deeding over the lots to defendants was not an act of a reasonable and prudent man, is equally without merit. This was a factual question for the trial court to determine. *McNichols v. Nelson Valley Building Co.*, supra; *McKee v. Mires*, 110 Cal. App.2d 517, 242 P.2d 954.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

116 Cal.App.2d 412

**PEOPLE v. ONE 1950 STUDEBAKER
COMMANDER CONVERTIBLE****COUPE et al.****Civ. 19397.**District Court of Appeal, Second District,
Division 1, California.

March 2, 1953.

Proceeding for forfeiture to state of conditional seller's interest in automobile seized while being used for transportation of narcotics. The Superior Court of Los Angeles County, Irvin Taplin, J., entered judgment for state, and seller appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain trial court's finding that conditional seller did not make a reasonable investigation of the moral responsibility, character, and reputation of the purchaser within statute permitting proof of such investigation before sale as defense against forfeiture.

Judgment affirmed.

1. Forfeitures ⇨3

Investigation into financial standing or credit rating of automobile purchaser is not such a "reasonable investigation" of moral responsibility, character, and reputation as will protect conditional vendor's interest in automobile against forfeiture because of use of automobile in unlawfully transporting narcotics. Health and Safety Code, § 11620.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Investigation".

2. Forfeitures ⇨3

In investigating moral responsibility, character, and reputation of conditional buyer to protect conditional seller's interest in automobile against possible forfeiture because of any future use of automobile in unlawfully transporting narcotics, question is not whether such investigation is made as is expedient with information at hand but whether a reasonable investigation is made. Health and Safety Code, § 11620.

3. Appeal and Error ⇨994(3), 996, 1011(1)

It is trial court's province to resolve conflicts in testimony, to choose among permissible inferences, and to evaluate testi-

mony in light of demeanor, apparent candor, bias, interest, and motives of witnesses.

4. Forfeitures ⇨5

In proceeding for forfeiture to state of conditional seller's interest in automobile seized while it was being used for transportation of narcotics, evidence was sufficient to sustain trial court's finding that conditional seller did not make a reasonable investigation of the moral responsibility, character, and reputation of the purchaser within statute permitting proof of such investigation before sale as defense against forfeiture. Health and Safety Code, §§ 11610 et seq., 11620.

Sydney J. Dunitz, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Ellis Peter Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In this proceeding for the forfeiture to the state of an automobile seized while it was being used for the transportation of narcotics (Health & Safety Code, sec. 11610 et seq.), the sole question presented is that of the sufficiency of the evidence to support the judgment rendered after trial before the court. By its findings and judgment the court determined that the appellant did not make a "reasonable investigation of the moral responsibility, character and reputation of the purchaser", as required by section 11620 of the Health and Safety Code.

The motor vehicle was seized while it was in the possession of Guy A. Ross, the registered owner. Appellant was the "legal" owner, having sold the vehicle to Ross upon a conditional sales contract. Appellant contends: "The finding that appellant did not make a reasonable investigation of the moral responsibility, character and reputation of the purchaser is not supported by the evidence." Section 11620 of the Health and Safety Code provides: "The claimant of any right, title, or interest in the vehicle may prove his lien,

mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

In this type of case, as in other cases, it is the province of the trier of fact to weigh the evidence. As was said in *People v. One 1937 Buick Coupe*, 89 Cal.App.2d 556, 561, 201 P.2d 402, 405, "The trier of fact 'is the exclusive judge of the credibility of the witnesses, and while a witness is presumed to speak the truth, this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by his motives or obvious interest. Code Civ.Proc., § 1847; see cases collected, 27 Cal.Jur., sec. 154, p. 179. Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. * * *' (Emphasis added.) (Citing cases.)"

The evidence on behalf of appellant was given by William Pearson, a co-owner of Pearson Motors, and Charles Burton, the manager of a finance company which purchased conditional sales contracts from Pearson Motors. In February, 1951, it appears from the testimony, Guy Ross, then in Navy uniform, appeared at the used car lot of appellant and sought to buy a 1941 Buick. He filled out an application form, listing as a personal reference one Lee Nandel, of Santa Monica, California. The application was forwarded to Associated Finance Company, which was in the business of purchasing conditional sales contracts. Mr. Burton, the manager of the company, testified that he inquired of Nandel whether Ross drank, "ran around, and so on and so forth." Mr. Burton's knowledge of Nandel was that he had been a satisfactory customer and was steadily employed. Mr. Burton then advised Pearson Motors that his company would require that Mr. Nandel be a co-signer on the conditional sales contract of Ross. The sale was completed when Nandel signed the contract with Ross.

About a year after this transaction Ross returned to appellant's car lot, stating that he had been discharged from the Navy (displaying his honorable discharge) and wished to buy another car. He planned to go to Colorado for a little while and then return to California to live and work. He made a phone call to his parents in Denver, Colorado, and, according to Mr. Pearson, "They said it was all right, if he wanted to come back to California to live, * * *." No further investigation was made at this time, but the purchase of the 1950 Studebaker was then consummated.

Appellant, in attacking the court's finding, presents the following version of the evidence:

"1. William Pearson, president of appellant, met Ross about February, 1951, approximately a year prior to appellant's sale of the Studebaker to Ross, in connection with the sale of a Buick to Ross. At that time Ross was a resident of Denver and was in the United States Navy. William Pearson personally saw Ross in Navy uniform and saw his Navy I. D. card.

"2. Prior to the sale of the Buick, William Pearson required Ross to disclose his address, how long there, his credit references and personal references.

"3. Prior to the sale of said Buick to Ross, and in connection therewith, the president of appellant contracted a local resident named Lee Nandel, whom he had known for three years, with whose family he had dealt, who was on the finance company's books and who was known by said finance company to be employed with a steady income and to have good character. Said local resident then told William Pearson that Ross was of moral character, that he thought enough of Ross to guarantee the contract, and he did guarantee the contract.

"4. Ross' application for the purchase of the Buick was turned over to a finance company for checking and was approved by it for credit purposes, and regarding Ross's moral

character. Said finance company interviewed Lee Nandel regarding Ross. The findings and approval of the finance company were communicated by the finance company to William Pearson, the president of appellant.

"5. Prior to the sale of the Buick to Ross, and in connection therewith, appellant submitted Ross' application containing all information to an insurance company and insurance was issued. William Pearson testified that insurance companies check service men very carefully.

"6. The sale of the Studebaker involved herein was made after Ross had satisfactorily made payments to appellant on the Buick over a period of approximately a year. During that time William Pearson saw Ross many times.

"7. When appellant sold said Studebaker to Ross, Ross had recently been discharged from the United States Navy and appellant's president had seen Ross' honorable discharge from the United States Navy.

"8. Before appellant sold the Studebaker to Ross, such sale was approved by Ross' parents by long distance telephone between Los Angeles and Denver."

Appellant further directs attention to the cases of *People v. One 1940 Chrysler*, 48 Cal.App.2d 546, 120 P.2d 117, and *People v. One 1939 Buick*, 56 Cal.App.2d 163, 132 P.2d 308, wherein the courts have stated that the claimant need establish only that the investigation made was such as to satisfy a reasonably prudent person of the purchaser's good moral character. Appellant also relies upon *People v. One 1941 Cadillac*, 63 Cal.App.2d 418, 147 P.2d 49, 52, wherein the court pointed out that the provisions of section 11620 of the Health and Safety Code are highly penal, impose an extraordinary burden on a lawful transaction, and that an attempt to enforce a forfeiture imposes a duty on the court to scan the record with meticulous care, to the end that no injustice may result, resolving all doubts in favor of the innocent

claimant. Appellant asserts that the investigation in the instant case was more thorough than that made in the last-cited case, with reference to which this court said:

"Neither a maximum nor a minimum of investigation, required to be made by a lender, is set forth in the statute. Nor is the extent to which the investigation as to the moral responsibility, character and reputation of a purchaser shall go, prescribed by the law. Under the facts disclosed in the instant proceeding, we are persuaded that it must be held that the statements made to the finance corporation by the purchaser's landlord as to his financial responsibility, his reputation in the community, and as to his employment, corroborating as they did the statements made by the purchaser in his purchaser's statement, were such as to satisfy a reasonably prudent person of the purchaser's good moral character. That is all the law requires."

As pointed out by respondent, however, all three cases relied upon by appellant stand for the legal principle earlier adverted to, that the decision of the trier of fact is controlling if supported by any substantial evidence. In each of the three cited cases the trial court found that the lien-claimant had made a sufficient investigation. In *People v. One 1941 Cadillac*, supra, in addition to the language above quoted, this court stated, 63 Cal.App. 2d at page 423, 147 P.2d at page 52, that "the interpretation to be given the investigation required therein to be made must turn on the circumstances of the individual case".

In *People v. One 1940 Buick 8 Sedan*, 70 Cal.App.2d 542, 548, 161 P.2d 264, the court laid down four principles as being definitely settled:

1. The defense that the investigation required by the statute has been made is an affirmative defense, and the burden of proof on the issue rests with the claimant.
2. The question as to whether a proper investigation has been made is one of fact

and is to be tested by the legal standards ordinarily applied to such fact questions.

3. The statute does not prescribe the maximum or minimum of the investigation that must be made. It requires a "reasonable" investigation of the factors involved. What is reasonable must be governed by the facts of each case.

4. An investigation into the financial standing or the credit rating of the car purchaser is not sufficient—the law requires an investigation of the "moral responsibility, character, and reputation of the purchaser".

As pointed out by respondent, at the time of the sale of the Buick, Ross was a total stranger to appellant. The sole investigation of his moral responsibility, character and reputation by appellant consisted in forwarding Ross' application to the finance company. The manager of the finance company testified that he contacted the personal reference, Mr. Nandel, and asked "what he knew about Mr. Ross, how long he'd known him, and what type of character, if he done a lot of drinking and running around, and so on and so forth. As far as following through character references, that was it. His credit was scattered." The finance company manager knew Nandel only as one of his customers, "that he had a steady income, had a residence in Santa Monica, and that his character was good and his ability to pay was good." After talking with Nandel, the finance company manager advised William Pearson that he would require that Nandel co-sign with Ross on the contract. With reference to any insurance company investigation, it appears only that the insurance was placed through a broker and the finance company manager wrote to the Navy base advising that liability insurance had been secured so that Ross would be permitted to bring the automobile on the base.

The trial judge in this cause was impressed that no real investigation was made either by the finance company or appellant into the moral responsibility, character and reputation of Ross. The testimony of the finance company manager indicates that

instead of a thorough investigation, after talking with Nandel he dropped further inquiry—"As far as following through character references, that was it. His credit was scattered."—and solved his problem by rejecting Ross as a credit risk unless he secured Nandel as a co-signer.

[1] Stress is laid by appellant upon the fact that when Ross returned to purchase the Studebaker, he had an honorable discharge from the Navy and that payments had been regularly made on the contract for the Buick previously purchased. The trial court was of the view that the presentation of an honorable discharge was not a substitute for the investigation as to moral responsibility required by law, nor was the fact that payments had been made upon the Buick. As pointed out in *People v. One 1940 Buick 8 Sedan*, supra, an investigation into the financial standing or credit rating of a purchaser is not sufficient.

[2] Appellant contends that it made as much investigation as expedient with the information at hand. The question, however, is not what is expedient, but what constitutes a reasonable investigation. In *People v. One 1939 Buick*, 43 Cal.App.2d 411, 416, 110 P.2d 1013, 1016, the court said: "It would seem that a bona fide investigation should, among other essentials, reveal the home address of the prospect, his employer, either past or present, the source of his income, his family or social connections, and as in the case here of a stranger, some inquiry as to his prior location and his standing in that community."

[3,4] In determining whether a reasonable investigation was made, the trial court also heard the testimony of a narcotics investigator as to conversations with Herbert Pearson, a co-owner of appellant, Pearson Motors. As stated at the outset of this opinion, it was the province of the trial court to resolve conflicts in the testimony, to choose among permissible inferences, and to evaluate the testimony in the light of the demeanor, apparent candor, bias, interest and motives of the witnesses. The trial court here concluded that appellant did not make a reasonable investigation

when the Buick was purchased, but was content when the purchaser secured a co-signor satisfactory to the finance company. It made no further investigation when the Studebaker was purchased. The determination of the trial court being supported by substantial evidence, the judgment must stand.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



116 Cal.App.2d 466

ERWIN v. CONROY et al.

Civ. 19278.

District Court of Appeal, Second District,
Division 1, California.

March 3, 1953.

Action by pedestrian against motorist for injuries. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., rendered judgment in favor of defendant, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that last clear chance doctrine was inapplicable in absence of evidence that motorist approaching intersection saw pedestrian crossing roadway in time to avoid striking pedestrian by exercising ordinary care and that motorist did not avail himself of that opportunity but by negligent conduct proximately caused the accident.

Affirmed.

1. Appeal and Error ⚡928(1)

In determining whether trial court erred in refusing to give requested instruction under doctrine of last clear chance, District Court of Appeal would set forth evidence in light most favorable to appellant.

2. Trial ⚡296(4)

In action by pedestrian who was struck by defendant's automobile while crossing street at intersection, instruction which set out duty of pedestrian crossing roadway elsewhere than within crosswalk to yield right of way to vehicles but which

failed to instruct that such duty does not relieve driver from duty of exercising care was not prejudicial to pedestrian, where instruction immediately following told jury that one who has right of way is not excused from exercise of ordinary care to avoid causing accident. Vehicle Code, § 562(a, b).

3. Automobiles ⚡227(3)

Last clear chance doctrine was inapplicable in absence of evidence that motorist approaching intersection saw pedestrian crossing roadway in time to avoid striking pedestrian by exercising ordinary care and that motorist did not avail himself of that opportunity but by negligent conduct proximately caused the accident.

Joseph Schecter, Los Angeles, for appellant.

Crawford & Baker, John W. Baker, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

This is an appeal from a judgment in favor of the defendant entered upon the verdict of the jury in an action wherein plaintiff sought to recover damages for personal injuries.

[1] Inasmuch as no claim is advanced by appellant that the evidence is insufficient to support the judgment, and as the principal contention of the appellant is that the court erred in refusing to instruct the jury upon the doctrine of the last clear chance, contrary to the usual practice upon appeal we shall, as required under the circumstances, set forth the evidence in the light most favorable to the plaintiff and appellant. *Bonebrake v. McCormick*, 35 Cal.2d 16, 19, 215 P.2d 728; *Brown v. McCuan*, 56 Cal.App.2d 35, 36, 132 P.2d 838.

The accident in question occurred at 10 o'clock p. m. at the intersection of Rosecrans Avenue and Paulsen Street, in the City of Compton. These thoroughfares intersect at right angles; the former is 76 feet wide and runs east and west, while the latter is 29 feet in width and runs in a northerly and southerly direction. The ap-

pellant was walking from the southwest corner of the intersection in a northerly direction across Rosecrans Avenue, and respondent was driving his automobile in a westerly direction on Rosecrans Avenue. The weather was clear and dry but the intersection is poorly illuminated, the only light in the vicinity being that in a malt shop about 150 feet or more east of the intersection. As appellant, who was dressed in dark clothing, stood on the curb preparatory to crossing Rosecrans Avenue, he looked to the west and saw the headlights of an automobile approaching about two blocks away. He then looked to the east and saw the lights of the respondent's automobile which was then approximately 150 feet distant. He thereupon stepped down off the curb and proceeded across the street, looking alternately to the east and west. When he reached the center line of Rosecrans Avenue he stopped and looked to the west "to see if the car approaching from the left would pass behind" him. While standing in this position he heard a screech of brakes and looking to the right he "saw the defendant's automobile veering down on top of me" just an instant before the impact. The testimony is conflicting as to the manner in which appellant walked and as to whether he was within the unmarked crosswalk, as well as to whether or not he was intoxicated.

Respondent was driving close to the center line of Rosecrans Avenue and did not see the appellant until the front of his car was almost to the west side of the intersection, when appellant was from 10 to 20 feet away from him, and at which time respondent was traveling between 25 and 30 miles per hour. Appellant was struck by the left front fender of the automobile, and a highway patrol officer who happened upon the scene immediately after the accident testified that the respondent's automobile was stopped almost at the body of the appellant. There were four wheel skid marks running from the front tires of the respondent's automobile back through the rear tires and extending into the intersection. These skid marks ran parallel to and the southerly of these was approximately three feet northerly of the center line of

Rosecrans Avenue and were 71 feet in length commencing about two feet west of the extension of the east curb of Paulsen Street.

[2] Appellant requested a rather long and argumentative instruction embodying the language of section 562 of the Vehicle Code, which the trial court modified by giving only that portion thereof which was in the language of subdivision (a) of section 562. Appellant contends that the court erred in stating the provisions of subdivision (a) without also stating those of subdivision (b). The section in its entirety reads as follows:

"(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"(b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

While it may be error to instruct the jury in the language of subdivision (a) of the section without also reading subdivision (b) *Cole v. Ridings*, 95 Cal.App.2d 136, 140, 212 P.2d 597, the failure to do so in the instant case was not prejudicial because in another instruction immediately following, the jury were told: "The fact that one has the right of way, if such be the fact, does not excuse him from the exercise of ordinary care to avoid causing an accident." This instruction while not in the identical language of subdivision (b) states the same principle. In addition, the jury were also instructed in the language of BAJI 201 as follows: "The law imposes upon the operator of any vehicle using a public highway, and upon a pedestrian, the same duty, each to exercise ordinary care to avoid causing an accident from which injury might result. This duty continues even when one has the right of way over the other." Thus, it is evident that the jury was fully and correctly instructed upon the relative rights and duties of the parties as set forth in the section of the Vehicle Code referred to.

[3] The appellant requested and the trial court refused to give an instruction upon the doctrine of the last clear chance. Admittedly the requested instruction was a correct statement of the doctrine but it was refused by the court because it did not deem that the giving of the same was warranted by the evidence. The requested instruction set forth the six elements necessary to invoke the doctrine, and these are so well known to the profession as not to require restatement here. *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.2d 915; *Selinsky v. Olsen*, 38 Cal.2d 102, 104, 237 P.2d 645. For present purposes we may assume that the first four prerequisites to the application of the doctrine were present and confine ourselves to the remaining two, namely, under the evidence would the jury have been justified in finding (a) that after respondent acquired actual knowledge of appellant's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care and, (b) that the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

The only direct testimony as to when respondent first saw the appellant is that of the respondent, namely, when he was within 10 to 20 feet from where appellant was standing, and at which time respondent was traveling at a rate of speed estimated to be between 25 and 30 miles per hour. At this rate of speed respondent was traveling between 37 and 45 feet per second and it appears fairly obvious that in this situation respondent did not have a clear opportunity to avoid the accident. However, appellant asserts that despite this, there were facts and circumstances which would have justified the jury in finding that the respondent was actually aware of plaintiff's danger in time to avert the accident. The argument is that inasmuch as the skid marks left by the respondent automobile were 71 feet in length, beginning approximately 2 feet west of the extension of the east curb of Paulsen Street, and allowing a "reaction time of three quarters of a second", it may be assumed that respondent traveled 33 feet from the instant he first saw the appellant until he started skidding, and therefore respondent

obviously saw appellant before he entered the intersection. Respondent replies that this argument overlooks the fact that the undisputed testimony is that the skid marks were four wheel locked skid marks, overlapping one another, as a result of which the car skidded not 71 feet but this distance less the length of the car, some 16 or 17 feet. Moreover, it is uncontradicted that respondent's car continued skidding forward after striking the appellant, but just how far does not appear.

We need not follow this interesting discussion for it fails of its purpose of establishing that respondent saw the appellant in sufficient time to have enabled him, by the exercise of ordinary care, to have avoided striking him. Without extending this opinion further, we quote the following language from *Jobe v. Harold Live Stock Commission Co.*, 113 Cal.App.2d 269, 247 P.2d 951, where, in replying to a similar argument to that advanced by the appellant here, Division 3 of this court, speaking through Mr. Presiding Justice Shinn, said, 113 Cal.App.2d at page 272, 247 P.2d at page 953:

"Other opinions of the witness were offered in an attempt to prove how far away defendant was from the point of the accident at the time he first saw plaintiff's car. The theoretical distance was computed by taking the length of the skid marks, estimating the speed of the car, and adding the distance a car would travel in three-quarters of a second at the speed indicated by the skid marks. The sum would be the theoretical distance between defendant's car, when he realized he should stop, and the point of the accident. The witness testified that three-quarters of a second is the 'reaction time,' or the average time, it takes all ages and classes of drivers to apply their brakes after realizing they should do so. He did not explain the basis of this assumption of fact, nor whether it was based upon tests of drivers who knew or those who did not know they were under observation for the purpose of testing their reflex actions. He did testify, however, that he could not express any opinion as

to defendant's 'reaction time,' without making tests. This was sufficient to have excluded the opinions of the witness which assumed a theoretical time within which defendant would have applied his brakes."

And continuing 113 Cal.App.2d at page 274, 247 P.2d at page 955:

"Plaintiff says that under the formula of his expert witness for computing the distance traveled by defendant's car after he realized he should stop, 'the jury could have formed the conclusion that defendant Stiefel was a greater distance away from plaintiff's vehicle than he testified,' that he saw plaintiff's car enter the intersection, and therefore, 'had a greater opportunity to avoid the accident and could have done so by exercising ordinary care.' The argument merely points out that plaintiff's car could have been seen as it entered the intersection, which does not supply proof of actual knowledge of its presence. Moreover, the theory itself was nebulous, and even according to the witness was inapplicable to defendant, since it assumed the unknown factor of the speed of defendant's reflex actions. But in any event, the argument is unavailing. It only supposes an interval of time within which defendant would have traveled a theoretical distance before he normally would have applied his brakes, and is entirely consistent with the view that he applied them as quickly as he could within his supposed capabilities. Plaintiff has no other theory to support his argument that there was evidence from which the jury could have found that defendant had a last clear chance to avoid the accident. We are unable to discover any such evidence. In view of the fact that defendant did realize his danger and made a determined effort to stop, it would be wholly illogical and unreasonable for the jury to have found upon the circumstantial evidence that there was a considerable interval of time during which defendant realized the danger and made no effort to avoid

the accident. *Mere doubt as to the credibility of defendant or the accuracy of his estimate of distance would not amount to affirmative evidence of any material fact.* An instruction on the doctrine of last clear chance would have been an invitation to the jury to speculate as to the existence of an essential fact of which there was no direct or circumstantial evidence." (Emphasis added.)

The facts in the instant case are far more favorable to the respondent than those in the case last cited. There, the accident occurred on a clear day at 11 o'clock in the morning where the roadway was level and dry. Here, the accident occurred during the nighttime at an unlighted street intersection and while appellant, wearing dark clothing, was engaged in walking across an arterial highway in front of an automobile which he had observed approaching him at a distance of some 150 feet prior to the time of starting to cross the roadway. There is a total absence of any evidence from which it can reasonably be inferred that defendant saw appellant in time to avoid the accident; much less that he had a clear opportunity of doing so. As was said in *Bagwill v. Pacific Elec. R. Co.*, 90 Cal.App. 114, 121, 265 P. 517, 519, quoted with approval in *Rodabaugh v. Tekus*, 39 Cal.2d 290, 297, 246 P.2d 663, 667: "Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. * * * We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last clear chance, not possible chance."

From the evidence viewed in the light most favorable to the appellant, it would appear almost to the point of demonstration that if either party had the last clear chance to avoid the accident it was the appellant rather than the respondent. Being aware, as he testified, of the approach of respondent's automobile at all times while in the act of crossing the street, appellant

had the clear opportunity of avoiding the accident by merely refraining from crossing into the northerly half of Rosecrans Avenue until respondent's automobile had passed in front of him. Indeed, if he had remained on the center line of Rosecrans Avenue where he testified he was immediately preceding the collision when he heard the screech of brakes, the accident would have been avoided, for the evidence as to the position of the skid marks discloses that no harm would have come to him in that position. Unless we indulge in sheer fantasy it is difficult to escape the conclusion that appellant stepped directly in the path of a moving vehicle, the presence of which in his immediate vicinity was known to him from the very moment he started to cross the roadway. The trial court therefore did not err in refusing to instruct upon the doctrine of the last clear chance.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 332

PEOPLE v. REIMRINGER et al
Cr. 2843.

District Court of Appeal, First District,
Division 2, California.

Feb. 27, 1953.

As Amended on Denial of Rehearing
March 14, 1953.

Defendants, tried together, were convicted of abortion and conspiracy. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., entered judgment of conviction, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that where evidence as to counts two, three and four was not strong and identification of a defendant was extremely weak, case would be remanded for new trial of such defendant on those counts.

Judgment as to one defendant affirmed on all counts; judgment affirmed in part and reversed in part as to other defendant.

1. Criminal Law ⇨1044

Where complaint and commitment by committing magistrate allegedly related only to counts one and five and other three counts were added on basis of additional evidence introduced at preliminary hearing to show a general scheme or plan, but lack of court's jurisdiction to try defendants on counts two, three and four was not urged in argument as basis of motion to set aside information, no error could be based on such ground on appeal, although defendant had moved to set aside information on all grounds in statute. Pen.Code, §§ 995, 996.

2. Abortion ⇨11

In abortion prosecution, testimony of police as to defendant doctor's presence in house where alleged crime was committed and defendant's evasive and contradictory statements showing consciousness of guilt were sufficient to connect defendant with offense charged. Pen.Code, § 1108.

3. Abortion ⇨11

In abortion prosecution, testimony of women not involved in 3 counts that defendant doctor was person who performed operation on them was sufficient corroborative testimony. Pen.Code, § 1103.

4. Abortion ⇨11

In abortion prosecution, where abortion charged in first count was well proved, it was legally sufficient to corroborate similar abortions in other counts. Pen.Code, § 1108.

5. Conspiracy ⇨47

In conspiracy prosecution, the agreement may be inferred from acts and conduct of defendants in mutually carrying out a common purpose in violation of a statute.

6. Conspiracy ⇨47

In prosecution for conspiracy to commit abortion, evidence was sufficient to establish that defendants mutually carried out abortion and conspiracy was properly inferred therefrom.

7. Criminal Law ⇨656(2), 1035(3)

In abortion prosecution, court's exercise of control over proceedings such as interrogation of witnesses was not objectionable as unduly rushing defense attorneys

and was not basis for reversal where no objections were made below and point was not raised on motion for new trial. Code Civ.Proc. § 2044.

8. Criminal Law ⇨655(1)

A few digressions or humorous remarks do not constitute misconduct by court.

9. Criminal Law ⇨1166½(12)

In conspiracy prosecution, failure of court when referring to crime charged to prefix it with word alleged or similar words was not prejudicial in view of fact that jury was instructed to disregard possible assumption by court that any fact had been proved.

10. Criminal Law ⇨1171(1)

In abortion prosecution, where, on offer to show proof, district attorney had referred to alleged statement of a witness, as to what defendant had said, as a statement of a defendant, error was not prejudicial.

11. Criminal Law ⇨706, 1171(1)

In abortion prosecution, where questions to character witnesses whether they had heard rumors that defendant was maintaining clandestine affairs, that defendant allowed home to be used by other doctors for clandestine affairs, and that defendant had been arrested for drunk driving, were answered in negative and district attorney made no attempt to show basis for questions, although there was no direct showing of bad faith questions were prejudicial.

12. Criminal Law ⇨723(1)

In abortion prosecution, remarks of district attorney that operation was done without benefit of human decency, etc., and of deputy district attorney that when district attorney compared defendants to butchers every butcher in county hung his head in shame, etc., tended to play upon emotions of jury and were prejudicial.

13. Criminal Law ⇨672

In conspiracy prosecution, court properly admitted as to defendant conversation of other defendant with prosecuting witness in pursuance of conspiracy over objection that corpus of conspiracy had not been established but subject to be stricken if conspiracy should not be established.

14. Criminal Law ⇨419(12)

In abortion prosecution, notebook containing names of abortees was not hearsay and was properly admitted to prove incriminating fact that notebook was in defendant's possession.

15. Criminal Law ⇨696(3)

Where answers of witnesses, although unresponsive, were relevant and material, motions to strike unresponsive parts of answers were properly denied.

16. Criminal Law ⇨1044

In abortion prosecution, where attorneys who had examined confession of one defendant did not move to strike part concerning other defendant or to separate the trial, alleged error in not striking part of confession or ordering separate trial could not be raised on appeal.

17. Criminal Law ⇨412(1)

In abortion prosecution, statement of defendant doctor was admissible because of evasive character of defendant's testimony and the conflict of such testimony with observations made by police officers at place of crime.

18. Criminal Law ⇨1169(1)

In abortion prosecution, where no objection was made to admission of irrelevant matter in statement of defendant doctor, no motion to strike any separate portion was made and no prejudice appeared, admission of entire statement was not reversible error.

19. Criminal Law ⇨379

In abortion prosecution, where evidence showed a primitively performed operation, character witness should have been allowed to answer questions as to defendant's general reputation for medical skill and medical ethics.

20. Witnesses ⇨347

Omission of facts in testimony at former hearing is not good impeachment unless on that occasion witness had been particularly questioned as to those facts.

21. Witnesses ⇨347

In abortion prosecution, court properly sustained objection to attempted impeachment by showing that prosecuting witness had not made same statement detrimental to defendant at preliminary hearing.

22. Criminal Law ⇨822(12)

In abortion prosecution, where court twice instructed on necessity of corroboration of testimony of women who submitted to abortions, jury was not misled by fact that instruction requiring corroboration of testimony of accomplice was followed by instruction that women on whom abortions were committed were not accomplices.

23. Criminal Law ⇨507(6)

A woman who submits to an abortion is not an accomplice of the person who performs operation.

24. Criminal Law ⇨785(1)

In abortion prosecution, it was not error to omit instruction that testimony of women who submitted to abortions ought to be viewed with distrust. Code Civ. Proc. § 2061 subd. 4.

25. Criminal Law ⇨823(11)

In abortion prosecution, giving of instruction as to exclusion of confession of one defendant as to codefendant, without such restriction as to admissions, was not prejudicial, in view of fact that other rulings and instructions made it clear that no part of admitted statement of defendant could be used against codefendant.

26. Criminal Law ⇨987, 996(2)

A judgment as to a felony cannot be modified so as to make concurrent sentences run consecutively without defendant being present and cannot be modified at all when sentence has been entered in minutes of court or defendant has begun serving sentence. Pen.Code, § 1193, subd. 1.

27. Criminal Law ⇨996(2)

Where original judgment stated that sentences on counts two, three, and four were to run consecutively to sentence on count one but made no express determination in what manner counts two, three and four should be served with respect to each other, court had power to modify judgment to provide that second count was to be served after first, third after second and fourth after third, although modification was made about one month after entry of first judgment, outside presence of defendant and after he had started to serve sentence. Pen.Code, § 669.

28. Abortion ⇨11**Conspiracy** ⇨47

In abortion and conspiracy prosecutions, where it was shown that defendant procured abortees, furnished his kitchen for operations and aided codefendant in performing operations, all elements of participation of defendant in crimes were shown.

29. Criminal Law ⇨1137(8)

In abortion prosecution, where district attorney allegedly made prejudicial remarks but opposing counsel had engaged in like conduct, defendant could not complain on appeal.

30. Criminal Law ⇨718, 1171(1)

In abortion prosecution, reference to recent miscarriage suffered by a prosecuting witness which was wholly foreign to any issues in case was improper, but was not prejudicial.

31. Abortion ⇨9

In abortion prosecution, notebook containing names of abortees taken from defendant at time of his arrest was properly admitted as showing defendant's connection with complaining witnesses.

32. Criminal Law ⇨1189

In abortion prosecution, where evidence as to counts two, three and four was not strong and identification of a defendant was extremely weak, case would be remanded for new trial of such defendant as to those counts, in view of fact that misconduct of district attorney may have influenced jury's verdict.

Jay Graves, Robert H. Kroninger, Oakland, for appellant Reimringer.

William T. Belcher, Jr., Oakland, for appellant Raegan.

Edmund G. Brown, Atty. Gen. of the State, Clarence A. Linn, Asst. Atty. Gen., Wallace G. Colthurst, Deputy Atty. Gen., Francis W. Collins, Dist. Atty. of Contra Costa County and Thomas F. McBride, Asst. Dist. Atty. of Contra Costa County, Martinez, for respondent.

NOURSE, Presiding Justice.

Defendants, tried together, were found guilty by a jury on four counts of abortion and one count of conspiracy. They appeal, represented by different counsel and filing separate briefs. Their attitudes have been different during all of the case. Both pleaded not guilty, but Raegan, in whose house the abortions took place, and who was contact man and assistant had admitted his part in a number of abortions before trial. Reimringer, a physician who allegedly performed the operations, constantly denied all knowledge of them. He testified in his own behalf, whereas Raegan did not testify. Reimringer urges insufficiency of the evidence, Raegan does not.

In the evening of August 31, 1951, police officers saw suspicious circumstances at Raegan's house and took it under observation. They saw a car arrive and somebody enter the house and return after eighteen minutes. He was followed and stopped and proved to be Dr. Reimringer. He said that he had been "out for a ride." He was brought back to the house where an aborted girl (Williamson) and instruments etc. of the abortion were found. The girl recognized Reimringer and told the story, later testified to at the trial, of the contact of her and her friend with Raegan, who brought her to the house, the preparation of a kitchen for the abortion, the appearance of the surgeon in operation mask and skull cap, the operation without anesthesia in the darkened kitchen, Raegan holding a flash-light, the payment of \$500 in \$20 bills. Raegan admitted and corroborated the story of Williamson. A notebook was found in his pocket containing dates, names and telephone numbers. He admitted that they related to prior abortions, all said to have been performed by Reimringer. A transcript of the statement of Raegan, containing the admissions and the notebook, was introduced in evidence only as against Raegan.

In one of Raegan's pockets \$300 in \$20 bills was found, in one of Reimringer's pockets \$200 in such bills. Reimringer denied having been in the house or ever having seen the Williamson girl. Testifying

at the trial he changed his position completely. He was the physician of Raegan's wife. On the evening of August 31 Raegan had called him because his wife was ill. He waited some time and stopped for a drink before going there, had a drink also at Raegan's, then Raegan asked him to examine Patricia Williamson, but he refused and when she became angry he left.

The abortion of Patricia Williamson constitutes the first count of the information, and the conspiracy to commit the abortion on her the fifth and last count. The second count relates to the abortion of Marilyn Lohmann on July 6, 1951, the third of Sharon Gallaher on August 9, 1951, and the fourth of Louise Carre on July 18, 1951. The facts and evidence in each of these three counts correspond with those of the first count except that all corroboration by observation of police officers is missing—the same place, the same transportation and the same preparation and assistance by Raegan and treatment by an unnamed physician wearing an operation mask. In each case the escort of the woman (husband or boy friend) could corroborate the contact with and transportation by Raegan, but the escort had no contact with Dr. Reimringer. Dr. Reimringer was identified in all cases by the patient, but during the treatment she had seen him only when wearing the operation mask and there were strong discrepancies in their descriptions of his complexion and eyes. As to all counts defendant Reimringer produced some alibi evidence over and above his own testimony.

[1] Appellant Reimringer contends that the trial court was without jurisdiction to try the defendants on counts 2, 3 and 4, because the complaint and commitment by the committing magistrate related only to counts 1 and 5 whereas the other three were added on the basis of additional evidence introduced at the preliminary hearing to show a general scheme or plan. *Parks v. Superior Court*, 38 Cal.2d 609, 241 P.2d 521 disapproving *People v. Wyatt*, 121 Cal.App. 180, 8 P.2d 901 is cited for the unconstitutionality and invalidity of such added counts relating to different trans-

actions. Respondent denies the restricted character of the commitment as not appearing in the record. It is further argued that section 996, Penal Code, excludes this objection on appeal if not made in the court below by motion to set aside. Although appellant moved to set aside the information "upon all of the statutory grounds set forth in Section 995 of the Penal Code of the State of California, and in particular upon the grounds of lack of probable cause" argument was only presented to show lack of probable cause, and no error can be based on grounds not submitted and shown to exist below. *People v. Hinshaw*, 194 Cal. 1, 9, 227 P. 156; *People v. Arnest*, 133 Cal.App. 114, 120, 23 P.2d 812. Failure to move to set aside on the ground urged on appeal was not involved in *Parks v. Superior Court*, supra. For the fatal effect of the omission see *People v. Harris*, 219 Cal. 727, 729-730, 28 P.2d 906; *People v. Greene*, 80 Cal.App.2d 745, 749, 182 P.2d 576; *People v. Ahern*, 113 Cal.App.2d 746, 750, 249 P.2d 63.

[2-4] Next appellant Reimringer urges that the evidence was insufficient to sustain the verdict and judgment because in each count the testimony of the woman on whom the abortion was committed was not corroborated as required by sec. 1108, Penal Code. With respect to the first count, his presence in the house of the crime observed by the police officers and his evasive and contradictory statements showing consciousness of guilt, *People v. Malone*, 82 Cal.App.2d 54, 64, 185 P.2d 870, undoubtedly connect him sufficiently with the offense. The main corroboration presented by respondent as to each of the other three abortion counts is that Dr. Reimringer was also recognized by the other women not involved in the count as the physician who operated on them. In law this is sufficient. "It is established that the 'Testimony relating to one count may be considered by the jury in corroboration of the testimony of the woman upon whom an abortion was alleged to have been performed in another count.'" *People v. Kendall*, 111 Cal.App.2d 204, 210, 244 P.2d 418, 423. In *People v. Solano*,

48 Cal.App.2d 126, 130, 119 P.2d 381, this court held that showing of another offense, similar in all respects, committed by the same defendant, and based on the same plan was good corroboration. The well proved abortion of the first count is then legally sufficient to corroborate the similar abortions in the other counts and the factual sufficiency is for the jury.

[5,6] As to the conspiracy count the evidence seems sufficient as the existence of the agreement may be inferred from the acts and conduct of the defendants in mutually carrying out a common purpose in violation of a statute, *People v. Sica*, 112 Cal.App.2d 574, 581, 247 P.2d 72. The mutually carrying out of the abortion on Patricia Williamson, the only abortion as to which conspiracy is alleged, is sufficiently proved.

[7-9] Both appellants complain of prejudicial misconduct of the trial court and the district attorney. They contend that numerous statements of the court prevented a fair trial. It is first said, illustrated with many examples, that the court unduly rushed the defense attorneys making it difficult adequately to represent their clients. The point is sufficiently answered by respondent that in this respect (and many others) no objections were made below, that the point was not even brought up on motion for new trial, and that the court only exercised the reasonable control over the proceedings which, as to interrogation of witnesses, is within sec. 2044, Code of Civil Procedure. Next appellant Reimringer complains of digressions by the court which are said to have created a camaraderie among judge, jury and prosecuting attorneys while ridiculing defendants and their counsel. A few digressions or humorous remarks do not constitute misconduct, *People v. Williams*, 32 Cal.2d 78, 84, 195 P.2d 393. Illustrations are given of an alleged difference in attitude towards counsel for the prosecution and for the defense, of which the strongest is said to be the holding of counsel for Raegan in contempt. Defense counsel interrupted the district attorney, allegedly because the district attorney in

an argument brought objectionable matter before the jury, and the district attorney and counsel addressed the court simultaneously for some time until the court, after warning, held counsel in contempt. On the motion for new trial Dr. Reimringer's counsel (not the present one) praised the impartiality and courtesy of the court, and Mr. Belcher, present counsel of Raegan, stated that he was probably properly held in contempt. Next appellant Reimringer complains of comments of the court on evidence by which the court showed his feeling as to the facts. Counsel for defense had argued that when Raegan gave his statement to the authorities the conspiracy, if there were any, had ended because the treatment had ended, so that his statement was not binding on Reimringer. The court agreed with counsel saying that it felt that at said time "the conspiracy had been consummated" without using a word like "alleged" or "if any". In the context the failure to use such expression does not seem prejudicial. *People v. Amaya*, 40 Cal.2d 70, 251 P.2d 324. At any rate the jury was instructed to disregard any possible assumption by the court that any fact was proved. The assignments of misconduct of the court made by appellant Raegan are of the same kind as those of appellant Reimringer stated above. All are without merit.

[10] Appellant Reimringer assigns as misconduct of the district attorney: Statements of "fact" unsupported by evidence. Of the many examples given only one need be stated. In an offer of proof to show materiality of the results of a search of Dr. Reimringer's car which he had not used on the evening of the Williamson abortion, the district attorney stated that the patient had testified that Dr. Reimringer had said that he used another medicine instead of penicillin that he would ordinarily administer because the penicillin was in his own car which he was not driving. Counsel for Dr. Reimringer objected because he thought that said evidence was stricken. The district attorney: "By no means, your Honor. If I may say, that was a statement of the defendant and it's in the record." The dis-

trict attorney was in error because there could not be in the record such statement by the defendant because he had not yet testified. What was meant was that the woman had testified to such statement of defendant and that such testimony was actually in the record. There is no serious error in this incident, nor in any of the other examples not stated herein.

[11] It is contended that on several occasions the district attorney asked witnesses questions containing highly prejudicial matter not because the district attorney expected or could expect a favorable answer but to bring the matter before the jury by the question itself. Character witnesses were asked questions whether they had heard rumors that Dr. Reimringer at his residence was maintaining clandestine affairs, that he allowed his home to be used by other doctors for clandestine affairs with women, that he had been arrested for drunk driving. The answers were always in the negative and no attempt was made to show that there was any basis for the questions. Respondent contends that such was legitimate cross-examination citing *People v. McKenna*, 11 Cal.2d 327, 335-336, 79 P.2d 1065, 1069, where it is said that, "In the absence of a showing of bad faith" a character witness may be asked whether he has heard accusations inconsistent with the character he attributed to defendant. Though there is no direct showing of bad faith here we are disposed to condemn the practice as a part of the general misconduct hereinafter noted.

[12] There is no doubt that the district attorney in the final argument used much language tending to play on the emotions of the jury instead of on their calm judgment. It was said that the operation was done "without the benefit of any kind of human decency at all", that it must have shocked the jury as it would any decent human being, that it was a "bungling, butchering job", that the doctor dashed back to his Vodka party leaving this poor mistreated creature with his accomplice to cart and dump her back at the bar; "\$500 * * * paid for this job of bungling by these two butchers." There were more

such remarks about utter abysmal disregard for every human decency and about butchery. A deputy district attorney thereafter went a step further by saying that it was poor judgment of his colleague to compare defendants to butchers because, when he did that every butcher in Contra Costa County hung his head in shame. Later he dramatically invited the jury to look on an instrument "and see the blood of Patricia Williamson." Respondent contends that in view of the evidence in the case the epithets, et cetera, were not prejudicial, citing 4 Cal.Jur.Supp. 773 where many examples are given and cases like *People v. King*, 13 Cal. 2d 521, 526-527, 90 P.2d 291 to the same effect and excluding assignment of misconduct on appeal where no objection was made below (which does not seem to have been done in this case) and where under the evidence no other result than conviction would have been reached without such misconduct. However other cases have been reversed on such grounds, some even where there was no objection, as the bad effect of the misconduct could not be undone. See *People v. Lynch*, 60 Cal.App.2d 133, 143, 140 P.2d 418; *People v. Wynn*, 44 Cal.App.2d 723, 733, 112 P.2d 979; *People v. Duvernay*, 43 Cal.App.2d 823, 827-829, 111 P.2d 659.

Appellant Reimringer assigns the following as errors in the admission of evidence:

[13] A conversation of Raegan with Patricia Williamson in pursuance of the conspiracy was admitted as to Dr. Reimringer over objection that the corpus of the conspiracy had not been established but subject to be stricken if said conspiracy should not be established. It is stated in *People v. Curtis*, 106 Cal.App.2d 321, 326, 235 P.2d 51, 54, that such declaration "is not admissible in evidence until prima facie proof has been made of the existence of the conspiracy, subject to the power of the trial judge to regulate the order of proof." What happened here seems in accordance with this rule.

[14] The admission of the notebook containing names of abortees found in Raegan's pocket and used by him in his state-

ment to the authorities. At the time of the offer there was evidence only of the officer who found it on Raegan. Respondent argues that the fact that the notebook was in Raegan's pocket was admissible because the fact of the possession was in itself incriminating and for that purpose the book was not hearsay. This is a sufficient answer.

[15] Motions to strike unresponsive parts of answers were denied. Respondent urges that this was correct where these answers, though unresponsive, were relevant and material. This position is supported by *Holzer v. Read*, 216 Cal. 119, 122, 13 P.2d 697.

[16] Reimringer complains of the admission of Raegan's statement notwithstanding the fact that it was expressly declared inadmissible as to him, because the effect on the jury of this statement, which disclosed that all abortions were performed by Reimringer, would nevertheless be very damaging. It is contended that the portion relating to Dr. Reimringer should have been expunged or a separate trial of Dr. Reimringer ordered. However although both attorneys examined the confession neither moved to strike part or to separate the trial. This precludes them from raising this point on appeal.

[17, 18] The admission of the statement of Dr. Reimringer is attacked although it was clearly admissible because of the evasive character of defendant's testimony and the conflict with the observations made by the police officers at the place of the crime. Although objection was made to the admission of all irrelevant matter in it, no motion to strike any separate portion was made and no prejudice appears.

[19] Error is assigned in excluding a defense question of a character witness: "And what is his general reputation for medical skill and medical ethics?" Respondent contends that the only trait of character involved in the accusation was his reputation as law abiding. It is said that not medical ethics but only general ethics are involved in the charge. This seems highly doubtful. Abortion is a breach of medical ethics not to be expected

from a physician of high medical ethics. The importance of medical skill is based on the accusation of "bungling" in the final argument which could not then have been foreseen. But if the evidence, as here, shows a very primitively performed operation, the fact that defendant is a skillful physician would be some indication that he was not the one who performed it. The witness should have been allowed to answer.

[20, 21] On cross-examination of the abortee Gallaher, counsel for Raegan attempted to impeach her by showing that she had not made the same statement detrimental to Raegan at the preliminary hearing. The court agreed with the district attorney that there was no inconsistency. Omission of facts on a former hearing is not good impeachment unless on that occasion the witness had been particularly questioned as to those facts. *People v. Casanova*, 54 Cal. App. 439, 446, 202 P. 45.

[22, 23] Appellant Reimringer complains that almost immediately after the instruction which requires corroboration of the testimony of an accomplice the court gave the instruction that the women on whom the abortions were committed were not accomplices and that this combination would mislead the jury in thinking that the testimony of said women did not require corroboration. However the court twice instructed on the necessity of corroboration of the testimony of such a woman. The instructions are correct. The woman who submits to an abortion is not an accomplice of the one who performs the operation, *People v. Clapp*, 24 Cal.2d 835, 839, 151 P.2d 237, but her testimony requires corroboration under the special provision of sec. 1108, Penal Code.

[24] For the same reason it was not error to omit an instruction that the testimony of said women ought to be viewed with distrust as sec. 2061, sub. 4, Code of Civil Procedure requires such instruction only as to accomplices.

[25] It is said that an instruction given by the court as to the exclusion of confessions of Raegan as to Reimringer, without such restriction as to admissions was prejudicial. However former rulings and

other instructions made it clear that no part of the admitted statement of Raegan could be used against Reimringer.

Finally it is contended that an amended judgment entered on March 5, 1952, more than a month after the duly pronounced and entered original judgment of February 4, 1952, outside of the presence of defendants and when they had started to serve time was a nullity. The original judgment contained, with respect to the manner in which the sentences were to run, the following:

Sentences on counts 2, 3 and 4 to run consecutively to sentence on count 1; the sentence on count 5 to run concurrently with count 1. The amended judgment contained instead that the second count was to be served after the first, the third after the second, the fourth after the third all consecutively, the fifth concurrently with the first.

[26, 27] Appellants contend that the first formulation makes counts 2, 3 and 4 run concurrently, *In re Sweet*, 113 Cal.App. 2d 413, 248 P.2d 94, whereas the new formulation makes them run consecutively. Such modifying of a judgment as to a felony cannot take place without the defendant being present, § 1193, sub. 1, Penal Code, and cannot take place at all when the sentence has been entered in the minutes of the court or defendant has begun serving said sentence. *People v. McAllister*, 15 Cal.2d 519, 525, 102 P.2d 1072. Respondent contends that, although the original formulation showed the intention of the court that only the fifth count should run concurrently with the first, whereas none of the others should run concurrently with any other count, there was no express determination in what manner counts 2, 3 and 4 should be served with respect to each other and that on the failure of such determination sec. 669 Penal Code gave the court power to make such determination within 60 days from the actual commencement of imprisonment and in the absence of the defendant. On its face the provision relates to prior existing judgments at the time of the pronouncing of a later judgment only, but respondent relies on *People*

v. Finkel, 94 Cal.App.2d 813, 211 P.2d 888 and *People v. Carr*, 6 Cal.2d 227, 57 P.2d 489 for the application of this provision also to judgments on separate counts of one information. Although these cases hold so only as to the power to impose consecutively running sentences the same construction must apply to the whole section which forms one unit. There is no reason conceivable why a different rule should apply to the correction of a failure to determine the manner in which a sentence should run with respect to a prior sentence known to the court than to the same failure with respect to the manner of running of sentences on different counts of the same judgment.

We hold that the court had power to make the modification in the manner it did. In *re Sweet*, supra, is not in point. It does not involve the power of modification but holds only in accordance with the express provision in section 669, Penal Code, that where there was no determination of the manner in which the sentences should run with respect to each other in the original judgments, and no later determination either, the judgments run concurrently.

Our decision on this point is without importance for appellant Reimringer, because with respect to him the counts as to which the judgment was amended will be reversed for new trial but is required with respect to appellant Raegan who urged the same contention.

[28] In a separate brief the defendant Raegan raises substantially the same points. They do not require separate treatment. As to the evidence all the elements of his participation in the crimes were shown. It was shown that he procured the abortees, furnished his kitchen for the operations, and aided his codefendant in performing the operations. *People v. Le Grant*, 76 Cal.App.2d 148, 172 P.2d 554, upon which he relies, supports the judgment here.

[29] He makes an extensive attack upon the conduct of the district attorney—saying nothing about his own which brought him in contempt of court. We do not ap-

prove of either, but can condemn one no more than the other. The case was not tried with dignity nor respect for the ethics of the profession but it is fair to assume that the jury was not influenced by the repeated emotional outbursts of counsel in so far as this appellant is concerned.

[30] The reference to the recent miscarriage suffered by Mrs. Raegan, though wholly foreign to any of the issues of this case and hence improper, cannot be deemed prejudicial to this defendant.

Criticism of the conduct of the trial court is without merit. In general the court was trying to keep counsel within bounds in the frequent outbursts of temper that occurred during the trial. The assignment of errors of law relates to the same matters as those which have been treated.

[31] The notebook which was taken from the defendant at the time of his arrest was properly admitted in evidence as showing his connection with the complaining witnesses upon whom the operations had been performed.

[32] Of the large number of assignments of error by both appellants we have treated those which seemed to merit consideration. As to the appellant Reimringer we are satisfied from a review of the record that the evidence plainly supports the conviction on the first and fifth counts. As to counts two, three and four the evidence was less satisfactory and the identification of appellant was extremely weak. Because of this factor it cannot be said that the errors above noted (misconduct of the district attorney) did not influence the jury's verdict. In this respect the case is in line with *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1. This, however, does not apply to appellant Raegan.

The judgment against Reimringer on the first and fifth counts is affirmed. As to the second, third and fourth counts it is reversed for a new trial. The judgment against Raegan is affirmed in all five counts.

GOODELL and DOOLING, JJ., concur.

116 Cal.App.2d 360

STOBIE v. STOBIE et al.

Civ. 8161.

Sac. 6259.

District Court of Appeal, Third District,
California.

Feb. 27, 1953.

Hearing Denied April 27, 1953.

Action was brought to impose a constructive trust on realty, to recover damages for alleged conversion of certain property, and for an accounting, and defendants filed a cross-complaint. The Superior Court of San Joaquin County, Quinn, J., entered judgment adverse to defendants, and they appealed. The District Court of Appeal, Schottky, J., held that evidence justified imposition of constructive trust.

Judgment affirmed.

1. Appeal and Error ⇨931(1)

On appeal by those claiming that decision was not justified by evidence, all conflicts were required to be resolved in favor of respondents and all legitimate and reasonable inferences were required to be indulged in to uphold judgment.

2. Appeal and Error ⇨989

Where a judgment is attacked as being unsupported by the evidence, power of appellate court begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, that will support trial court's conclusion.

3. Trusts ⇨110

Evidence justified action of trial court in imposing a constructive trust on realty.

4. Trusts ⇨110

In action to impose a constructive trust on realty, evidence sustained finding that plaintiff had committed no fraud which would prevent recovery, on probate court in negotiating and effectuating a loan from estate of mentally incompetent father of one of the defendants to plaintiff, who was guardian of the father.

5. Tender ⇨28

In action for an accounting, evidence sustained finding that tender had been made by plaintiff of money owed to defendants, so as to stop running of interest. Civ.Code, § 1914.

6. Witnesses ⇨283

Where examination of plaintiff at trial of accounting action was exhaustive and consumed nearly one-half of the more than 600 pages of the reporter's transcript, and about fifteen months after case had been tried and submitted on briefs, case was reopened on motion of defendants, and certain evidence was introduced by defendants, trial court did not abuse its discretion in refusing to permit defendants to recall plaintiff for cross-examination in regard to a certain note.

Lafayette J. Smallpage and Harold J. Willis, Stockton, for appellants.

Louttit, Louttit & Wilson, Stockton, for respondent.

SCHOTTKY, Justice.

On January 17, 1947, Frank A. Shackford commenced an action against appellants Wilbur E. Stobie and Vera Mae Stobie, husband and wife, in which action plaintiff sought (1) to impose a constructive trust upon certain real property hereinafter referred to as the "Lindsay Street property", located in Stockton, California, the record title of which, on the date of the filing of the action, stood in the name of appellant Wilbur E. Stobie, (2) damages for the taking and converting by appellant Wilbur E. Stobie of certain property, and (3) an accounting.

Appellants, Wilbur E. Stobie and Vera Mae Stobie, filed an answer denying any trust, pleading the statute of frauds, and alleging that if the agreement was made as alleged by respondent it was in fraud of the estate of the incompetent father of respondent Wilbur E. Stobie. Appellants also cross-complained in said action that they were the owners of the Lindsay Street property and sought to have their title thereto quieted against Shackford. As a separate cause of action appellant Wilbur E. Stobie alone cross-complained against respondent for an accounting for malfeasance while acting as Wilbur's attorney in fact.

The action was tried before the court sitting without a jury, the trial commenc-

ing on November 30, 1948, and with several continuances, extended through December 9, 1948, at which time the cause was ordered to stand submitted upon the filing of briefs. However, appellants' motion to reopen the trial was granted on March 16, 1950, and a further trial was had on May 1, 1950. On November 10, 1950, the trial court ruled in favor of respondent, an interlocutory judgment being filed on April 11, 1951, with final judgment being rendered on August 1, 1951, after appellants had filed an accounting of the rents, issues and profits which they had collected from the Lindsay Street property, appellants having, at the beginning of 1946, taken over the management of all properties standing in appellant Wilbur E. Stobie's name.

The accounting between respondent and appellants, separately stated as to the Lindsay Street property and the other matters handled by respondent in his fiduciary capacity for Wilbur, the latter appearing under the heading "General Accounting," had been ordered in the interlocutory order. By the terms of the judgment Shackford was entitled to a conveyance of the said real property upon payment of \$5,707.29, the net amount found to be still owing by him after the completion of all of the accounting. This appeal is from said judgment.

Appellants attack the judgment on a number of grounds. They first contend that the court erred in holding that appellants, Wilbur E. Stobie and Vera Mae Stobie, were constructive trustees for respondent Shackford of the Lindsay Street property, and that the evidence does not justify that decision because if any trust were created it was an oral express trust and void under our statutes. Appellants also set forth a number of other contentions which we will refer to hereinafter.

[1,2] Before discussing the points raised by appellants upon this appeal we shall summarize briefly the evidence as shown by the record, bearing in mind the familiar rule that all conflicts must be resolved in favor of respondents and all legitimate and reasonable inferences must

be indulged in to uphold the judgment, and that when a judgment is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 106 P.2d 886.

Frank Shackford was the uncle of defendant Wilbur E. Stobie, defendant's mother being Shackford's sister; Shackford was also the guardian of the person and estate of defendant's father, Wilbur J. Stobie, father Stobie having been adjudicated a mentally incompetent person and confined in the State Asylum. William H. Stobie, who now represents the estate of the deceased Shackford, is the brother of defendant Wilbur E. Stobie. Subsequent to the filing of this action on January 17, 1947, defendant Wilbur E. Stobie was, on November 10, 1947, adjudicated an incompetent person, and he appears by his wife and guardian, Vera Mae Stobie; Vera Mae Stobie is also an individual defendant. The property which is the subject of the action, referred to as the Lindsay Street property, is located in Stockton, California, and consists of two lots, upon one of which is located the parties' residence of many years, and upon the other, a corner lot, there were located two small buildings, a Log Cabin restaurant and a flower shop, which were subsequently removed.

In 1922 or 1923, upon the death of his mother, defendant Wilbur and his two older brothers, Sam and William, came to Stockton to live with their maternal grandmother, Mrs. Emma Shackford, and her son, their uncle, plaintiff Frank Shackford, in the residence located on the Lindsay Street property. Wilbur was at that time a boy of about six years of age. The brother, Sam, lived on the premises only a short while, was subsequently adjudicated an incompetent person and was confined in the State Asylum. The brother, William, continued to make his home there until 1930, when he moved to San Francisco, where he still resides. Mrs. Emma Shackford

died in 1936; after that, plaintiff Shackford and defendant Wilbur continued to live together on the premises until Wilbur was drafted in February of 1942. Upon his induction Wilbur made a general power of attorney in favor of his uncle, Shackford, which was not cancelled until October 5, 1946. While in the military service Wilbur suffered a head injury which ultimately resulted in the loss of nearly half of his brain. He was discharged from the army on November 14, 1945, and was married to his present wife, and now guardian, in Missouri on November 18, 1945. In March of 1946, after he was discharged from the Veterans Hospital in Missouri, Wilbur and his wife came to Stockton and moved into the Lindsay Street house on March 22, 1946, Shackford shortly thereafter moving to other property which he owned. Defendant Wilbur and his wife returned to Missouri late in 1946, and in the summer of 1947 Wilbur was hospitalized at Jefferson Barracks, Missouri, and his wife was appointed his guardian. By the time of the trial of this action in November, 1948, they had returned to California and were again living in the Lindsay Street home. While Wilbur had improved so as to be able to testify during the first hearing of the action, immediately afterward his condition became so serious that he was taken to the Veterans Hospital at Palo Alto, where, according to appellants' brief, he is still confined.

In January of 1935, title to the Lindsay Street property stood in Shackford's name, it having at various times previous thereto been either in his or his mother's name; it was encumbered by a deed of trust and delinquent taxes. Pursuant to the advice of family counsel, one John Chase of Visalia, Shackford, on January 30, 1935, deeded the property to the brother William, who was then of age. On February 9, 1935, William executed a deed conveying the property back to Shackford, but only the former deed was recorded. After this, a loan of \$4,900, approved by the probate court of Tulare County, was made from the estate of the incompetent father Stobie to William, with the Lindsay Street property

as security therefor. The entire plan was executed pursuant to an oral agreement by William to hold the property in trust for Shackford until Shackford repaid the loan to father Stobie's estate, after which William would reconvey the property to Shackford, the parties having been advised by counsel Chase that it would be illegal for the guardian of the estate to make a loan to himself upon his own property out of estate funds. At the trial plaintiff Shackford defended the transaction as having been prompted merely by the desire to invest available funds and thus benefit the estate, and as not being unique in that defendant Wilbur did, from time to time, also borrow money from his father's estate for the acquisition of property. Defendants attacked the transaction as being a fraud upon the court in that it was the improper use by the guardian of estate funds for his personal benefit to protect his property from foreclosure. In August of 1941, the brother, William, conveyed the property to defendant Wilbur, by a deed which was recorded; there was no reconveyance deed to Shackford. Plaintiff's explanation of this transaction was that it was a precautionary measure against possible marital difficulties of brother William, and that counsel outlined fully to Wilbur the trust relationship pursuant to which he would hold the property. No consideration was paid for either the conveyance to William or Wilbur. In February of 1942, a loan from father Stobie's estate to Wilbur, secured again by the Lindsay Street property, was approved in the amount of \$8,600. This money was used to pay off the 1935 loan with interest, the delinquent taxes, penalties and interest owing to the City of Stockton, and moving the Log Cabin restaurant and floral building to other property of Wilbur's, so as to clear off the corner Lindsay lot; this was all done in order to conclude a lease of that lot to the Richfield Oil Company. In April of 1944, defendant Wilbur's various obligations to father Stobie's estate, including the \$8,600 loan on the Lindsay Street property, were consolidated into a total obligation of \$24,000, including principal and accrued

interest. Plaintiff Shackford accomplished this for Wilbur under his general power of attorney, for the purpose of reducing the interest rate from 6% to 4%. The obligation was secured by a blanket deed of trust upon all property standing in Wilbur's name, and was represented by two notes, one in the amount of \$19,000, and the other in the amount of \$5,000. There is conflict as to whether the principal and accrued interest then owing by Wilbur totaled \$24,000 or only \$19,000, and it is one of the specific errors assigned by defendants and discussed hereinbelow. There is ample evidence in the record that during all of their years together extending until the latter part of 1946, the relationship existing between Shackford and defendant Wilbur was of an extremely close and confidential nature. In May of 1946, father Stobie died and Shackford was discharged as guardian of the estate in July of 1946, no objection having been filed to his annual or final accounts. The estate was closed on December 24, 1946, and, as part of the distribution, all of defendant Wilbur's promissory notes were satisfied on April 9, 1947, as evidenced by Wilbur's receipt for his interest in the estate of his father.

Late in 1946, Wilbur repudiated the trust, refused to reconvey upon Shackford's offer of payment, accused Shackford of mismanagement during the life of the general power, and revoked said power. Subsequent to the repudiation, Shackford commenced this action on January 17, 1947, his complaint alleging the previous dealings between the parties, praying that their accounts be settled, offering to pay whatever amount the court found him still to owe, and asking that a constructive trust be imposed upon defendants. Vera Mae Stobie was named an individual defendant because she asserted some interest in the property, and prior to the trial she was also ordered to appear as Wilbur's guardian. (Shortly after the filing of the original complaint, Wilbur purported to convey a joint tenancy interest in all his property to his wife.)

The following analysis of the evidence set forth in the memorandum opinion of

the learned trial judge is amply supported by the record:

"The evidence adduced in this proceeding is conflicting in many respects and on the whole somewhat confusing. It does appear quite clearly, however, that in addition to family ties between plaintiff (uncle) and defendant (nephew) the relationship existing over a period of many, many years was not only intimate but extremely confidential in character. As a matter of fact, it seems that plaintiff and defendant Wilbur Stobie worked together on all matters, the affairs of each being of genuine mutual interest. So, also, it may well be that that counsel and assistance of plaintiff was an important contributing factor in the acquisition of some considerable property by defendant Wilbur. Perhaps the very intimacy of the relationship explains to some extent the informality with which business matters were transacted.

"It appears quite clearly also that plaintiff and defendant Wilbur agreed upon an arrangement under which Defendant Wilbur was to acquire the Lindsay Street property from his brother William subject to the rights of plaintiff upon payment of the indebtedness due thereon. This deal seemed mutually advantageous, designed as it was to protect the home place occupied by both as well as to bolster the security situation particularly from Wilbur's point of view. It is admitted, tacitly if not actually, that defendant Wilbur was aware of the existence of the original arrangement between Plaintiff and William for a long time, perhaps from its inception. So, also, it is quite evident that this situation became a source of some concern either because of a change in William's status or perhaps purely for reasons of convenience. It seems significant also that prior to his marriage there was no misunderstanding, defendant apparently always recognizing the rights of plaintiff.

"The subsequent repudiation of the arrangement found to exist between

plaintiff and defendant Wilbur necessitates equitable relief through the medium of a constructive trust."

[3] Appellants first contend that the evidence does not justify the imposition of a constructive trust, and that if any trust was in fact created it was an oral express trust and void under our statutes. We are satisfied that under our decisions appellants' contention cannot be sustained. This question is fully and ably discussed in *Steinberger v. Steinberger*, 60 Cal.App.2d 116, 140 P.2d 31 (hearing denied) where it was held that breach of an oral promise to reconvey by the transferee or his administrator when the transfer was in a confidential relationship with the transferor at the time of the transfer constitutes sufficient fraud to create a constructive trust. In that case the court said, 60 Cal.App.2d at pages 119, 122, 140 P.2d at pages 33, 34, 35:

"California has apparently aligned itself with the English and the so-called minority American view. In *Taylor v. Morris*, 163 Cal. 717, 127 P. 66, there was involved a similar problem to the one here presented. Without reference to the confidential relationship there existing, the court stated [163 Cal. at page 722, 127 P. at page 68]: 'The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol. When it rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail. Certainly no elaboration of so plain a proposition is necessary, and it should be sufficient to refer to such cases as *Butler v. Hyland*, 89 Cal. 575, 26 P. 1108; *Hayne v. Hermann*, 97 Cal. (259), 261, 32 P. 171; *Odell v. Moss*, 130 Cal. 352, 62 P. 555; *Becker v. Schwerdtle*, 141 Cal. (386), 391, 74 P. 1029; *Fanning v. Green*, 156 Cal. 279, 104 P. 308; *Cooney v. Glynn*, 157 Cal. (583), 589, 108 P. 506; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430.' In *Gray v. Walker*, 157 Cal. 381, 108 P. 278, however, a department of

the Supreme Court expressly adopted the so-called majority view, citing such cases as *Feeny v. Howard*, 79 Cal. 525, 526, 21 P. 984, 4 L.R.A. 826, 12 Am. St.Rep. 162; *Babcock v. Chase*, 111 Cal. 351, 43 P. 1105; *Sheehan v. Sullivan*, 126 Cal. 189, 58 P. 543. See, also, *Smith v. Mason*, 122 Cal. 426, 55 P. 143, adopting the so-called majority American view. The more recent California cases have clearly followed the rule of *Taylor v. Morris*, supra, and have held that a constructive trust arises and will be enforced to compel restitution upon violation of the oral promise. *O'Brien v. O'Brien*, 50 Cal. App.2d 658, 123 P.2d 877; *Robertson v. Summeril*, 39 Cal.App.2d 62, 102 P.2d 347; *People v. Ahern*, 31 Cal.App.2d 655, 88 P.2d 787; *McRae v. McRae*, 67 Cal.App. 480, 227 P. 933; *Airola v. Gorham*, 56 Cal.App.2d 42, 133 P.2d 78.

* * * * *

"* * * The cases are clear that where there is some sort of a status between the grantor and the grantee, and confidence is imposed, a constructive trust will be imposed upon repudiation of the oral promise to reconvey. Thus actual trust and confidence, plus the relationship of parent and child, is sufficient (*Robertson v. Summeril*, 39 Cal.App.2d 62, 102 P.2d 347; *Cooney v. Glynn*, 157 Cal. 583, 108 P. 506; *Nordholt v. Nordholt*, 87 Cal. 552, 26 P. 599, 22 Am.St.Rep. 268; *Mead v. Mead*, 41 Cal.App. 280, 182 P. 761), as is that of husband and wife (*Allen v. Meyers*, 5 Cal.2d 311, 54 P. 2d 450; *Kohn v. Kempner*, 59 Cal. App. 621, 211 P. 805; *Smith v. Lombard*, 201 Cal. 518, 258 P. 55; *Taylor v. Bunnell*, 77 Cal.App. 525, 247 P. 240; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; *Jones v. Jones*, 140 Cal. 587, 74 P. 143; *Brisson v. Brisson*, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189), even where the relationship is meretricious, *Cole v. Manning*, 79 Cal. App. 55, 248 P. 1065. The trust has also been imposed where actual trust and confidence existed and the grantor

and grantee were brother and brother (*O'Brien v. O'Brien*, 50 Cal.App.2d 658, 123 P.2d 877; *Logan v. Ryan*, 68 Cal. App. 448, 229 P. 993; *Cummings v. Cummings*, 55 Cal.App. 433, 203 P. 452), or were brother and sister (*Tench v. McMeekan*, 17 Cal.App. 14, 118 P. 476), or were attorney and client (*Broder v. Conklin*, 77 Cal. 330, 19 P. 513; *Id.*, 121 Cal. 282, 53 P. 699), or principal and agent (*Kimball v. Tripp*, 136 Cal. 631, 69 P. 428), or client and business advisor (*Sanguinetti v. Rossen*, 12 Cal.App. 623, 107 P. 560). Coming closer to the relationship, here involved, it has been held that actual trust and confidence, plus the relationship of aunt and niece, will be sufficient to raise the constructive trust (*Butler v. Hyland*, 89 Cal. 575, 26 P. 1108) as is the relationship of uncle and niece and adopted daughter (*Alaniz v. Casenave*, 91 Cal. 41, 27 P. 521) and where the grantor and grantee were aunt and nephew by marriage (*People v. Ahern*, 31 Cal.App.2d 655, 88 P.2d 787). Trusts have also been imposed where the grantor and grantee were an engaged couple (*McRae v. McRae*, 67 Cal.App. 480, 227 P. 933), and where the grantor and grantee had 'relations of great confidence' and were later married (*Bradley Co. v. Bradley*, 165 Cal. 237, 131 P. 750; *Id.*, 37 Cal.App. 263, 173 P. 1011) and where they were brothers-in-law. *Anderson v. Broadwell*, 119 Cal.App. 130, 6 P.2d 260."

Appellants argue that under Shackford's version of the facts, Wilbur was to take all of the risk incident to ownership of the property with no chance at any profits, which would be a most unreasonable and unfair arrangement, no matter how friendly the parties were. Appellants then list seven "confirmations" of Wilbur's view that he did not take title to the property in 1941 subject to any rights in Shackford, but rather took title under an agreement that if he would assume and pay the loans thereon, the property would be his.

Appellants make an able and earnest argument in an effort to prove that the record does not sustain the findings of the

trial court. If the findings and judgment had been in favor of appellants, their argument would be very helpful in pointing out evidence in support of such judgment, but in the face of the adverse judgment, the testimony pointed out by appellants merely accentuates the conflict in the testimony, and, as hereinbefore pointed out, it was the province of the trial court to weigh the evidence. Therefore we deem it unnecessary to discuss at length the argument of appellants as to the insufficiency of the evidence.

[4] Appellants next contend that the trial court erred in finding that respondent committed no fraud upon the probate court of Tulare County in negotiating and effectuating the loan from father Stobie's estate. However, the argument of appellants upon this point is in effect an argument upon the weight of conflicting evidence. While the record might support a finding that the dealings with father Stobie's estate constituted fraud of such a character as to prevent recovery, that was not the finding which was made, and this court cannot say that as a matter of law the record will support only the conclusion urged by appellants. Rather there is adequate support for the view taken by the trial court that the dealings with father Stobie's estate were not improper.

Appellants' third asserted error of law is that: "The court gave Vera Stobie an equal interest in the moneys which Shackford was ordered to pay because of the Lindsay and other property accountings." Appellants contend that the only matter here at issue in which Wilbur and Vera Stobie had a joint interest was the Lindsay Street property, since Wilbur had, on March 17, 1947, subsequent to the filing of the *lis pendens* on January 17, 1947, purported to convey a joint tenancy interest to his wife. Wilbur was the sole plaintiff in that portion of the cross-complaint which prayed for an accounting from Shackford as attorney in fact for the handling of Wilbur's affairs concerning property other than the Lindsay Street property, and since Vera Mae Stobie was

not a party to that part of the action she should not have received judgment for any portion of the moneys awarded to Wilbur thereunder.

Respondent urges, we think correctly, that this is a matter of accounting as between appellants themselves, who are husband and wife, as well as the wife being guardian of the incompetent Wilbur. Respondent says he has no information on the matter, and that the appellants offered no testimony other than an accounting involving both receipts and disbursements, and set up by appellants without any distinction as between themselves, plus the testimony of Vera Mae Stobie herself, which indicated that she had some interest in the moneys involved in that accounting. Respondent further points out that Vera Mae Stobie had some interest in all of Wilbur's property for about a year and a half immediately preceding trial of the action, because Wilbur's conveyance of joint tenancy interest to her in March of 1947 covered all of his property.

Since the dispute is by one appellant as against the other, and since they do not point to any evidence in the record setting forth the extent of each appellant's interest in these moneys, it would appear that this court has no basis for entertaining this issue on appeal.

Appellants' fourth and fifth asserted errors of law are stated as follows:

"Fourth error of law: In the accounting involving the 'Lindsay property', the court allowed Wilbur interest on a portion of the moneys he paid out for the Lindsay property from the date of the making of said advances to January 17, 1947, only. Further, the court allowed interest during part of the time at 6% and part at 4%.

"Fifth error of law: The court's finding (Cl.Tr. p. 125, line 11) that Shackford, at the time Wilbur paid off the loan on Lindsay Street, tendered to Wilbur the sum of the latter's advances for the care and upkeep and loan payment, is not supported by one iota of evidence."

Appellants combine their arguments as to these two asserted errors and contend, in effect, that the filing of the complaint, with its offer of payment, did not constitute a sufficient tender to stop the running of interest. Besides, appellants assert, the question is not one of tender at all, because the agreement urged by respondent is that Wilbur was to keep the property until Shackford paid the loan, not to Wilbur, but to the estate of father Stobie, and since that has never been done, nothing has happened to stop the running of interest; and if Wilbur be not granted interest until he is reimbursed, Shackford is unjustly enriched. As to the percentage of that interest, they contend that irrespective of the rate on the notes to father Stobie's estate, Wilbur should be allowed interest at 7%—certainly as to those moneys, set at some six or seven thousand dollars, that did not come from any loans. Appellants also urge Civil Code section 1914 that a loan is presumed to be made upon interest unless otherwise expressly stipulated at the time in writing.

Respondent argues that to recover interest, the party must show a rate created by statute or an agreement therefor, express or implied, and that here the trial court properly considered all the circumstances in determining whether appellants were entitled to any interest at all, and in setting the rate thereof at the same rates payable on the notes to father Stobie's estate. Further, there were no actual "out of pocket" expenditures by either appellants because the income from the Lindsay Street property plus the \$8,600 loan thereon paid the various costs attributable to that property. Except for those payments by respondent (the crediting of his guardianship fee), the interest on the loans was allowed to accrue, and in this action to impose a constructive trust it was within the discretion of the trial court to adjust the affairs of the parties and provide for reimbursement as befits the equity of the case, citing *Milloglav v. Zacharias*, 33 Cal.App. 561 at page 565, 165 P. 977. Indeed respondent says, the court exercised its discretion liberally in light of the rule

that a constructive trustee who has repudiated his trust is not entitled to demand reimbursement for moneys expended in preservation or improvement of the property, citing *Marsh v. Smith*, 46 Cal.App. 692, 189 P. 1037. As for tender, respondent points to appellants' own evidence, the letters from Attorney Cavaleiro in October of 1946, as stating that respondent offered to pay the amounts due. Also cited is respondent's own testimony to the effect that tender was made through Attorney Chase.

[5] We are satisfied that there is ample support in the record for the finding that tender was made by respondent, and also that the court, in the exercise of its equitable powers, did not err in fixing the interest rates in accordance with the rate in the notes to father Stobie's estate.

Appellants next contend that the court erred in allowing the \$5,000 note executed in April, 1944, by respondent Shackford under his power of attorney. They argue that this note, together with the interest thereon, should be charged back to respondent until respondent shows that this money was legitimately used in the discharge of some obligation owing by Wilbur, either to father Stobie's estate or to someone else. They object to the holding that Shackford's guardianship account, filed and approved by the probate court of Tulare County, and showing the existence of the note, was a sufficient voucher to show the legitimacy of that item.

Respondent in reply states that the \$5000 represented the accrued interest on appellant Wilbur's various obligations, the principal of which totaled \$19,000, and we are satisfied that the record supports the contention of respondent and the holding of the trial court.

[6] Finally, appellants contend that the trial court abused its discretion in not permitting appellants' counsel to cross-examine respondent Shackford further in regard to the \$5000 note following the granting of their motion to reopen the case for

further evidence. The record shows that some 15 months after the case had been tried and submitted on briefs, the case was reopened upon motion of appellants. Certain evidence was introduced and counsel for appellants then endeavored to recall respondent Frank Shackford for further cross-examination. Counsel for respondent objected and the court, in sustaining the objection, stated: "Well, I think we have to bring the matter to a conclusion Mr. Smallpage unless you are in possession now of something that hasn't been gone into, something entirely new. Just to call him again for additional statutory cross-examination would seem not to be appropriate as a matter of procedure. I think perhaps there may arise frequently cases where it may be desirable from one point of view to recall the witness but we have to bring the matter to a conclusion and I think the matter was rather thoroughly considered on the original trial."

The record shows that the examination of respondent Shackford at the trial was exhaustive, consuming nearly one-half of the more than 600 pages of the Reporter's Transcript. The matter was one within the sound discretion of the trial court and it does not appear that there was any abuse of discretion, as the case seems to have been thoroughly tried and fully presented.

The record shows that the trial court was confronted with a most unusual situation and with a mass of conflicting and confusing evidence. It is evident that the learned trial judge gave the cause very thorough consideration. The conflict in the evidence was for the trial court to determine and it was likewise the duty of the trial court to determine what inferences should be drawn from the evidence. We are convinced that there is ample support in the record for the findings of fact made by the trial court and for its conclusions as to the law.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

116 Cal.App.2d 278

PEOPLE v. BOYDEN.
Cr. 4889.

District Court of Appeal, Second District,
Division 1, California.
Feb. 26, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, William B. Neeley, J., of having received stolen property, and he appealed. The District Court of Appeal, White, P. J., held, *inter alia*, that the evidence sustained the conviction.

Affirmed.

1. Criminal Law $\S$ 665(1)

The exclusion from court room of witnesses on part of prosecution, on motion of accused, is not matter of absolute right in all cases, but rests in discretion of court, which discretion may be exercised in favor of defendant's application or not, according to circumstances of the case.

2. Criminal Law $\S$ 665(2)

Practice of permitting some officer active in prosecution of case to remain for purpose of advising district attorney as to facts, interest and character of witnesses, etc., is proper.

3. Criminal Law $\S$ 1035(3)

Where no charge was made in trial court that investigating officer, who was permitted to remain in courtroom to advise district attorney after all other witnesses had been excluded at accused's request, had abused his privilege, such charge would not be considered on appeal.

4. Criminal Law $\S$ 665(2)

In absence of showing to trial court of prejudice that would probably arise from presence in court of investigating officer after exclusion of all other witnesses, trial court did not abuse discretion in refusing to exclude investigating officer.

5. Criminal Law $\S$ 641(1)

It is a fundamental right that accused confined in jail pending trial of charge against him shall have opportunity to obtain and consult with counsel. Pen.Code, $\S$ 825; Const. art. 1, $\S$ 13.

6. Criminal Law $\S$ 1165(1)

Where holding accused incommunicado until arraigned and denying him privilege of communicating with counsel prior to arraignment materially affects regularity of trial and conviction, conviction will be reversed. Pen.Code, $\S$ 825; Const. art. 1, $\S$ 13.

7. Criminal Law $\S$ 1186(4)

Holding accused incommunicado until arraigned and denying him privilege of communicating with counsel prior to arraignment did not so affect regularity of trial or result in such miscarriage of justice as to require reversal of conviction. Pen. Code, $\S$ 825; Const. art. 1, $\S$ 13; art. 6, $\S$ 4 $\frac{1}{2}$.

8. Criminal Law $\S$ 1186(1)

A District Court of Appeal will not reverse judgment of conviction solely as rebuke to law enforcement officers for their own lawless acts or for improper administration of law independent of trial which resulted in judgment. Pen.Code, $\S$ 825; Const. art. 1, $\S$ 13.

9. Constitutional Law $\S$ 257

The test for determining whether violation of constitutional and statutory rights of accused immediately after his arrest has amounted to such denial of due process as to require reversal of conviction is whether such violation has materially affected outcome of trial. Pen.Code, $\S$ 825; Const. art. 1, $\S$ 13.

10. Criminal Law $\S$ 1165(1)

Although accused had not been taken before magistrate within time specified by statute, in absence of showing of misconduct on part of law enforcement officers which appeared to have materially affected result of trial or made trial itself unfair, conviction would not be reversed. Pen. Code, $\S$ 825; Const. art. 1, $\S$ 13.

11. Criminal Law $\S$ 335

Indictment and Information $\S$ 176

In prosecution for having received stolen goods, burden was upon people to show that alleged offense was committed within statutory period of three years, but people were not required to prove date of offense exactly as alleged. Pen.Code, $\S$ 800.

12. Receiving Stolen Goods Ⓒ8(3)

Evidence supported conviction for having received stolen property. Pen.Code, § 800.

13. Criminal Law Ⓒ564(2, 3)

Venue, like any other fact in criminal case, may be established by circumstantial evidence and need not be proven beyond reasonable doubt.

14. Criminal Law Ⓒ304(6)

The court will judicially notice that Pasadena is in Los Angeles County. Code Civ.Proc. § 1875.

15. Criminal Law Ⓒ564(3)

Where theft occurred in Los Angeles County, and person charged with having received the stolen property was found with some of it in another city in such county trying to sell such property, in absence of evidence that such person had been elsewhere than in such county, trial judge was warranted in concluding that such person had received the property in such county so as to lay venue in such county. Code Civ.Proc. § 1875.

16. Receiving Stolen Goods Ⓒ3

Guilty knowledge of larceny is essential fact to be proved in prosecution for receiving stolen goods, but such knowledge need not be that actual and positive knowledge which is acquired from personal observation of the fact.

17. Receiving Stolen Goods Ⓒ8(4)

Knowledge that goods acquired were stolen may be inferred from surrounding conditions and circumstances, as for instance, that goods were acquired from person of questionable character, that person accused with having received stolen goods gave evasive answers to material questions with reference to ownership of the stolen property, the manner in which he claims to have acquired such property, or that he denied possession of the goods if such denying is shown to be false.

18. Receiving Stolen Goods Ⓒ8(3)

The inference that person charged with having received stolen goods, had received the property for his own gain was reasonably justified by his statement when asked

by officer as to remuneration which he was to receive that he thought he would make a "fast buck on the deal." Pen.Code, § 496.

Gerald Glen Boyden, in pro per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, appellant and one Louis William Parks were charged in Count I with the crime of burglary, and in Count II with the offense of receiving stolen property. Each was charged with having previously been convicted of a felony and with having served a term of imprisonment therefor.

Appellant pleaded not guilty as charged in the information, and admitted the prior conviction. He refused the court's offer to appoint counsel to represent him, and notwithstanding the repeated urging of the trial judge that he accept counsel, he steadfastly insisted that he would represent himself.

Trial by jury was duly waived and following trial before the court, appellant was found not guilty of burglary as charged in Count I and guilty of the offense of receiving stolen property as alleged in Count II. His co-defendant Parks was acquitted on both counts. Judgment was accordingly pronounced and from the judgment of conviction this appeal is prosecuted.

Epitomizing the factual background surrounding this prosecution, the record reflects that at 5 p. m. on February 26, 1952, the senior cashier of the Department of Employment of the State of California, at the Huntington Park office in Los Angeles County, locked up the two safes which were inside a metal cash cage, focused a light on each, turned it on, and locked the door of the cage. Inside the cage were two adding machines. Between 5:00 and 5:30 p. m. that night, the windows and doors of the office were checked to see that they were locked. The janitor,

who was the last person to leave the office, noticed that the cage was locked and the lights focused on them when he left at 7:15.

On the morning of February 27, 1952, the employment security officer for the Employment Department entered the office between 7:00 and 7:10 a. m. He saw that the back door was open and a fire extinguisher was holding it. The screen door was unlocked and there were several indentations on it. The door of the cage had been forced open, the lock was broken, the lights which had been focused on the cages were off, and one of the safes had been moved several inches off its base.

The acting manager checked the equipment which was left in the office against an inventory list which had been made up the previous July, and determined that two adding machines and eight typewriters were missing. The types and numbers of the missing typewriters were of record. Neither the senior cashier nor the acting manager had given anyone permission to enter the office or take anything therefrom.

On February 29, 1952, at about 1:45 p. m., appellant entered the Parker Typewriter Company in Pasadena. He asked if they bought used typewriters, and Mr. Parker asked him what kind of a machine he had. The appellant said it was an Underwood, and was about six months old. He said that he had it in his car, and Mr. Parker told him to bring it in. The appellant brought in a typewriter, an Underwood, No. 6571790. (This was one of the stolen typewriters.) Mr. Parker offered the appellant \$65 for the machine, which he accepted. While Mr. Parker was writing up the bill of sale, he asked the appellant if he had a bill of sale. The appellant said that he had not, as the machine had been given to his wife as a Christmas present. He later said it was a birthday present. Mr. Parker telephoned the Pasadena Police Department to check the serial number, and at that time the police said they had no record of it, but that they would telephone to Los Angeles and call Mr. Parker back. Ten minutes later the police

called and said that the typewriter had been stolen, and that two officers were on their way over. The appellant was still in the store when the police arrived, and Mr. Parker turned the typewriter over to them.

The appellant told Officer Bornhoft, one of the arresting officers, that he was from Watts; that a friend named Robertson had taken him to Pasadena in the appellant's old Ford; that Robertson had gone to visit a girl friend and would return for him in about thirty minutes. The appellant said that his wife had given him the typewriter the day before. The officers took the appellant to the police car, drove around the block, and parked on the Arroyo Parkway just south of Colorado Street. Their attention was attracted to a 1939 Oldsmobile which was parked nearby. It was registered to W. L. Boyden, and in the trunk compartment there was an adding machine (which was identified as having previously been in the Department of Employment Office), and a Smith-Corona typewriter No. 1A2123484 (also identified as one of the stolen typewriters).

Later at the Pasadena Police Detective Bureau, Officer Bornhoft asked appellant where he obtained the Underwood typewriter, to which question appellant repeated that his wife had given it to him the day before; that he was to sell it for her and give her the proceeds of such sale. The officer said, "You are not telling the truth". Appellant moved his head, indicating that he was not. The officer said, "You did not get this typewriter from your wife. You are telling a lie", to which appellant replied, "Yes. I have been in this sort of thing before, and the truth has never helped me." The officer then inquired of the appellant as to who owned the Oldsmobile and received the reply that it belonged to appellant's brother, but that the former did not know that the vehicle was in Pasadena since he had not brought it there.

The arresting officer found a key on the appellant's person, and "No. 43" appeared on the tag thereof. The appellant said that it was for a room in the Reed Hotel,

some place on 103rd Street but that he did not live there, as he kept it to entertain girl friends; that his own room was No. 5.

On the evening of the same day, an investigator from the Department of Employment had a conversation with the appellant in the interrogation room of the Pasadena Police Department. The investigator, Mr. Cooper, asked appellant if he would give him a written statement, and the appellant refused. Mr. Cooper said, "This story that you told Officers Bornhoft and Rhue this afternoon was not true, was it, Gerry?" The appellant replied, "No, it wasn't. I never got any place telling the truth." Mr. Cooper said, "Well, this story that you got this typewriter from your wife is not true, is it?" The appellant replied, "No." Mr. Cooper asked where he got the typewriters and the adding machine, and the appellant said he got them at about 12:00 o'clock that day outside of the Samba Cafe on East Fifth Street, from a Joe Taylor. He said that Joe Taylor was a man he had "done time" with in the County Jail at Los Angeles in 1947. He said that Taylor had backed up his Plymouth and transferred the machines into the trunk of the Oldsmobile. When Mr. Cooper asked the appellant if he knew whether the merchandise was "hot", appellant said, "I had an idea it was." He also said that he had nothing to do with the burglary.

On March 4th at the Huntington Park Police Department, Mr. Cooper showed the appellant seven photographs taken from the Los Angeles Police Department files, and asked him if he knew any of the persons. The appellant picked one photograph out and said that he "knew him"; that his name was Joe Taylor. He denied that it was the Joe Taylor that gave him the machines, and said that it might have been the Joe Taylor that he "did time" with in 1947. He said that he did not know where the other machines were, but that if Mr. Cooper released him he thought that he could recover them with the assistance of Toledo Slim, a character from Fifth Street.

On March 4th, Officer Keator, of the Huntington Park Police Department, received a key, with a tag containing the number "43", from Captain Armstrong of the same department. He went to Room 43 of the Kaye Hotel at 5535 Central Avenue, and entered it. Inside he found a Remington typewriter and certain papers, among which was one having "State of California, Department of Employment" printed at the top.

On March 5th, Mr. Cooper had another conversation with appellant, about a typewriter which was said to have been removed. Mr. Cooper said, "Gerry, I suppose you know where we got this typewriter, don't you?" The appellant answered, "Yes, I think I do." Mr. Cooper said, "It was recovered in your room." The appellant said, "Yes, I know that." The appellant denied that Joe Taylor had taken the typewriter to the room, and said that he took it there himself.

In his brief, appellant denies the truth of statements attributed to him by Police officers in their testimony, but he did not take the witness stand at his trial to deny or explain them. Article I, section 13 of the Constitution of California provides that in a criminal case, the failure of an accused to explain or deny by his testimony any evidence or facts in the case against him may be considered by the court or jury.

[1] As his first ground of appeal, it is urged by the appellant that the court erred in allowing the investigating police officer to remain in the court room after all other witnesses were excluded at appellant's request. In refusing to exclude the investigating officer the court did not err. The exclusion of witnesses on the part of the prosecution, on motion of the accused, is not a matter of absolute right in all cases, but rests very much in the discretion of the court, which discretion may be exercised in favor of the defendant's application or not, according to the circumstances of the case.

[2-4] In the instant proceeding, the district attorney stated that he needed the services of the officer, and that there was no way in which he could properly present

his case without the assistance of the officer. It has long been the general practice to permit some officer, active in the prosecution of the case, to remain for the purpose of advising the district attorney as to the facts, the interest and character of the witnesses, etc. Such a practice is proper and charges that such officer or witness has abused his privilege should be first brought to the knowledge of the trial court, that they may be corrected, if there be any ground for the charge. No charge of such abuse was made in the trial court and cannot be considered when made for the first time in the appellate tribunal. Furthermore, the officer in question had testified at the preliminary hearing and the testimony he gave was in the possession of appellant. In the absence of any showing to the trial court of prejudice that would probably arise from the presence in court of the investigating officer, it does not appear that there was any abuse of discretion in the order as made, *People v. Garnett*, 29 Cal. 622, 625; *People v. Ong Git*, 23 Cal.App. 148, 151, 137 P. 283; *People v. Halbert*, 78 Cal.App. 598, 613, 248 P. 969; *People v. Oliver*, 7 Cal.App. 601, 604, 605, 95 P. 172.

It is next contended by appellant that he was deprived of the right to obtain counsel. In this regard appellant refers us to testimony given by one of the arresting officers, Wayne Bornhoft, of the Pasadena Police Department, as follows:

"Q. By Mr. Boyden: Did the Defendant Boyden ever ask you for permission to call an attorney? A. Yes, he did.

"Q. Did you give him permission to call an attorney? A. No, sir.

"Q. When was that? A. That was after my conversation with Defendant Boyden.

"Q. February 29th? A. Yes, sir."

Also, the testimony of Officer Arnett of the Huntington Park Police Department who was acting as jailer while appellant was confined there:

"Q. Were you instructed to keep the prisoners from making any outside contact? A. I was given instructions by the Captain of Detectives to keep the prisoners

from making any outside calls until they were arraigned."

As we read the record in this case it substantiates appellant's contention that he was held incommunicado until he was arraigned, that during that period he was denied the privilege of communicating with counsel.

[5] It is a fundamental right guaranteed by the law of the land that an accused confined in jail pending the trial of a charge against him, shall have an opportunity to obtain and consult with counsel. In California, the right of an accused to obtain and consult with counsel is guaranteed by the Constitution, which, in section 13 of Article I, expressly declares that "In criminal prosecutions, in any court whatever, the party accused shall have the right to * * * appear and defend, in person and with counsel". That this clause of the constitution, "* * * unquestionably was adopted to secure to the accused person all the benefits which may flow from the employment of counsel to conduct his defense. To afford him those benefits it is essential that he should be allowed to consult with his counsel, not only during the actual trial, but prior thereto, in order to prepare for his defense", was the holding in *In re Rider*, 50 Cal.App. 797, 799, 195 P. 965. For the state to place a man on trial in its courts, charged with an offense involving his life, liberty or character and then place him in a position that he could not prepare to make his defense, would be nothing more than a cheap subterfuge of and a senseless mockery upon justice, and as well, a contemptuous disregard of the aforesaid constitutional provision. In California the Legislature has expressly provided that one confined in jail may be visited by his counsel and makes it a misdemeanor for an officer or jailer having custody of a prisoner, to unlawfully refuse or neglect to permit visitation of a prisoner by his attorney. Penal Code, section 825.

Respondent urges that while in jail appellant told an investigator that he had an attorney and named him. Be that as it may, what service could such attorney ren-

der if the accused was denied the right of communicating with him?

[6-8] Such flagrant misconduct and utter disregard of the rights of an accused by law enforcement officers deserves the severest condemnation, and if it appears that it materially affected the regularity of his trial and conviction, would require a reversal. However, in the case at bar, the misconduct of the police officers does not appear to have so affected the regularity of appellant's trial nor to have resulted in a miscarriage of justice. Such being the case, "* * * it is not the function of this court to reverse a judgment solely as a rebuke to 'law enforcement' officers for their own lawless acts, and improper administration of law, independent of the trial which resulted in that judgment." *People v. Stroble*, 36 Cal.2d 615, 618, 226 P.2d 330, 332.

Appellant next urges that the fact that he was not taken before a magistrate within two days after his arrest requires a reversal of the judgment of conviction. Appellant was arrested February 29 and held incommunicado until March 6 before he was brought before a magistrate. Of the illegality of such conduct there can be no doubt. Section 825 of the Penal Code provides, in part, as follows: "The defendant must in all cases be taken before the magistrate without unnecessary delay, *and, in any event*, within two days after his arrest, excluding Sundays and holidays * * *". (Emphasis added.)

Officers of the law must realize that if they indulge in practices such as appear herein, they may, in the end, defeat rather than further, the ends of justice.

[9] However, before we can declare a denial of that fundamental fairness essential to due process, we must find that the absence of that fairness materially affected the trial, and the conduct complained of must be of such quality as necessarily prevents a fair trial, such as a coerced confession which is used as a means of obtaining conviction. In the instant case no confession was obtained from the appellant during the time he was held in jail, nor

were any tyrannical or oppressive means used to obtain from him any evidence that was presented at the trial. Appellant urges only that, the object of holding him in jail incommunicado, "was to permit the officers to manufacture a better case against him through his absence". Our research has not been rewarded with any case in which it was held that such securing of further evidence amounted to a denial of due process when it was presented in court. The test seems to be whether the violation of the constitutional and statutory rights of an accused immediately after his arrest appears to have materially affected the outcome of his trial. The situation presented here is not like that in the cases cited by appellant where judgments of conviction were reversed because of fundamental defects in the conduct of the trial due to the denial to an accused of fair, orderly trial procedure.

[10] We find herein no showing of misconduct on the part of law enforcement officers which appears to have materially affected the result of the trial or made the trial itself unfair. A reversal of the judgment on the claimed ground of breach of due process is, therefore, not warranted.

Finally, appellant asserts that the evidence was insufficient to support the judgment of conviction. He urges that the prosecution failed to prove when the alleged stolen property was received by him, where the crime was committed, or that he knew the property had been stolen.

[11,12] The People were not required to prove the date exactly as alleged. The burden was upon them of showing only that the offense was committed within the statutory period of three years. The evidence showed that the property in question was not stolen until the night of February 26-27, 1952. Manifestly, it must have been received by appellant subsequent to that time which was well within the statutory period. Furthermore, it was clearly established by appellant's own admissions that he received the property from one Joe Taylor at about noon on February 29, 1952. *People v. James*, 59 Cal.App.2d 121, 138 P.2d

30; *People v. Tracy*, 50 Cal.App.2d 460, 464, 465, 123 P.2d 138; Penal Code, section 800.

[13-15] Appellant's contention that the property was received in San Clemente, Orange County, California, and that therefore, the Superior Court of Los Angeles County was without jurisdiction, is devoid of merit. Venue, like any other fact in a criminal case, may also be established by circumstantial evidence, and it need not be proven beyond a reasonable doubt, *People v. Harkness*, 51 Cal.App.2d 133, 139, 124 P.2d 85. In the case at bar, the evidence showed that the typewriters were taken in the City of Huntington Park, Los Angeles County. Some of them were found in appellant's possession in Pasadena, which the court will judicially notice is also in Los Angeles County, Code Civ.Proc. sec. 1875; *Warnock v. Kraft*, 30 Cal.App.2d 1, 3, 85 P.2d 505. Since the theft occurred in Los Angeles County, and appellant was found with some of the stolen property in another city in that county trying to sell such property, and since it is not suggested in the evidence that appellant had been elsewhere than in Los Angeles County, the trial judge was warranted in reasonably concluding that appellant received the property in the last named county.

To substantiate his claim that there is no showing in the evidence that he had knowledge of the theft of the property in question, appellant calls attention to his repeated denials of such knowledge; that he submitted to a lie detector test; that he gave his true name to Mr. Parker when he attempted to sell the typewriter to the latter, and that he stood by while Mr. Parker made a telephone call to the police to ascertain whether or not the typewriter was stolen.

[16] "While guilty knowledge of the larceny is an essential fact to be proved in a prosecution for receiving stolen goods, such knowledge need not be that actual and positive knowledge which is acquired from personal observation of the fact." *People v. Mercado*, 59 Cal.App. 69, 72, 209 P. 1035, 1037.

[17] Whether the accused knew that the goods were stolen is to be determined by all the facts of the case. Such knowledge may be inferred from the surrounding conditions and circumstances, as for instance, that the goods were acquired from a person of questionable character, *People v. Moore*, 137 Cal.App. 130, 132, 30 P.2d 79; *People v. Stollmack*, 18 Cal.App.2d 471, 477, 64 P.2d 162; that the accused gave evasive answers to material questions with reference to the ownership of the stolen property; the manner in which he claims to have acquired such property, or as is generally stated, a failure on the part of the accused to "satisfactorily explain his possession", *People v. Jacobs*; 73 Cal.App. 334, 340, 238 P. 770; *People v. Juehling*, 10 Cal. App.2d 527, 531, 52 P.2d 520; *People v. Cox*, 117 Cal.App. 254, 258, 3 P.2d 581; or that he denied possession of the goods if such denying is shown to be false, *People v. Levison*, 16 Cal. 98, 99.

In the case now engaging our attention, appellant claimed to have received the typewriters and the adding machine from one Joe Taylor with whom he had "done time" in the county jail. It could reasonably be inferred that such former inmate of the county jail was a person of unsavory or questionable character and known by appellant to be such.

When first arrested, appellant told the officer that the typewriter he was attempting to sell belonged to his wife. Later he admitted this statement was false. He then stated he had received the machines from one Joe Taylor outside a cafe on East Fifth Street. When the appellant was shown some police photographs taken from the Los Angeles Police Department files, he identified one as being that of Joe Taylor, but not the Joe Taylor who gave him the machines, although it might have been the Joe Taylor that he "did time" with in 1947. He also told an officer that he had an idea that the merchandise was "hot". No showing was made at the trial that any attempt was made to secure the presence of Joe Taylor as a witness. Having in mind the rule as to the *quantum* of evidence sufficient to support a conviction on a charge of

receiving stolen goods, knowing them to be stolen, and in view of the conflicting, vague and evasive explanations of his possession of the property in question as given by appellant at different times, we are satisfied that the trier of facts was justified in finding appellant guilty. Added to the foregoing is the fact that when arrested, one of the arresting officers asked appellant how he got to Pasadena, and in reply he stated that a friend of his named Robertson had taken him to Pasadena in the appellant's old model Ford car, and had then gone to see a girl friend, and would return for the appellant in about half an hour. Shortly afterwards, an Oldsmobile was found parked on a street in Pasadena, and in it were a typewriter and an adding machine which were identified as having been stolen.

Later, the appellant stated that the Oldsmobile belonged to his brother, but that he, the appellant, did not know that it was in Pasadena, as he had not taken it there. Later he told an investigator that when he received the machines from Joe Taylor, that the latter had backed his Plymouth up and transferred the machines to the trunk of the Oldsmobile.

Thus, the appellant at first denied possession of the machines found in the Oldsmobile, and then admitted that the denial was false, thereby furnishing a basis for the inference that he knew that they were stolen.

[18] The inference that appellant received the property for his own gain, within the definition of the crime charged against him as contained in Penal Code, section 496, was reasonably justified by his statement when asked by an officer, "Well, what kind of a deal did you have with Taylor as to what remuneration you were to receive?" and to which appellant replied, "Oh, I thought I would make a fast buck on the deal".

In view of our holding that nothing which happened prior to the trial materially affected the fairness thereof or resulted in a denial of due process of law, coupled with the fact that there was no miscarriage of

justice, a reversal of the judgment would be without justification. Const. of Calif. Art. VI, sec. 4½.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



116 Cal.App.2d 512

**GREEN v. KEY SYSTEM TRANS-
IT LINES et al.**
Civ. 15352.

District Court of Appeal, First District,
Division 1, California.

March 5, 1953.

Hearing Denied May 4, 1953.

Action by truck driver for injuries sustained in collision with train at partially obstructed railroad crossing. The Superior Court, County of Alameda, James R. Agee, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Bray, J., held, *inter alia*, that the evidence presented a question for the jury as to whether plaintiff had been guilty of contributory negligence in failing to look in the direction of danger at a proper place, or in failing to see the approaching train when he looked.

Affirmed.

1. Appeal and Error ⇨930(1)

In determining sufficiency of evidence to support verdict, evidence and reasonable inferences therefrom would be taken most strongly in favor of party for whom verdict was returned.

2. Railroads ⇨327(8)

A driver of vehicle approaching railroad crossing is not necessarily required to stop, but he is required to look, though he does not necessarily have to look from the best possible available spot so long as spot selected gives him reasonably assuring view of track.

3. Railroads ⇨350(24)

In action by truck driver for injuries sustained in collision with train at partial-

ly obstructed railroad crossing, evidence as to driver's failure to stop, place from which he looked, and character and extent of obstruction presented question for jury as to contributory negligence.

4. Railroads $\Rightarrow$ 350(24)

In action by truck driver for injuries sustained in collision with train at partially obstructed railroad crossing, wherein it was contended that driver had been contributorily negligent in failing to look or in failing to stop after looking, whether train was in sight when driver first looked was question for jury, despite graphs, which were based upon driver's testimony as to speed of truck and his estimates of number of feet it went in certain intervals and which showed that train must have been in sight at time driver looked.

Donahue, Richards, Rowell & Gallagher and George E. Thomas, Oakland, for appellants.

Ricksen, Freeman & Johnson, Kennedy Jackson, Jr., and Stanley C. Smallwood, Oakland, for respondents.

BRAY, Justice.

From a judgment on a jury verdict awarding plaintiff \$32,500 for injuries received in a railroad crossing accident, defendants appeal.

Question Presented.

Was plaintiff guilty of contributory negligence as a matter of law? The answer depends, in turn, upon the obligation of a vehicle driver approaching a railroad crossing at a blind street intersection.

Facts.

[1] It is conceded that the evidence supports the jury's implied finding of defendants' negligence. Taking the evidence and the reasonable inferences therefrom most strongly in plaintiff's favor, as we are required to do, *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183, the facts follow. Plaintiff was driving a milk truck at the intersection of 46th Street and Linden Street, Oakland. Linden Street runs generally north and south;

46th Street east and west. The paved portion of 46th Street is 36 feet wide, widening out, however, in the intersection. Linden Street is 130 feet wide, unpaved, except at the intersection. Both the northwest and southwest corners are occupied by buildings constructed up to the property lines. Running north and south on Linden Street are four sets of tracks of the Key System. At the northwest corner is located the Remar Baking Company building. From its wall easterly to the first track is approximately 35 feet, roughly one-half of which was a graveled shoulder and the other a graveled or dirt roadway. The line between the shoulder and roadway is not defined. Except at the intersection the railroad bed is unpaved and the rails are laid on bare ties. A police officer characterized the intersection as a blind one. Automobiles were parked on Linden Street in front of the Remar building. Apparently this was customary as plaintiff had seen automobiles parked there before. Approximately 250 to 300 feet north of the crossing the tracks curve. There was a railroad crossing sign, or crossarm, near the curb on the southerly side of 46th Street a short distance from Linden and a white "X" on a black background overhead approximately at the entrance of the intersection. The crossing was practically at grade, the grade, if any, so slight as not to be noticeable. Plaintiff was familiar with the crossing having driven over it for three weeks before. On this occasion he saw the crossarm and was aware of the tracks as he approached. For three weeks he had been a retail milk route driver for the South Berkeley Creamery. Plaintiff testified the accident happened between 7:55 and 8:00 a.m. The conductor stated it happened at 7:52. Plaintiff operated the milk truck standing up, with the doors open. The truck has gears like an automobile with one difference in gear position. The same pedal operates both the brake and the clutch, the clutch being thrown at a position half way down the pedal. Schlater, the creamery's then route foreman, was standing up at plaintiff's right. Plaintiff testified that he was driving 10 to 15 miles an hour in the

short block leading to the intersection. He was going easterly on 46th Street. As he approached he slowed down to 4 to 6 miles an hour before coming out beyond the buildings. Schlater testified that the truck approached the intersection at not over 15 miles an hour, that it slowed down to 8 to 10 miles an hour and then came almost to a stop at a speed of 4 to 5 miles an hour, at which speed it continued until the occurrence of the accident. Apparently the truck did not stop. Plaintiff also stated that the truck proceeded to the point of impact at 4 to 6 miles an hour, although it had stopped just before it was hit by the train. After coming out into the intersection from between the buildings plaintiff looked to his left (or north, the direction from which the train came). In so looking to the left he drove 10 to 15 feet. His vision was partially cut off by the diagonally parked cars; they blocked his view of the tracks. (In his deposition he denied that they did.) The detail of his testimony on this subject will be given later. He could not say whether when he stopped looking left he had cleared the obstruction or saw the tracks. He then looked to his right traveling about 10 to 15 feet. When he looked to his left again the front of his truck was probably 10 to 12 feet from the nearest track and the train was about 90 to 100 feet away coming towards him on that track. At this position he could not stop his truck before it reached the track. Had he not looked right he would have seen the train up the track. His brakes were in good condition. Neither plaintiff nor Schlater heard any warning whistle or bell until Schlater heard the bell when the train was about 15 feet away. His speed was 4 to 6 miles an hour and it would require 10 to 12 feet to stop. He would have stopped before reaching the track if he had been able to. He immediately stepped on the brake pedal and stopped his truck with the front end over the first rail but not extending to the second rail. When he stopped the train was not quite 49 feet away. He tried to shift into reverse but the train hit the truck and he does not know whether he succeeded. He received serious injuries.

As defendant does not challenge the amount of the verdict, it is unnecessary to detail the injuries. Generally Schlater corroborated plaintiff's testimony, except that he testified that after slowing to 4 to 5 miles an hour the truck's speed increased to 8 to 10 miles an hour. He also testified that the truck proceeded 4 to 5 miles an hour until the accident. Schlater jumped just before the truck was hit. When they came into the intersection he looked both ways. He does not remember if he first looked left. When he did look left the truck was about 8 feet from the track and the train was two-thirds of the bakery building away from the crossing.

The motorman testified that he blew his whistle 200 to 250 feet from the intersection and sounded the bell for 65 feet from the intersection and 80 to 85 feet from the point of impact. The train could have been going at a speed as high as 27 miles an hour and continued until after he had seen the truck and up to the point 15 to 20 feet from the point of impact when he threw the train into emergency. He used no power, however. He was going 15 to 20 miles an hour at the moment of impact. It takes 200 feet to stop a train at 20 miles an hour, 300 at 25. He could see the intersection from 250 feet away. He was 60 to 65 feet from the intersection when he first saw the truck which was then 15 to 20 feet from the track. The truck was going 15 to 20 miles an hour, but it slowed down to 5 to 8 miles an hour and rolled on the track at about 2 miles an hour. When the truck was 15 to 20 feet from the track the driver was looking south (the opposite way from the train), and the passenger was looking north, both talking. (Plaintiff and Schlater both denied they were talking at this time.) He noticed only one diagonally parked car at the point where plaintiff testified there were several. The train conductor testified that the truck was going 10 to 12 miles an hour on approaching and had stopped on the track for about 2 seconds before being hit. Other defendants' witnesses noted a heavy application of the truck's brakes, stating that the truck approached at 15 miles an hour, did not slow down and arrived simultaneously

with the train. Witnesses called by defendants concerning the whistle and bell gave divergent testimony. Some heard one, some two whistles. All heard the bell but differed as to when it started in the interval between the whistle and the application of the train's brakes.

Plaintiff's Duty.

Defendants make two contentions in their claim that plaintiff was guilty of contributory negligence as a matter of law: (1) He failed to look in the direction of danger at a proper place. (2) He failed to see the approaching train when he looked.

The law as to the duty of a vehicle driver approaching a railroad crossing has undergone considerable change since the rather unrealistic doctrine of "stop, look and listen" was evolved by Mr. Justice Holmes in *Baltimore & Ohio R. Co. v. Goodman*, 275 U.S. 66, 48 S.Ct. 24, 72 L. Ed. 167. *Griffin v. San Pedro, L. A. & S. L. R. Co.*, 170 Cal. 772, 151 P. 282, L.R. A. 1916A, 842, and *Eddlemon v. Southern Pacific Co.*, 41 Cal.App. 340, 182 P. 811, followed this doctrine. In *Koster v. Southern Pac. Co.*, 207 Cal. 753, 279 P. 788, relying on the *Baltimore & Ohio R. Co.* case and the *Griffin* case, the court even went so far as to state that the driver of a vehicle approaching an obstructed railroad crossing might even be required to stop and get out of his vehicle. At least he must "stop and look." 207 Cal. at page 763, 279 P. at page 792. There are many other cases to the same effect, including *Murray v. Southern Pac. Co.*, 177 Cal. 1, 169 P. 675. As early as *Thompson v. Southern Pac. Co.*, 31 Cal.App. 567, 161 P. 21, 23, the court softened the "stop and look and listen" rule by stating "that the rule requiring the traveler to *stop* is not an absolute one", 31 Cal.App. at page 572, 161 P. at page 24, although in that case it held that the driver should have stopped because of the completely obstructed view almost up to the track itself. See also *Cooper v. Southern Pacific Co.*, 43 Cal. App.2d 693, 111 P.2d 689. This language is quoted with approval in *Murray v. Southern Pac. Co.*, supra, 177 Cal. 1, 169

P. 675, although again there, the court held the driver should have stopped because his view up the track was so obstructed that he could not see further than 15 to 18 feet. In *Swigert v. Pacific Electric R. Co.*, 7 Cal.App.2d 661, 47 P.2d 353, 357, it was contended that the driver must look not only from a point where he has a *reasonable* view of the track but such point must be the *best possible place available for that purpose*. The court stated that the test of whether due care was used is not what a *very* careful and cautious person would have done, but rather what a person using ordinary care for his own safety would have done under the same or similar circumstances. It then quoted from *Alloggi v. Southern Pacific Co.*, 37 Cal.App. 72, 77, 173 P. 1117: "The court did not err in refusing to instruct the jury that it was the duty of the plaintiff to stop, look, and listen at the most advantageous place. He was not required to look at the *most* advantageous place; for this would be putting upon him the burden of not only knowing the most advantageous point, but also of exercising the highest degree of care, while all that was required of him was ordinary care."

In *Music v. Southern Pacific Co.*, 91 Cal.App.2d 93, at page 96, 204 P.2d 422, 424, the court said concerning the place where plaintiff stopped and looked and from which he could see only 150 feet up the track: "Whether the place selected by respondents to stop and look was the best possible place under the circumstances is immaterial. The operator of an automobile is under a duty to use only that care which a reasonably cautious man would have used under similar circumstances in selecting the place of view. [Citations.] After having so conducted himself, whether or not it was negligent for him to have then proceeded up the grade and across the track, likewise must depend upon whether a reasonable man would have so proceeded under the circumstances then existing."

In *Emmolo v. Southern Pacific Co.*, 91 Cal.App.2d 87, 204 P.2d 427, 428, plaintiff looked from a position where "His vision * * * was obscured to 'some' extent by

trees and brush along defendants' right of way, approximately 250 to 300 feet * * *. How far he could see past the obstruction does not appear * * *." 91 Cal.App.2d at page 89, 204 P.2d at page 428. "In a recent case involving the question of the contributory negligence of a motorist at a railroad crossing the Supreme Court stated that ' * * * the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law * * *'. *Toschi v. Christian*, 24 Cal. 2d 354, 360, 149 P.2d 848, 852. While the *Toschi* case is not entirely analogous since it involved a crossing protected by flagmen, nevertheless such a difference is only one of the 'material circumstances' by which the 'actor's conduct must always be gauged' and cannot serve to change the question herein involved from one of fact to one of law. In this regard the following language appearing in the *Toschi* case, supra, 24 Cal. 2d at page 360, 149 P.2d [848] at page 851 is apropos: 'Standards of care are typically relative; rules of law are basically absolute. Hence, in regard to negligence, any attempt to screen factual conduct into legal classifications through a sieve of absolute law will be impracticable whenever the related circumstances admit of materially conflicting inferences.'" 91 Cal.App.2d at pages 90-91, 204 P.2d at page 428. "Whether or not his choice of view was that of a reasonably prudent man, exercising reasonable precautions for his own safety, was a question properly left to the jury." 91 Cal.App.2d at page 91, 204 P.2d at page 429.

In *Nelson v. Southern Pacific Co.*, 8 Cal. 2d 648, at page 652, 67 P.2d 682, at page 684, the court said: "But the plaintiff's choice of a position for observation is also

a question for the jury. *Pietrofitta v. Southern Pac. Co.*, supra [107 Cal.App. 575, 290 P. 597]."

In *Southern Pacific Co. v. Souza*, 9 Cir., 179 F.2d 691, at page 693, the court well sums up the present situation in this state: "Appellant argues that the California courts have established definite standards of care for highway travelers at railroad crossings and that appellee's own testimony shows that he failed to measure up to those standards and was therefore contributorily negligent as a matter of law. Many of the earlier California decisions cited by appellant would seem to sustain this argument.¹ However, the more recent decisions of the courts of California, although they have not expressly overruled the old cases, show a definite policy trend away from the 'crystallized fact' cases and favor making the standard of care a question for the determination of the jury.² Several California decisions have held on similar fact situations that whether or not the driver's choice of a place to look and his failure to look a second time constituted negligence were questions of fact for the jury."

[2] A fair summation of the present rule with reference to the duty of a vehicle driver approaching a railroad crossing is that he is not necessarily required to stop. He is required to look. However, he does not necessarily have to look from the best possible available spot as long as the spot selected gives him a reasonably assuring view of the track. *Koster v. Southern Pacific Co.*, supra, 207 Cal. 753, 279 P. 788.

[3] Nor does the fact that his view down the track in the direction from which the train eventually appears, is somewhat obstructed, make him necessarily guilty of contributory negligence as a matter of law. Whether his failure to stop, the place from which he looks, and the character and extent of the obstruction, if any, are such that

1. Citing and quoting from *Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 149 P. 175. "To the same effect see *Griswold v. Pacific Electric R. Co.*, 45 Cal. App. 81, 187 P. 65; *Hamlin v. Pacific Electric R. Co.*, 150 Cal. 776, 778, 89 P. 1109."

2. Citing and quoting from *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, and *Peri v. Los Angeles Junction R. Co.*, 22 Cal.2d 111, 137 P. 2d 441.

a reasonably prudent person would not have conducted himself as the driver did, are questions for the jury in determining whether he was guilty of contributory negligence as a matter of fact. *Toschi v. Christian*, 24 Cal.2d 354, 360, 149 P.2d 848.

Application of Law to the Evidence.

Plaintiff testified that the only time he looked to his left was at a point from which his view of the tracks was obstructed by the diagonally parked cars. He could see "more or less" over the tops of those cars. He could not say how far down the track he saw. When asked if he could see as far as the bridge (200 to 250 feet from the intersection), he said he could see "the area more or less; there is a lot of telephone poles and lot of stuff up in that area, but I probably could see the general area, yes, sir." On being asked "You couldn't see the top of any train coming towards you at that time? A. No, sir, I could not." Whether this meant he would not have been able to see such top had a train been there, or merely that he did not see one, it is difficult to tell. However, plaintiff's exhibit 8, a photograph taken a few days before the trial from the intersection showing the view over the tops of diagonally parked cars, was in evidence without objection and exhibited to the jury. Police Officer Dahl testified without objection concerning this photograph that with the automobiles that were parked there the day of the accident, and with one standing at the edge of the bakery building looking north, the photograph represented a typical view as it existed on that day. The photograph is labeled "View looking north toward Key System right-of-way from a point in 46th Street along a projection of the west property line facing Linden Street." It shows cars parked diagonally in front of the bakery and over the tops of those cars can be seen the trolley wires of the four tracks north as far as the bridge, also trolley and other poles. Considerable area is shown between the wires and the portion of the view obscured by the cars. Defendant contends that from plaintiff's standing position in the truck the upper portion of a train at or south of the bridge would be visible to him over the tops of the parked cars. Plaintiff agrees that "the up-

per portion of an approaching train, or at least the trolley thereof," would not be obscured by the parked cars.

In view of the facts that plaintiff testified that he could see the area above the cars as far as the bridge, both parties' admissions that the top of the train and the trolley would be visible, plus the very considerable view shown in the photograph (even the side railing of the bridge is visible), we cannot say as a matter of law that the point from which plaintiff looked north was an unreasonable one. Whether it was or not, whether plaintiff having looked and not observed such portion of the train as would have been visible were it within the approximately 200 feet within his vision, and whether continuing on under the circumstances constituted contributory negligence, were matters for the jury. See *Toschi v. Christian*, supra, 24 Cal.2d 354, 359, 149 P.2d 848, and *Music v. Southern Pacific Co.*, supra, 91 Cal.App.2d 93, 204 P.2d 422. While plaintiff undoubtedly did not choose the most advantageous spot from which to look up the track, he is not required, as a matter of law, under the herein mentioned authorities, to do so. If a prudent person under the circumstances, with his view partially but not wholly obscured, would have chosen this spot as his viewpoint, the test is met. As we cannot say that such a person might not have so chosen, the question is one for the jury. "In the *Koch* case [*Koch v. Southern Cal. R. Co.*] (supra, 148 Cal. 677, at page 680, 84 P. 176 at page 177, 4 L.R.A., N.S., 521) the court declared: 'Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury.'" *Toschi v. Christian*, supra, 24 Cal.2d at page 361, 149 P.2d at page 852.

[4] Defendants contend that at the time plaintiff claims to have looked the train was within the 200 feet area visible to him, and hence, he either did not look, or having looked did not see that which was in his range of vision. His failure to see the train, in either event, constituted negligence as a matter of law, say they. Supporting

this contention they have worked out a set of graphs showing that the front of the train must have been south of the bridge which was 257 feet from the point of impact, when plaintiff claims to have looked and therefore its top at least was visible to him. These graphs are based upon plaintiff's testimony as to the speed of his truck and his estimates of the number of feet it went in certain intervals. In spite of these graphs the question was one for the jury to determine. Obviously plaintiff's distances were only estimates. Moreover, the computation ignores the time interval when the truck was standing on the track before being struck. Plaintiff testified that after the truck stopped he attempted to shift into reverse, but does not know whether he succeeded before being hit. The motorman testified likewise that he saw plaintiff trying to shift gears, although he places the truck at that moment two feet from the track. These mathematical calculations "may serve as a matter for argument before a jury," *Dillon v. Qualls*, 63 Cal.App. 637, 641, 219 P. 754, 755, but they are based upon mere estimates and upon occurrences concerning which in *Connerly v. Correia*, 66 Cal.App. 570 at page 574, 226 P. 841, at page 843, the court stated: "Such occurrences take place so quickly that it is not to be expected any one would be able to explain step by step the events as they take place or give anything more definite than a general statement of the events as they were impressed upon the mind by the rapidity of their occurrence." "This is especially true in automobile accidents. Modern psychological experiments have shown that, due to the quickness with which an accident happens, those who see it,

and those who participate in it, may not get clear impressions. If, after trial, an appellate court attempted to weigh every one of these impressions which may seem contradictory, by the rules of the exact sciences, few verdicts could stand." *Hughes v. Quackenbush*, 1 Cal.App.2d 349, 355, 37 P.2d 99, 102. In *Nagamatsu v. Roher*, 10 Cal.App.2d 752, at page 755, 53 P.2d 174, at page 175, the court said concerning arguments similar to those made by defendants: "As has been frequently pointed out in cases of this nature, such arguments are unreliable because they fail to take into account the human element, what may have been done by the respective drivers, and because of the many uncertainties which necessarily exist in such matters as the respective weights of the cars, the respective speeds, the exact positions, the force and direction of the blows, and many other elements." In *Hill v. County of Fresno*, 140 Cal.App. 272, at page 277, 35 P.2d 593, at page 596, the court stated: "We think that we are not called upon to indulge in a mathematical calculation in which certain factors must be assumed to be definitely determined in order that we may declare that respondent's testimony was so inherently improbable that the jury was not justified in giving any consideration to it." Whether the train was in sight when plaintiff first looked was a matter for the jury to determine. We cannot say as a matter of law that it was.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

40 Cal.2d 307

ROTH v. STATE BAR.

L. A. 22278.

Supreme Court of California

Feb. 25, 1953.

Original proceeding for reinstatement as member of state bar. The Supreme Court, Per Curiam, held that evidence which at very most revealed that petitioner had present good reputation for honesty and integrity in business dealings, was not sufficient to warrant overruling recommendation against reinstatement.

Application denied.

Carter, J., dissented.

1. Attorney and Client ⇐61

In proceeding for reinstatement as member of state bar, evidence of petitioner's past misconduct was admissible. Business and Professions Code, § 6102; Pen. Code, § 1203.4.

2. Attorney and Client ⇐61

In proceeding for reinstatement as member of state bar, petitioner had burden of proving rehabilitation by evidence of his present qualifications. Business and Professions Code, § 6102; Pen.Code, § 1203.4.

3. Attorney and Client ⇐61

Although a proceeding for reinstatement after disbarment is treated as a proceeding for admission to bar, proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character, and proof of reform must be clear, convincing and overwhelming

4. Attorney and Client ⇐61

In proceeding for reinstatement following disbarment, evidence of petitioner's present character must be considered in light of moral shortcomings which resulted in imposition of discipline. Business and Professions Code, § 6102; Pen.Code, § 1203.4.

5. Attorney and Client ⇐61

In proceeding for reinstatement following disbarment, letters of recommendation and favorable testimony of witnesses are entitled to considerable weight, but such evidence, however laudatory or great

in quantity, is not alone conclusive. Business and Professions Code, § 6102; Pen. Code, § 1203.4.

6. Attorney and Client ⇐61

Although the Supreme Court has plenary power to reinstate person who has been disbarred, it accords greatest deference to recommendation of state bar and its administrative committee, and only where record convincingly demonstrates that such person possesses an acceptable appreciation of duties and responsibilities owed by an attorney at law to his clients and the courts may a decision overruling unfavorable action of Board of Governors be justified. Business and Professions Code, § 6102; Pen.Code, § 1203.4.

7. Attorney and Client ⇐61

In proceeding for reinstatement as member of state bar, evidence, which at very most revealed that petitioner had a present good reputation for honesty and integrity in business dealings, was not sufficient to warrant overruling recommendation against reinstatement. Business and Professions Code, § 6102; Pen.Code, § 1203.4.

John W. Preston, Los Angeles, for petitioner.

Neal G. Locke, Los Angeles, Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

Irwin Harry Roth was disbarred in 1942 upon conviction of a felony. (Bar Misc. No. 1745.) In 1950, he petitioned for reinstatement. An administrative committee of The State Bar unanimously recommended that his petition for reinstatement be denied. The matter is before this court upon Roth's petition to review the order of the Board of Governors upholding that determination. Rules on Original Proceedings in Reviewing Courts, Rule 59(b).

Roth first was admitted to practice in Missouri. In 1931, following three years of practice in Missouri, he was admitted to the California bar without examination.

About three years later, Roth was adjudged in contempt of court for alleged vi-

ulations of court orders restricting the withdrawal and use of funds recovered as damages by minors in personal injury actions in which they had been represented by him. Because of the insufficiency of the affidavits by which the contempt proceedings were instituted, he was released upon a writ of habeas corpus. In re Roth, 3 Cal.App.2d 226, 39 P.2d 490. In a concurring opinion, one justice suggested that "the facts show a scandalous manipulation of funds awarded by the court for the benefit of minors. Whether or not petitioner was involved in such manipulations, I do not intimate. It would seem, however, that the facts would admit of positive allegations should the State Bar be advised to take further action". 3 Cal.App.2d at page 237, 39 P.2d at page 495.

Acting upon this suggestion, The State Bar instituted disciplinary proceedings against Roth, charging him with violation of court orders and misappropriation of funds of clients. (L. A. No. 798.) Upon the recommendation of its administrative committee, the Board of Governors dismissed the proceeding for insufficiency of the evidence to support the charges.

In 1937, Roth was suspended from practice for a period of six months by order of this court for violations of the Rules of Professional Conduct by the solicitation of employment. Roth v. State Bar, 8 Cal.2d 656, 67 P.2d 337. In that proceeding, only two specific cases were under investigation. However, the court said: "The further fact should be mentioned that petitioner's conduct in other cases has been the subject of investigation and that he has been employed in other cases under suspicious circumstances.

"We entertain no doubt that petitioner has been soliciting the employment of himself through persons who are not entitled to practice law and has been paying those persons for this solicitation, and, from all the circumstances, we are convinced that his conduct has extended over a considerable period of time * * *." 8 Cal.2d at page 659, 67 P.2d at page 338.

When Roth was retained in 1941 to defend Thayne Staker, \$1,000 was deposited

with him to be used as bail. Roth put up \$500 as security for bail and retained the balance. As a result of this transaction, Roth was charged with grand theft and found guilty. He repaid the \$1,000, sentence was suspended and he was placed on probation for 10 years.

While this proceeding was pending, the Board of Governors declined to accept Roth's proffered resignation without prejudice. Roth did not appeal from the judgment of conviction and he was disbarred automatically. Bus. & Prof. Code, § 6102. Five years later, probation was terminated, the judgment set aside, and the cause dismissed under the provisions of section 1203.4 of the Penal Code.

After disbarment, Roth volunteered for military service but was rejected because of his age. He became a defense worker in a shipyard, studied accounting at night school, and secured a position in the accounting department of an aircraft company.

Soon afterward, he went into the liquor business for himself. He sold that business about seven months later to purchase the first of a series of three bars which he operated during the remainder of his period of probation. Two of these bars were on South Main Street in the "skid row" section of Los Angeles. The third was a deluxe restaurant-night club known as the "Californian" of which he was part owner and operator from 1946 to 1949. For a short time, Roth also engaged in an unprofitable building venture. After he sold his interest in the "Californian", Roth sought employment in the aircraft industry but, because of his age, was unable to find work.

In connection with his various liquor businesses, Roth obtained the requisite licenses after the usual investigation of his character and reputation. No license was revoked, nor was Roth at any time in difficulty with the authorities concerning the manner in which he conducted his premises. His purchases of the various businesses were financed by substantial loans, one in excess of \$70,000. Although, to a certain extent secured by the assets of the busi-

ness including the fixtures, it appears that the larger portion of these loans was based upon personal credit. All such loans were repaid in full, and Roth is not presently in debt.

In his petition for reinstatement, Roth stated his earnings in lump sum figures ranging from about \$1,300 in 1943 to \$5,200 in 1949, with a loss of approximately \$1,600 in 1946. No breakdown indicating the sources of his earnings was given. He also presented copies of his federal income tax returns for the years 1947 to 1949. These show a declared income of \$2,100 in 1948 and \$4,475 in 1949, rather than the \$5,200 reported for each of those years in his petition for reinstatement. At the hearing before the administrative committee, Roth testified that he "earned over \$1,000.00 a month" in 1946, but that he had to sell one of his bars at a \$13,000 loss. He also stated that, in 1944, he had lost about \$7,000 in stock transactions. Apparently he deducted this loss in arriving at a "net income" figure for that year of approximately \$1,800.

At the hearings before the local administrative committee, Roth produced 11 witnesses who testified that his moral character and legal ability are good. He also presented eight letters in which the writers expressed confidence in him. The uncontradicted evidence shows that, since his disbarment, Roth has not been in any legal difficulties and has been fair and honest in his dealings with others.

Two officers of the vice squad of the Los Angeles Police Department testified that Roth made every effort to conduct his bar business in a lawful manner. According to them, his places were considered above average for the neighborhood in which they were located. This opinion of Roth's business dealings was repeated by the probation officer who recommended termination of his probation.

Five of the witnesses knew Roth only casually and based their opinions of him either upon what he had told them himself or upon information supplied by others. None of them had been informed that Roth had been disciplined prior to

his disbarment. Roth had misinformed one of them concerning the facts of his conviction. This witness said that Roth's inaccuracy in stating the reason for his disbarment "is inclined to lessen my faith in him slightly". Although he had heard nothing against Roth, the witness said, "Whether he is reformed completely or not, I do not know." Two of the others stated that if they had been fully informed concerning Roth's prior difficulties their opinion of him might have been different.

One witness, the judge who granted Roth probation after his conviction, knew nothing concerning him since that time. He stated that Roth had showed above average ability as a practitioner before his court prior to his disbarment. Two more of the witnesses who testified that Roth was capable as an attorney based their opinion upon the ability which he demonstrated in practice before being disbarred. Three stated that he displayed a present understanding of legal problems.

Only two of the witnesses had more than a casual acquaintance with Roth. One was his brother, the other a former law associate. Basing their opinions upon the manner in which Roth conducted his business operations, both felt that he had rehabilitated himself. Recently, Roth has used his former associate's law library for study.

Seven of the letters introduced into evidence were to the effect that Roth has a reputation for honesty and integrity in his business dealings. The eighth was written by the judge who terminated his probation. Until the motion for dismissal came before him, he knew nothing of Roth's difficulties. In prior professional dealings with Roth, the judge had been impressed with him "as being an honorable man". The judge wrote, "I have every reason to believe that Mr. Roth is worthy of the confidence of the community and that it would be a credit to the Bar to reinstate him."

No evidence was introduced to indicate that Roth has been guilty of any wrongdoing since disbarment. The chief investigator for The State Bar testified that no com-

plaints have been made against Roth since his conviction.

Concerning one of the matters involved in the contempt proceeding and the first disciplinary investigation (*In re Roth*, supra; L.A. No. 798, supra), Roth testified that the court directed money recovered for a minor to be placed in the bank and not withdrawn until the boy reached his majority. However, he said, "about six months later or so the boy wanted to buy an automobile, and the parents wanted him to have it and after that they withdrew sufficient money to buy the car. That, in my opinion, was not a violation of the court order."

He discussed the matters which led to his suspension, *Roth v. State Bar*, supra, as follows: "When I came out here, there were open and legal ambulance chasing businesses going on * * * I would pay them a flat fee for this investigation work * * * it was a better deal than some lawyers that were splitting a fee with them. * * * I had only been out here for a few years. And then I learned that the Bar Association prohibited the handling of any case that was originally solicited regardless of what agreement the lawyer may have had with the person who solicited it, and I quit handling any cases that were originally solicited at least two years before I was called into the Bar for handling and soliciting cases."

Roth stated to the committee that he had no right to take the money in the case which resulted in his conviction and disbarment. He said that he needed it because of illness in the family and thought he would be able to repay it from the fee which he expected to receive upon completion of the trial. The fee was not paid to him and he could not return the money when it was demanded of him.

In regard to his present legal ability, Roth testified: "I read all of the advance sheets decisions, I have read the codes, I have read all the textbooks and pamphlets that he (Burby) has for law students who are about to take the Bar examination, and I have discussed legal cases and legal problems with lawyers that I know who keep

abreast of it." He also stated that he has attended refresher courses on procedure and law lectures, as well as meetings of The State Bar.

The local administrative committee concluded that this evidence was not sufficient to support the burden of proving rehabilitation and present learning in the law and that Roth lacks the present qualifications for reinstatement. Its unanimous recommendation that the petition be denied was approved by the Board of Governors.

Roth contends that evidence of his past misconduct is irrelevant and does not constitute a ground for denying reinstatement. According to him, the relevant evidence shows without dispute that he has both the moral and mental qualifications to practice law. The State Bar argues that Roth's prior misconduct was properly considered. The position of the Board of Governors is that he failed to meet the burden of proving, by clear and convincing evidence, that he is entitled to reinstatement.

[1,2] There is no merit to Roth's contention that evidence of his past misconduct is inadmissible in this proceeding. The cases upon which he relies for this argument are those which lay down the rule that the petitioner for reinstatement may not attack the proceedings which resulted in his disbarment. *Maggart v. State Bar*, 29 Cal.2d 439, 443, 175 P.2d 505; *In re Andreani*, 14 Cal.2d 736, 751, 97 P.2d 456; *Vaughan v. State Bar*, 208 Cal. 740, 742, 284 P. 909. He has the burden of proving rehabilitation by evidence of his present qualifications. *Maggart v. State Bar*, supra.

[3,4] This court repeatedly has held that "the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character."

Kepler v. State Bar, 216 Cal. 52, 55, 13 P.2d 509, 510; Feinstein v. State Bar, 39 Cal.2d 541, 248 P.2d 3; Beeks v. State Bar of California, 35 Cal.2d 268, 275, 217 P.2d 409; Maggart v. State Bar, supra, 29 Cal.2d at page 444, 175 P.2d 505; McArthur v. State Bar, 28 Cal.2d 779, 788, 172 P.2d 55. In determining whether that burden has been met, the evidence of present character must be considered in the light of the moral shortcomings which resulted in the imposition of discipline. Feinstein v. State Bar, supra, 39 Cal.2d 541, 248 P.2d 3, and cases there cited.

Roth argues that he is entitled to reinstatement because the evidence which he produced of his present good moral character was undisputed. However, the question is not whether any evidence was presented to controvert his showing of present good character, but rather whether his proof is "clear and convincing, nay, * * * overwhelming, proof of reform". In re Morganstern, 85 Cal.App. 113, 117, 259 P. 90, 92; Feinstein v. State Bar, supra, 39 Cal.2d 541, 248 P.2d 3; Wettlin v. State Bar, 24 Cal.2d 862, 869, 151 P.2d 255.

The very most which can be said for the evidence produced by Roth is that it tends to prove a present good reputation for honesty and integrity in business dealings. There is no convincing or overwhelming proof that he now possesses the highest moral qualities required of an attorney. To the contrary, his own testimony indicates a more than careless attitude toward the rules of conduct of the profession.

In discussing his financial affairs, Roth consistently failed or refused to differentiate between capital and income. In view of the fact that he testified to his qualifications as an accountant, it cannot be inferred that his confusion of finances resulted from ignorance. He stated that his statement of earnings in the petition complies with a rule of The State Bar requiring a report of monthly earnings and other income, together with the sources thereof. This was despite the fact that he had presented no statement of monthly earnings and other income and had reduced his report of annual income by capital losses. The failure to report a monthly income in excess of \$1,-

000, earned within five years after his conviction for taking \$500 of trust funds for his own use, does not tend to prove that Roth possesses the highest integrity.

The same indifferent attitude toward strict compliance with the law is indicated in Roth's discussion of the contempt proceeding. In re Roth, supra; L.A. No. 798, supra. In that instance, he did not consider the withdrawal of money to purchase an automobile to be a violation of a court order requiring the fund to be held intact. In like manner, Roth's testimony indicates that he feels aggrieved by the action of The State Bar in prosecuting him for "ambulance chasing" when it was being done openly. That he should have been familiar with the professional rules of ethics does not seem to have occurred to him.

The testimony of the witnesses whom Roth produced is far from the clear and convincing "proof which we could with confidence lay before the world in justification of a judgment again installing him in the profession". In re Morganstern, supra. Most of them were mere casual acquaintances. One, in fact, knew nothing about his present character. Roth had misinformed one of the witnesses concerning the reason for his disbarment and had informed none of them of the preceding series of transactions for which he had been investigated or disciplined. Several of the witnesses indicated that such knowledge might have altered their opinion of him.

Roth relies upon Jones v. State Bar, 29 Cal.2d 181, 173 P.2d 793, 794, as being similar in facts to the present situation and controlling upon the question of whether he should be readmitted. However, in the Jones case the local administrative committee unanimously recommended the petitioner's readmission and the recommendation was approved by a representative of the local bar association. The Board of Governors, by a vote of nine to three, found that Jones was not entitled to reinstatement. It appeared from the record, however, that at least three of the members of the board were influenced by a belief that Jones was precluded from reinstatement because he had resigned in accordance

with an order terminating his right to apply for readmission. In addition, Jonesi produced recommendations by "members of the bar who had frequent and fairly intimate contact with him". Under those circumstances, the court held that he was entitled to reinstatement.

[5-7] Letters of recommendation and the favorable testimony of witnesses are entitled to considerable weight, but such evidence, however laudatory or great in quantity, is not alone conclusive. *Feinstein v. State Bar*, supra, 39 Cal.2d 541, 248 P.2d 3. The committee of The State Bar, which has an opportunity to hear the witnesses and the petitioner, is in a better position than is this court, which has only the printed record upon which to determine the issue of the applicant's rehabilitation. Although this court has plenary power to reinstate an applicant, it has always accorded the greatest deference to the recommendation of The State Bar and its administrative committee. In *re Lacey*, 11 Cal.2d 699, 701, 81 P.2d 935. "Only where the record clearly and convincingly demonstrates that the applicant possesses an acceptable appreciation of the duties and responsibilities of an attorney at law in relation to his clients and the courts may a decision overruling the unfavorable action of the Board of Governors be justified." *Feinstein v. State Bar*, supra, 39 Cal.2d at page 548, 248 P.2d at page 7; *Beeks v. State Bar of California*, supra, 35 Cal.2d at page 277, 217 P.2d 409.

The application of petitioner for reinstatement is denied.

CARTER, Justice.

I dissent.

"The uncontradicted evidence shows that, since his disbarment, Roth has not been in any legal difficulties and has been fair and honest in his dealings with others." "No evidence was introduced to indicate that Roth has been guilty of any wrongdoing since disbarment. The chief investigator for The State Bar testified

that no complaints have been made against Roth since his conviction." These statements from the majority opinion show that only evidence of misconduct prior to disbarment bars petitioner's right to reinstatement.

The above quoted statements also show that a majority of this Court has again considered conduct prior to disbarment in determining whether petitioner is *presently* rehabilitated so as to gain readmission to the Bar. It is also said that the evidence he must produce as to his present good moral character must be "clear and convincing, nay, * * * overwhelming, proof of reform". I am still at a loss, see my dissent in *Feinstein v. State Bar*, 39 Cal.2d 541, 248 P.2d 3, to know just *what* is expected of a petitioner in a case such as this in way of the proof he must adduce. If he produced all the people with whom he has done business, or all the acquaintances he has made since his disbarment, the majority would say that none of them had known him before—or that because he had done well in one type of business and gained a reputation for good character and fair and honest business dealings there, he might not have that same reputation in another type of business. It appears to me that no matter what he does, or says, or how many witnesses he produces, The State Bar, aided and abetted by a majority of this Court, will deny him readmission to his chosen profession. If *past conduct* is to be considered in determining his *present* fitness to practice law, then that is the only result which can be reached because, to my mind, "overwhelming" proof would be proof with no contradictions. If conduct prior to disbarment is not the determinative factor here, then the statements in the majority opinion to the effect that no evidence was produced contrary to the evidence of his good reputation show that petitioner has borne the burden of proof and should be reinstated.

I would grant the application for reinstatement.

CUMMINS v. LEVY et al.***LEVY et al. v. CUMMINS et al.**

Civ. 19133.

District Court of Appeal, Second District,
Division 2, California.

March 11, 1953.

Hearing Denied May 7, 1953.

Action for injunction against certain use by defendants of real property purchased from plaintiff, and for damages for trespass and for reformation of instrument of purchase. The defendants cross-complained for damages for breach of purchase agreement. The Superior Court of Los Angeles County, William R. Gallagher, J., entered judgment from which plaintiff appealed. The District Court of Appeal, McComb, J., held that evidence sustained findings that agreement had been signed by the parties, that removal of dirt, in accordance with rights granted to defendants, had been done in a reasonable manner, and that there were no facts entitling plaintiff to either declaratory relief or reformation of the contract.

Judgment affirmed.

1. Easements ⇨36(3)

In action for injunction against certain use by defendants of real property purchased from plaintiff, and for damages for trespass and reformation of written instrument, wherein it appeared that purchase agreement gave defendants an easement over parcel retained by plaintiff and right to remove dirt, evidence sustained finding that the written agreement had been signed by both parties.

2. Easements ⇨69

In action for injunction against real property purchased from plaintiff, and for damages for trespass, wherein it appeared that purchase agreement had granted defendant an easement over parcel retained by defendant and the right to remove dirt, evidence sustained finding that removal of dirt was being done by defendants in a reasonable manner.

3. Declaratory Judgment ⇨347**Reformation of Instruments ⇨45(3)**

In action for injunction against certain use by defendants of real property purchased from plaintiff, and for damages for trespass and reformation of purchase agree-

ment, wherein it appeared that purchase agreement granted defendants an easement over parcel retained by plaintiff and the right to remove dirt therefrom, record established that plaintiff's burden of showing facts entitling her to either declaratory relief or a reformation of the contract had not been sustained.

4. Easements ⇨44(2)

Where an easement of way is located by a grant which does not define its width, the width is to be that which is suitable and convenient for the ordinary uses of free passage.

5. Easements ⇨36(3)

In action for injunction against certain use by defendants of real property purchased from plaintiff under agreement granting defendants an easement over parcel retained by plaintiff, evidence sustained finding that plaintiff was entitled to a 60-foot easement as an easement of suitable width for ordinary uses of free passage when no width to the contrary was specified in the agreement.

6. Easements ⇨69

In action for injunction against certain use by defendants of real property purchased from plaintiff under agreement whereby defendants were granted an easement over parcel retained by plaintiff and the right to remove dirt therefrom, evidence sustained finding that plaintiff had not suffered any irreparable injury and damages by reason of any acts of defendant.

7. Vendor and Purchaser ⇨350, 351(1)

In action for injunction against certain use by defendants of real property purchased from plaintiff, and for other relief, evidence sustained finding that plaintiff had failed to perform portion of purchase agreement requiring her to, at her cost, bring certain utilities to the property purchased by the defendants, and that the sum of \$5,179.71 was a reasonable sum to compensate defendants for damage which they had thereby suffered.

Caidin & Bloomgarden, Beverly Hills,
Newton Kalman, Brennan & Cornell, Los Angeles, for appellants.

* For subsequent opinion see 255 P.2d 29

Victor Ford Collins, Arnold M. Cannan, Hyman Smith and Howard R. Harris, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to obtain (1) an injunction to restrain certain use of real property; (2) damages for trespass; and (3) reformation of a written instrument, plaintiff appeals.

Facts: Plaintiff was the owner of a large unimproved parcel of hilly property on Tower Grove Drive in the city of Los Angeles, a portion of which she wanted to sell. Defendants, interested in buying a lot upon which to build a home, inspected the property and discussed its desirability with plaintiff. Mrs. Levy expressed the wish to have a level lot without expensive retaining walls. Plaintiff assured her this could and would be accomplished, and that the dirt on the plot proposed to be sold to defendants could be rolled and the entire lot leveled.

Thereafter the parties entered into a contract whereby a portion of the property was sold to defendants. By the terms of this agreement defendants were granted an easement over and across the portion retained by plaintiff. The agreement further provided that plaintiff would "cause to have the following named utilities, to wit: Gas, water, electricity, telephone line and sanitary sewer brought to the property line of said Parcel 1 and to pay the cost of same and to immediately upon the signing of this agreement make application to the proper authorities for that purpose and to use her best efforts to cause the completion thereof. * * * To permit said Levys to remove from Parcel 2 as above-mentioned or other portions of said Lot 1 as much dirt, soil or other natural material as the architect employed by said Levys may direct. It being understood that no charge will be made for said dirt, soil or other natural material, but said Levys will pay the cost of removing same. * * * To pay one-half of the cost of creating and paving a road over said Par-

cel 2 to permit ingress and egress from Tower Grove Drive to said Parcel 1 and to that portion of said Lot 1 upon which said Adeline M. Cummins shall erect a building for residential purposes."

This written agreement was signed by both plaintiff and defendants. Thereupon defendants employed Mr. Schutt as their architect and he directed that certain dirt and soil be removed from portions of the property including portions of the parcel still owned by plaintiff. After the commencement of the removal of the dirt as directed by Mr. Schutt plaintiff told defendants to stop the work and obtained a temporary injunction from the court preventing them from proceeding.

After trial the court found that the agreement between the parties was valid and subsisting, not subject to reformation, and the work which defendants were doing was within the terms of the contract and the contemplation of the parties. The trial judge denied plaintiff any relief for alleged damages to her property, and awarded defendants damages for breach of provisions of the contract by plaintiff.

Plaintiff's sole contention is: *the findings of the trial court are not sustained by the evidence.*

This contention is devoid of merit as will appear hereafter in a review of the findings:

[1] 1. *That the written agreement referred to above had been signed by the parties.*

This finding was supported by direct testimony of witnesses that plaintiff signed the agreement. Defendants admit they signed it.

[2] 2. *That the removal of the dirt from plaintiff's property was being done by defendants in a reasonable manner.*

Witnesses for defendants testified that this was the fact, and that contrary to destroying the value of plaintiff's property it would enhance it. This testimony sustains the questioned finding. We must, of course, disregard conflicting evidence.

[3] 3. *That there were no facts which entitled plaintiff to either declaratory relief or a reformation of the contract.*

This finding was supported by the fact that there is not any evidence in the record which would have supported a contrary finding. Since the burden was upon plaintiff to produce such evidence the trial court properly made the foregoing finding.

[4, 5] 4. *That plaintiff was not entitled to a 60-foot easement over the land, but was entitled to a driveway of a width of 12 feet.*

Since the agreement and deed did not determine the width of the easement, the trial court properly found it in accordance with the rule which plaintiff in her brief states thus: "The law is well settled that where an easement of way is located by a grant which does not define its width, the width is to be that which is suitable and convenient for the ordinary uses of free passage. (*Addison County v. Blackmer*, 101 Vt. 384, 143 A. 700; *Palmer v. Newmar*, 91 W.Va. 13, 112 S.E. 194.)"

[6] 5. *That plaintiff had not suffered irreparable injury and/or damages by reason of the acts of defendants.*

This finding is supported by testimony mentioned above under finding 2.

[7] 6. *Defendants are entitled to recover the sum of \$5,179.71 from plaintiff.*

The agreement between the parties provided that plaintiff would "cause to have the following named utilities, to wit: gas, water, electricity, telephone line and sanitary sewer brought to the property line of said Parcel 1 and to pay the cost of the same and immediately upon the signing of this agreement to make application to the proper authorities for that purpose and to use her best efforts to cause the completion thereof."

The uncontradicted evidence disclosed that plaintiff had not at any time complied with this provision and other evidence established that the amount awarded was a reasonable sum to compensate defendants for the damage which they had suffered.

In view of the foregoing findings and the evidence in support thereof various authorities cited by plaintiff are inapplicable.

Affirmed.

MOORE, P. J., concurs.

FOX, J., deeming himself disqualified, did not participate in this decision.

Hearing denied; SCHAUER, J., dissenting.



116 Cal.App.2d 541

RICHMOND v. FREDERICK.

Civ. 15338.

District Court of Appeal, First District,
Division 1, California.

March 6, 1953.

Action against executrix of an estate of a decedent on a rejected claim for money due upon an open book account for real estate commissions claimed to have been earned by plaintiff while working as salesman for decedent real estate broker, wherein defendant filed a cross-complaint. The Superior Court, Alameda County, Cecil Mosbacher, J., entered a judgment for plaintiff and defendant appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained determination that original items contained in decedent's books correctly stated amount owed to plaintiff by decedent.

Judgment affirmed.

1. Account, Action on ⚡22

In action on open book account the account does not prove itself and evidence of correctness of account must be offered, but positive proof of each item is not required, and general trend of the business can be used as substitute for proof of each item, and account can be proved by result rather than by all particular items.

2. Evidence ⚡354(24)

Books of account of a debtor, regularly kept by a duly authorized agent, constitute admissions of debtor against interest.

3. Evidence ⇨383(8)

Where a contemporaneous entry that is against interest of party making it in his book is subsequently altered by that party in his own favor and introduced into evidence by him, it will be presumed that original entry was according to facts, since it was made at time of transaction and was against interest of party making it, and since it was in his interest to make alteration.

4. Executors and Administrators ⇨221(5)

In action against executrix of an estate of a decedent on a rejected claim for money due upon an open book account for real estate commissions claimed to have been earned by plaintiff while working as salesman for decedent real estate broker, evidence sustained determination that original items contained in decedent's book correctly stated amount owed plaintiff by decedent.

5. Evidence ⇨376(8)

In action against executrix of estate of a decedent upon rejected claim for money due upon an open book account for real estate commissions claimed to have been earned by plaintiff while working as salesman for decedent real estate broker, books of decedent containing entries relative to amount owed to plaintiff were properly admitted in evidence, as against contention that sufficient foundation for admission of such books in evidence was not laid. Code Civ.Proc. § 1953f.

6. Evidence ⇨351

The purpose of statute authorizing admission in evidence of a record of an act, condition or event, if custodian or other qualified witness testifies to its identity and mode of its preparation, and if made in regular course of business, at or near time of act, condition or event, and if sources of information, method and time of preparation were such as to justify its admission, was to broaden and liberalize many of strict foundational requirements of common law. Code Civ.Proc. § 1953f.

7. Appeal and Error ⇨1011(1)

Holding of sufficiency of evidence as to foundation for admission in evidence of a record of an act, condition or event, will

not be disturbed if supported by substantial although conflicting evidence or inferences therefrom. Code Civ.Proc. § 1953f.

Alfred Nelson, Piedmont, for appellant.

Anderson & Peck, Milner J. Anderson, Edward F. Peck and Gordon W. Nelson, Oakland, for respondent.

PETERS, Presiding Justice.

This is an appeal from a judgment for \$1,213 and costs, rendered in an action against an estate upon a rejected claim for money due upon an open book account for real estate commissions claimed to have been earned by plaintiff Don Richmond while working for L. B. Frederick, the deceased. From this judgment the executrix appeals.

The decedent was a real estate broker. As such, he employed some eight or ten salesmen, among them the plaintiff, to assist him in his operations. Decedent did not operate by listing properties and selling them on commission. He and his salesmen would secure options on properties and exercise them if the properties could be resold at a profit. The commission on the resale was divided 10 per cent to the salesman securing the option, 45 per cent to the salesman making the resale, and 45 per cent to decedent. The profit on the resale above the commission was split 25 per cent to the salesman securing the option, 25 per cent to the salesman making the resale, and 50 per cent to decedent. Accrued profits were paid out semi-monthly. Obviously, such profits could accrue over a substantial period of time. Plaintiff was employed by decedent from 1944 to 1946. Late in March, 1946, plaintiff and decedent quarreled and plaintiff quit. At that time the accounts between the parties were unsettled. This action involves commissions earned during 1946 and which became payable before and after plaintiff terminated his employment.

It took the plaintiff up to a sixth amended complaint to state a cause of action not susceptible to demurrer. Only the original, the first amended and sixth amended complaints are to be found in the record.

One of the major contentions on this appeal is that the action finally pleaded on an open book account was barred by the statute of limitations. This contention requires an analysis of the pleadings.

The complaint was filed October 31, 1949. After setting forth the jurisdictional facts, including the filing and rejection of a claim for \$1,865, the complaint alleges a cause of action for such sum "for real estate commissions earned by said plaintiff from the said decedent, upon written contract, for the period of 1946 to 1948 inclusive."

Pursuant to leave of court, plaintiff, on August 1, 1950, filed his (first) amended complaint, in which he abandoned his cause of action upon a written contract and alleged a liability of decedent of \$1,865 based upon "an open book account" for such commissions.

Demurrers to this and four succeeding complaints were sustained. The sixth amended complaint, which was filed January 5, 1951, and upon which the case proceeded to trial, is also based on an open book account for real estate commissions, also alleging that such commissions were earned from 1946 to 1948 "while said plaintiff was employed by said decedent as a real estate broker, under an oral agreement, whereby said decedent promised and agreed to pay to plaintiff one-half of any and all commissions received by said decedent on any and all sales of real estate made by plaintiff while in the employ of the decedent."

The executrix claims that the cause of action pleaded in the sixth amended complaint was barred by the provisions of section 337, subd. 2, of the Code of Civil Procedure, which provides that in an action on an account the cause of action is barred four years from the "date of the last item." See for applications of this rule *Egan v. Bishop*, 8 Cal.App.2d 119, 47 P.2d 500; *Gardner v. Rutherford*, 57 Cal.App.2d 874, 136 P.2d 48; *Furlow Pressed Brick Co. v. Balboa L. & W. Co.*, 186 Cal. 754, 200 P. 625; *Merchants' Collection Agency v.*

Levi, 32 Cal.App. 595, 163 P. 870. The account that was introduced into evidence and upon which the judgment is predicated shows the date of the last entry as September 30, 1946. It is the contention of the executrix that since the sixth amended complaint was not filed until January 5, 1951, and since the plaintiff completely changed his cause of action in that complaint from one on a written contract to one on an open book account, the time for the running of the statute of limitations must be computed from the date of the filing of the sixth amended complaint. So computed, the statute had run when that complaint was filed.

If it be assumed that a change from a written contract to an account stated is an attempt to state a wholly new and different cause of action within the application of the rules applicable to the statute of limitations, a point subject to some doubt,¹ the difficulty with this contention of the executrix is that it completely disregards the allegations of the first amended complaint. That complaint was filed August 1, 1950. The last item in the account was dated September 30, 1946. That item and some six others were made within the four-year-period involved. Thus, the cause of action on an account stated was first brought into the case some two months before the statute of limitations had run. The differences between the first and sixth amended complaints, from the standpoint of the rule under discussion, are minor and did not amount to pleading a completely new and different cause of action. (See cases cited in last footnote.) Thus, the contention that the cause of action on an account stated was barred by the four-year statute of limitations is without merit.

The executrix next contends that, in any event, the cause of action pleaded and proved was barred by the provisions of section 339, subd. 1, of the Code of Civil Procedure, providing for a two-year limitation on oral contracts. It is urged that plaintiff pleaded and proved an oral con-

1. See *Wennerholm v. Stanford University School of Med.*, 20 Cal.2d 713, 128 P. 2d 522, 141 A.L.R. 1358; *Day v. Western Loan & Bldg. Co.*, 42 Cal.App.2d 226,

108 P.2d 702; *Cowell v. Snyder*, 171 Cal. 291, 152 P. 920; *Union Lumber Co. v. J. W. Schouten & Co.*, 25 Cal.App. 80, 142 P. 910.

tract with the incidental keeping of accounts, it being contended that such a device cannot be used to lengthen what would otherwise be the two-year-period applicable to oral contracts. There are cases cited by the executrix such as *Stewart v. Claudius*, 19 Cal.App.2d 349, 65 P.2d 933; *Lee v. DeForest*, 22 Cal.App.2d 351, 71 P.2d 285; and *People v. California Safe Deposit, etc., Co.* [*People v. Magee*], 41 Cal.App. 727, 183 P. 289, that hold directly or by way of dicta, that, where there is a written contract and the debt sued upon arises at a fixed time by the operation of the contract, the incidental keeping of accounts cannot operate to extend the statute. But that rule is not here applicable. In the instant case the pleading and the evidence to which reference will hereafter be made, show not a debt arising at a fixed time by the operation of the express contract, but a running account upon which withdrawals could be made, and without a definite date for payment, because the salesmen could only be paid when a deal was closed. Unlike the cited cases, the contract here was a mere framework necessarily contemplating the keeping of open accounts, and was not, as were those cases, the mere recording of transactions conducted under the terms of the contract. See *Mercantile Trust Co. of San Francisco v. Doe*, 26 Cal.App. 246, 146 P. 692.

We turn now to a discussion of the relevant evidence. The plaintiff Richmond was permitted to testify that he was a licensed real estate agent, and was permitted to identify his books, which he stated were kept in the regular course of business, but most of his other testimony was successfully objected to under the provisions of section 1880, subd. 3, of the Code of Civil Procedure. His books were admitted into evidence, subject to a motion to strike, but there is a complete absence of any testimony as to the correctness of the entries in these books. These books were not used by the court in fixing the amount of the judgment. That judgment is predicated on the books kept by decedent.

Before decedent's books were introduced, the plaintiff called several witnesses, including the office manager of decedent, who

testified that plaintiff was employed by decedent during the period in 1946 here involved, and that the terms of employment were as already described. The office manager testified that plaintiff brought signed option papers into the office while working there in a quantity described as "quite a number." These papers were kept by the office. There was evidence that plaintiff worked for decedent until late in March of 1946, when he quit because of a quarrel with decedent. Under the terms of the employment, however, a person quitting could have commissions accruing in his favor thereafter on options secured by him during his employment and sales made by others thereafter. That is what happened in reference to plaintiff.

The office manager also testified that after March of 1946 plaintiff came into the office and demanded of decedent his earned commissions. The then bookkeeper for decedent (who is now the wife of plaintiff) testified to being present after March of 1946 at several conversations between plaintiff and decedent when plaintiff made demands for his commissions. During one of these conversations decedent paid plaintiff \$1,000 and admitted more was owing but asked for time to pay. Plaintiff claimed, in these conversations, that over \$1,900 was still due and owing. Decedent at no time denied that some sum was owing, and stalled plaintiff, promising to pay in the near future.

It was during the bookkeeper's testimony that the decedent's books were introduced. She, then unmarried, had been the bookkeeper for decedent from January or February of 1946 to September of 1946. She testified that ledger sheets were kept and filed in the office for each salesman, and she found and identified the ledger sheets relating to plaintiff's account. The office manager later testified that each salesman had his ledger account on which he was credited with his earnings, and upon which he could draw. The bookkeeper further testified that she kept the books in her own handwriting at the request of decedent, and that the books showed the account of and the transactions conducted by plaintiff, that the ledger sheets showed the

deals closed each month credited to plaintiff, and that there were no other ledger sheets kept. These books showed a balance owing to plaintiff of \$1,212.87, treated by common consent as \$1,213, the amount of the judgment.

The bookkeeper also testified that in keeping these books she checked with the salesmen, including plaintiff, as to whether any money was owing, and that she recorded the transactions at the time of closing, keeping track of each by its file number. Any charges against the salesmen were customarily made when they accrued. All deposits received were transmitted to her.

On cross-examination this witness testified that many of the entries in the books were not made by her, but were made by her predecessor, her first entry being either January 23, or February 15, 1946, but she did identify two entries made by her after she was employed showing payments in full as of those dates, and indicated another entry made by her on April 15, 1946, showing a balance of but \$4.94. The items here involved built up after that date, and were made by her.

Over the objection of the executrix that a proper foundation had not been laid, these books were admitted into evidence.

While the bookkeeper was on the stand as plaintiff's witness another one of decedent's books was produced. The bookkeeper testified that between July and September, 1946, she was directed by decedent to revise the books, by adding to the accounts already discussed certain items as charges against the plaintiff. In this fashion the existing accounts were "adjusted" by re-calculating various claimed charges against the plaintiff. One such item was for \$200 as commission on a home purchased by plaintiff for himself from the listings of decedent, the evidence being to the effect that such commissions were not customarily charged salesmen when they purchased a house for their own residence. Another item involves \$625 commission on some business property purchased by plaintiff, which he and his wife testified had been purchased after

plaintiff had terminated his employment and on which he would, therefore, not have been liable for the charge.

The bookkeeper testified that charges against salesmen were customarily made contemporaneously with their accrual, but this special review and revision of plaintiff's accounts was made at the direction of decedent to "charge him for everything you can" and in order to "make it up as much as he could so there would be no more money due on the books." This set of books, so "adjusted," showed that plaintiff actually owed \$8.32 to decedent, instead of the decedent owing to plaintiff \$1,213 as shown by the unadjusted books. This \$8.32 was made the basis of a cross-complaint by the executrix in the present action.

At the conclusion of the trial the trial court announced its decision in favor of plaintiff, stating that while plaintiff had been unable to prove the correctness of his own books, it would be equitable to use decedent's own unadjusted accounts to fix the amount owing, since such books were kept in the regular course of business and were admissions against interest. As to the adjusted books, the court noted that some items were improper and had been prepared merely to cancel off the indebtedness of plaintiff. The findings, with certain unimportant minor exceptions, found all of the allegations of the sixth amended complaint to be true and that the operative allegations of the answer and cross-complaint were untrue. Judgment was entered for plaintiff in the sum of \$1,213.

[1] After first contending, for several reasons, that the cause of action is barred by the statute of limitations, contentions already held to be unsound, the executrix contends that, assuming the books were properly introduced, the evidence is insufficient to sustain recovery upon an open book account in that the evidence is not sufficient on the issue of the correctness of the accounts, or on the issue of the rendition of the services. The question here presented is what evidence, besides the books, is needed to sustain a recovery upon an open book account? No doubt an account does not prove itself, and evidence of the cor-

rectness of the items of the account must be offered. But it is also well settled that positive proof of each item is not required, that a general trend of the business can be used as a substitute for the proof of each item and that an account can be proved by the result rather than by all the particular items. See for a general discussion, 1 Cor.Jur., p. 661, § 184 et seq.; 1 C.J.S., Account, Action on, § 16 et seq., p. 604; 1 Cal.Jur.2d p. 358, § 37.

[2,3] Each case must, of necessity, turn on its own facts. In the instant case we start with the fact that the account was proved by the decedent's own books. Obviously, more proof of correctness should be required when the creditor relies on his own books than where he relies on the regularly kept books of the debtor. The books of the debtor, regularly kept by a duly authorized agent, certainly constitute admissions against interest. *Barth v. Adelstein*, 66 Cal.App.2d 406, 152 P.2d 498. If the creditor elects to rely on the books of the debtor, he should not be required to produce the same quantum of evidence as would be necessary to prove the correctness of items found in his own books. That is just common sense.

In the instant case the plaintiff not only proved the original entries, but also proved an attempt at non-contemporaneous tampering by decedent. This factor is important. It creates an inference that the contemporaneous entries were correct. This rule is stated as follows in 1 Cal.Jur.2d p. 353, § 35: "Where a contemporaneous entry that is against the interest of the party making it in his own book is subsequently altered by that party in his own favor and introduced into evidence by him, it will be presumed that the original entry was according to the facts, since it was made at the time of the transaction and was against the interest of the party making it, and since it was in his interest to make the alteration." While here the plaintiff introduced the adjusted accounts, it was those accounts that were relied upon by the executrix to support her cross-complaint.

[4] In addition to these facts there was the evidence of the office manager and

bookkeeper, already summarized, which proved the contractual relationship and the nature of the contract, and that plaintiff had secured numerous options. That evidence, plus the inferences already discussed, amply supports the trial court's determination that the items contained in the books correctly stated the amount owed.

The last contention of the executrix is that the unadjusted books of account should not have been admitted into evidence over her objection, that a proper foundation had not been laid. She claims that the evidence shows that only one of the bookkeepers who kept the books testified, that the witness did not make all of the entries, that the witness did not testify to knowing anything about the performance of the services, or deals, or to have gone to original sources for her information. The point is without merit. The pertinent section is section 1953f of the Code of Civil Procedure, added to our law in 1941 as part of the Uniform Business Records as Evidence Act. It provides:

"A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

[5-7] The evidence relating to the foundation for the introduction of the books has already been fully set forth. That evidence clearly sustains the admission of the books under this section. While under the law as it existed prior to 1941 the foundation here made might have been insufficient, see *Chan Kiu Sing v. Gordon*, 171 Cal. 28, 151 P. 657, the very purpose of the act was to broaden and liberalize many of strict foundational requirements of the common law. See *Loper v. Morrison*, 23 Cal.2d 600, 145 P.2d 1; *Robinson v. Puls*, 28 Cal.2d 664, 171 P.2d 430; comment in 35 Cal.Law Rev. 434; discussion in 1 Cal.Jur.2d p. 354, § 36. The section grants to

the trial court a wide discretion in determining whether the mode of keeping the books justified their admission. *Thompson v. Machado*, 78 Cal.App.2d 870, 178 P.2d 838; *Nichols v. McCoy*, 38 Cal.2d 447, 240 P.2d 569; see discussion 35 Cal.Law Rev. p. 434, particularly at pp. 441-2. A holding of the sufficiency of the evidence as to the foundation will not be disturbed if supported by substantial although conflicting evidence or inferences therefrom. *Egan v. Bishop*, 8 Cal.App.2d 119, 47 P.2d 500; *Copriviza v. Rilovich*, 4 Cal.App. 26, 87 P. 398.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



PEOPLE v. BUILDING MAINTENANCE CONTRACTORS ASS'N Inc. et al.

No. 14868.

District Court of Appeal, First District,
Division 1, California.

March 3, 1953.

Hearing Granted April 30, 1953.

Action to enjoin alleged violations of Chapter of the Business and Professions Code relating to combinations in restraint of trade. The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, Wood, J., held that provisions exempting from operation of such Chapter any agreement, combination or association, the object and purpose of which are to conduct operation at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed, are too vague and uncertain to serve as standard of conduct under due process of law requirements of Federal Constitution, but are separable from remainder of Chapter.

Order reversed.

1. Constitutional Law ⚡258

Monopolies ⚡10

Statutes ⚡64(2)

Provisions of Chapter of Business and Professions Code relating to combinations in restraint of trade, exempting from operation of such chapter any agreement, combination or association, the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed, are too vague and uncertain to serve as standard of conduct under due process of law requirements of Constitution, but are separable from remainder of chapter. Business and Professions Code, § 16723.

2. Monopolies ⚡24(12)

In action to enjoin unincorporated association, and members thereof, each member being a building maintenance contractor, from violation of chapter of Business and Professions Code relating to combinations in restraint of trade, burden of proving that involved agreement came within an exception to such chapter rested upon defendants. Business and Professions Code, § 16720.

3. Monopolies ⚡24(13)

In action to enjoin unincorporated association, and members thereof, each member being a building maintenance contractor, from violation of chapter of Business and Professions Code relating to combinations in restraint of trade, defendants failed to meet burden of proving that agreement, whereunder defendants promised to refuse to contract with public to furnish labor and material except under therein regulated prices and conditions, was within provision of statute exempting from operation of chapter an agreement, association or combination in furtherance of trade. Business and Professions Code, § 16725.

4. Constitutional Law ⚡258

Monopolies ⚡10

Statutes ⚡64(2)

The phrase "in furtherance of trade" within provision of chapter of Business and Professions Code relating to combinations in restraint of trade, exempting from opera-

tion of such chapter an agreement, association or combination in furtherance of trade, does not furnish a sufficiently definite and certain standard under due process of law requirements of Constitution, but such phrase is separable from remainder of chapter. Business and Professions Code, § 16725.

5. Monopolies ⇨24(13)

Evidence established that agreement entered into between some building maintenance contractors of city, whereunder they promised in part to refuse to contract with public to furnish labor and materials except under therein regulated prices and conditions, was a "trust" as defined in chapter of Business and Professions Code relating to combinations in restraint of trade. Business and Professions Code, § 16720.

6. Monopolies ⇨24(15)

Where agreement entered into between some building maintenance contractors of city constituted a trust as defined in chapter of Business and Professions Code relating to combinations in restraint of trade, and each agreed to bid from 5% to 20% higher than existing contract rate for particular work, under some circumstances, judgment enjoining agreement to raise, fix, maintain or bring about use of "uniform" mark-ups, price differentials, terms or conditions with respect to furnishing of labor, materials or services, was not objectionable as restraining acts not involved in agreement, agreement having aspect of unanimity justifying use of word "uniform" in judgment. Business and Professions Code, § 16720.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty. of the City and County of San Francisco and Gregory Stout, Deputy Dist. Atty., San Francisco, for appellant.

Landels & Weigel and Francis McCarty, By: Stanley A. Weigel, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff appeals from an order granting a new trial after judgment had been ren-

dered for plaintiff in an action brought by the state to enjoin alleged violations of the Cartwright Act, Bus. & Prof. Code, §§ 16700-16758.

The principal question is whether or not certain exceptions expressed in sections 16723 and 16725 of the code are constitutional. Section 16723 excepts from the operation of the statute any agreement, combination or association "the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed." Section 16725 excepts an agreement, association or combination "the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade." If these exceptions are unconstitutional or otherwise inapplicable, the question remains whether or not the stipulated facts demonstrate that the defendants formed a trust as defined in section 16720 of the code. For adequate consideration of these questions a fairly detailed statement of facts is necessary.

The defendants are Building Maintenance Contractors' Association, an unincorporated association, and the members thereof, each member being a building maintenance contractor.

The Complaint.

The complaint alleges: there is a building maintenance industry in San Francisco concerned with the operation, cleaning, painting, renovating and supplying of janitorial service for the owners or occupants of buildings who engage others to supply the requisite labor and materials. Other than the defendant association, the defendants are such persons who supply such labor and materials to buildings occupied by others. Defendants, other than the defendant association, supply all or nearly all of the labor and supplies used in the building maintenance industry in San Francisco which are supplied by contractors. Defendants, other than the association, have formed or joined the association and conspired together to create and carry out restrictions in trade and commerce. Pursuant to that conspiracy, defendants have created a monopoly and

destroyed free competition in said building maintenance industry and are directly and indirectly preventing free and unrestricted competition among the defendant association members, refusing to contract with the public to furnish labor and materials except at prices fixed and agreed upon by them in advance.

The Facts as Stipulated.

The parties stipulated: (1) the sole question is whether or not the facts set forth in this stipulation constitute a violation as to plaintiff of the Cartwright Act. This stipulation sets forth the only material facts and no other or further evidence shall be introduced. Defendants shall be deemed to have filed answers generally denying all the allegations of the complaint and alleging all affirmative defenses necessary to support the materiality as a defense of any fact stipulated. The parties respectively reserve their rights to contest the materiality of any fact covered by this stipulation.

(2) The term "building maintenance industry" means all persons, associations, firms, partnerships and/or corporations participating in the maintenance operation, cleaning, painting, renovating and supplying of janitorial service for buildings, lofts and stores in San Francisco. The terms "maintenance contractor" and "maintenance contractors" mean one or more persons engaged in the building maintenance industry in San Francisco, in the business of contracting, for a fixed term, as to buildings, lofts or stores located in San Francisco, to do part or all of any one or more of the following: window cleaning, janitorial work and providing elevator operators and starters, building engineers for maintaining heating equipment and for minor repairs, night watchmen, and powder room matrons. The word "service," whether as a noun or a verb, means contracting to do any of the work just described.

(3) In San Francisco there are 44 maintenance contractors of whom 30 are not members of defendant association. Members of defendant association employ approximately 90% of the total number of employees employed by all maintenance

contractors in San Francisco and service approximately 90% of all San Francisco buildings, lofts and stores serviced by maintenance contractors.

(4) The defendants who participate in the building maintenance industry only by contracting to provide service, have, through the association, agreed that if the owner of a building who had an existing contract with any member for servicing and asked for bids from another member for the same service, the latter would report the fact to the defendant association and inquire as to the contract price then prevailing; that an investigation was then to be made by the defendant association to determine (a) whether that price was unreasonable in being too high; (b) whether the contractor under contract to service the building was doing a good job; and (c) whether the owner of the building had any reason for dispensing with the contractor, such as personal dislike or inability to get along with the contractor; and if, in the opinion of the defendant association, the price was unreasonably high or if the work was not being performed satisfactorily or if the owner had a specific reason, no matter how trivial, for dispensing with the existing contractor, then any other member of defendant association was not precluded from undertaking to get the business on such terms as such member might elect; that if, in the opinion of the defendant association, the price charged was reasonable in fact and if the work was being performed satisfactorily and if the owner was completely satisfied with the personal and business relationships between the owner and the contractor, then and only then the members were required, if they bid upon the job, to make their minimum bid higher than the existing contract by a range of percentages from 20% higher to 5% higher, varying according to the job price per month under the existing contract.

(5) "Defendants entered into the foregoing agreement with the intent and for the object and purpose of conducting operations at a reasonable profit, of marketing at a reasonable profit products and services which could not otherwise be so marketed

and of acting in furtherance of trade, and with no other intent whatever nor for any other object or purpose whatever. There is no evidence, except as stated in this stipulation, if any is stated herein, that the effect of the admitted agreement has exceeded, exceeds or will exceed the stated intentions, objects or purposes."

(6) The entire organized labor force in the building maintenance industry in San Francisco consists of members of Building Service Employees Union, Local 87, Window Cleaners Union, Local 44, Elevator Operators and Starters Union, Local 117, and Stationary Engineers Union, Local 39, each union an affiliate of the American Federation of Labor.¹ All of said unions have contracts establishing wages, hours, working conditions, number of men to be used, type of work to be performed, and the like. The identical contract is entered into by the unions, whether on behalf of union employees working for a building maintenance contractor or working for a building owner or operator.

Only a portion of the employed members in San Francisco of Building Service Employees Union, Local 87, work for Building Maintenance Contractors (725 to 794) as compared with the total number of employed members (2085-3534). Of a total of 190 office buildings in San Francisco, 22 are serviced by building maintenance contractors (including defendants and others) and 168 directly by owners or operators who employ members of Local 87. Of other types of buildings, the same figures in the same order are: 50 department and furniture stores, 14 and 36; 17 laundries and breweries, 3 and 14; 55 banks, 30 and 25; 4 newspapers, 1 and 3. Of buildings serviced by contractors or by owners or operators, employing members of Local 87, 24% are serviced by contractors; 76% independently of contractors. In addition, there are thousands of San Francisco buildings (exclusive of private homes, flats and the like) that are serviced neither by owners or operators who employ

members of Local 87, nor by any maintenance contractor.

Building Maintenance Contractors employ but 121 of 404 members of Local 44, 165 of 965 members of Local 117, and 5 of 225 members of Local 39. Of buildings serviced by contractors or by members of these Locals respectively, contractors service less than 30% while more than 70% are serviced under direct contract with or employment of members of Local 44 wholly independently of any maintenance contractor. Like figures in respect to members of Local 117 are 17% and 83% and as to members of Local 39 they are .5% and 99.5%. In addition, there are thousands of San Francisco buildings which are serviced neither by owners or operators who employ members of Locals 44, 117 or 39, nor by any maintenance contractor.

(7) Over-all, all defendant maintenance contractors service less than 1/2 of 1% of the buildings, lofts and stores in San Francisco, exclusive of private homes, flats and the like. Said defendants service no private homes, flats or the like. Over 99 1/2% of the buildings, lots and stores in San Francisco, exclusive of private homes, flats and the like are serviced by (a) competitors of defendants, (b) owners or operators, or (c) other persons wholly independent, all and singular, of defendants, of competitors of defendants and of said unions and their members.

At the trial plaintiff objected to the consideration of any of the facts recited in paragraphs (5), (6) and (7), above, upon the ground that those facts are immaterial and do not tend to prove or disprove any matter at issue in the cause.

Findings of Fact, Conclusions of Law, Judgment, and Order For New Trial.

The court found that the facts as stipulated are true and concluded that "the plaintiff is entitled to judgment against the defendants perpetually enjoining defendants as prayed for in the complaint," and

1. Except that the buildings of the Pacific Gas & Electric Company and of the Pacific Telephone and Telegraph Company

are serviced by those companies, respectively, employing members of unions of the Congress of Industrial Organizations.

rendered judgment in accordance with that conclusion.

The judgment enjoined the defendants from (1) formulating, promoting, participating or combining in any undertaking, compact, plan or agreement (a) to raise, fix, adhere to or maintain prices for the furnishing of labor, material or services in the building maintenance industry or (b) to raise, fix, adhere to, maintain or bring about the use of uniform mark-ups, price differentials, allowances, discounts or terms or conditions with respect to the furnishing of such labor, materials or services, or (c) by which the contract terms or prices, or terms or prices for labor, materials or services charged by any defendant is revealed to any other person or corporation for any of the purposes hereby enjoined, and (2) creating or carrying out any restriction preventing or interfering with free competition in the building maintenance industry.

Upon motion of the defendants the court set aside the findings of fact and conclusions of law, vacated the judgment, and ordered a new trial upon the grounds that the evidence was insufficient to justify the decision and that the decision was against the law.

That order must be reversed. The decision was not against the law and the evidence was sufficient to justify the decision. We will consider first the exception expressed in section 16723.

As To the Constitutionality and Separability of the Exception Expressed In Section 16723.

The parties stipulated that the defendants entered into the agreement described in paragraph (4), above, "for the object and purpose of conducting operations at a reasonable profit, of marketing at a reasonable profit products and services which could not otherwise be so marketed * * * and with no other intent whatever nor for any other object or purpose whatever." That was tantamount to a stipulation that the questioned agreement was one expressly excepted by section 16723, which says that no agreement is unlawful "the object and purpose of which are to conduct operations at a reasonable profit or to market at a reason-

able profit those products which can not otherwise be so marketed." Plaintiff suggests that the stipulation fell short of that, arguing that reasonableness as used in the statute means and is to be tested by the effect of the agreement, whereas the stipulation refers only to the mental attitude of the parties to the agreement. No such argument is logical or tenable. We are immediately concerned with the intent of the parties to the stipulation. When they lifted those words right out of section 16723, after having recited that the "sole question to be decided is whether or not the facts stipulated herein constitute a violation * * * of the Cartwright Act," they must have intended to use those words with precisely the meaning they have in section 16723.

This presents squarely the question of the constitutionality of section 16723. If it is constitutional, defendants have not and are not violating the act, and our inquiry is at an end.

Our analysis of this section and of the pertinent judicial decisions, convinces us that its provisions are invalid and inoperative for lack of certainty. That was the answer given in 1927 by the Supreme Court of the United States when considering a Colorado statute which in terms was a replica of our own. We have found no subsequent decision which persuades us that the court would come to a different conclusion should it again receive the identical question for consideration and decision.

Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146, is the 1927 decision to which we refer. The court said that the main provisions of the Colorado statute, Laws 1913, p. 613 (those which were substantially the same as our § 16720) sufficiently described the acts intended to be punished, but that a proviso excepting any agreement or association "the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed" was too indefinite to furnish a standard of guilt, 274 U.S. at page 456, 47 S.Ct. at page 684. This proviso, and another with which we are not here concerned, said the court, "make the line between lawfulness and criminality to

depend upon, first, what commodities need to be handled according to the trust methods condemned in the first part of the act to enable those engaged in dealing in them to secure a reasonable profit therefrom; second, to determine what generally would be a reasonable profit for such a business; and, third, what would be a reasonable profit for the defendant under the circumstances of his particular business. * * * Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused." 274 U.S. at pages 456-457, 47 S.Ct. at page 684. The defendants in the Cline case contended that the questioned proviso was less definite and certain than the Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note, which made criminal every contract and all monopolies in restraint of trade or interstate commerce, and directed attention to the fact that in *Nash v. United States*, 229 U.S. 373, 376, 33 S.Ct. 780, 57 L.Ed. 1232, the court had held that the Sherman Act fixed a permissible and ascertainable standard of guilt. In overruling that contention, the court in the Cline case said "In the Nash Case we held that the common-law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute", 274 U.S. at page 460, 47 S.Ct. at page 685, and referred to the review of common-law precedents which had been made in *United States v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271. That review indicated that the inhibitions against restraints of trade at common law at first had no exception but that in time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced, and so it developed that certain types of agreements in partial restraint of trade were deemed valid. An illustrative list of such types was furnished by the court in the Addyston case: "For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate

from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business." At page 281 of 85 F.

Thus not every contract in restraint of trade was void and unenforceable at common law. Likewise, it was not every such contract which came within the penalty of the Sherman Act. It was recognized that there were incidental restraints on trade the statute was not intended to cover. This "view was fully confirmed", said the court in the Cline case, "in *Standard Oil Company v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, and *United States v. American Tobacco Company*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663, where the language of the federal statute was read in the light of the common law, and in accordance with its reason, and was construed not to penalize such partial restraints of trade as at common law were not only permitted, but were promoted in the interest of the freedom of trade itself." 274 U.S. at page 461, 47 S.Ct. at page 686. However, in respect to "reasonableness" of price or of profit, the "review of the many common-law precedents as to due and undue restraints of trade shows", said the court in the Cline case, "that in only one or two cases, and those not well considered, was there left to the court

or jury as a criterion of the validity of a restraint of trade the reasonableness of the prices fixed or the profit realized under it." 274 U.S. 461, 47 S.Ct. 686.

The court, in the Addyston case, had rejected a contention that the rule of "reasonableness" applied to the price fixed by or pursuant to a contract in restraint of trade, deeming such a standard too shifting, vague, and indeterminate. The Supreme Court had taken the same view of the matter in *United States v. Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed to-day may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." 274 U.S. 462-463, 47 S.Ct. 686. Accordingly, the court in the Cline case concluded that "it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge, involving so many factors of varying effect that neither the person to decide in ad-

vance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A Legislature must fix the standard more simply and more definitely before a person must conform or a jury can act." 274 U.S. at page 465, 47 S.Ct. at page 687.

[1] The decision in the Cline case compels the conclusion that the provisions of section 16723 are too vague and uncertain to serve as a standard of conduct under the due process requirements of the Federal Constitution. Similarly convinced were the courts in *Blake v. Paramount Pictures, D.C.*, 1938, 22 F.Supp. 249, 254-255 and *Ward v. Auctioneers Ass'n of Southern Cal.*, 1944, 67 Cal.App.2d 183, 153 P.2d 765. In each of those cases the court upon the authority of the Cline case held unconstitutional a proviso added in 1909 (now section 16723) and, deeming that proviso inseparable, found the entire act unconstitutional. The fact that they were mistaken as to separability does not detract from the persuasiveness and force of their reasoning that the proviso was and is void for uncertainty.

But, say the defendants, later decisions indicate that the United States Supreme Court would now overrule the Cline case and come to a different conclusion if the same question were again presented. The decisions which they invoke do not persuade us.

In *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 52 S.Ct. 103, 104, 76 L. Ed. 136, a California statute, St.1929, p. 927, prohibiting "the unreasonable waste of natural gas" was upheld as furnishing a sufficiently definite standard. Significantly, it appeared, the standard did not depend upon the words "unreasonable waste" alone. Those words had reference to the power of gas to lift the oil in which it occurred and the use of that power to produce the maximum quantity of oil in proportion

to the quantity of gas withdrawn. The state Supreme Court had found that, depending upon various ascertainable physical factors, each oil and gas well has a best mean gas and oil ratio in the utilization of the lifting power of the gas and the production of the greatest quantity of oil in proportion to the amount of gas used, which could be computed as to each well to a reasonable degree of certainty, see *People v. Associated Oil Co.*, 211 Cal. 93, 107, 294 P. 717. In striking contrast, the formula used in our section 16723, "reasonable profit," has no such frame of reference, no means of producing certainty.

In *Old Dearborn Distributing Co. v. Seagram Corp.*, 299 U.S. 183, 57 S.Ct. 139, 146, 81 L.Ed. 109, the court approved the expression "fair and open competition" in the context in which it appeared. It was used in a statute, S.H.A.Ill. ch. 121½, § 188 et seq., which dealt with contracts for the sale or resale of a commodity which bears the trade-mark, brand, or name of the producer "and which is in fair and open competition with commodities of the same general class produced by others". In such a contract the statute permitted stipulations concerning the resale price of the commodity. The court upheld the statute as designed primarily to protect the property, the good will of the producer, the price restriction being a means to that end, not an end in itself. Concerning the phrase "fair and open competition," the court said it "is as definite as the phrase contained in section 5 of the Federal Trade Commission Act (15 U.S.C.A. § 45) 'unfair *methods* of competition,' which this court has never regarded as being fatally uncertain. [Citations.] We think the phrases complained of are sufficiently definite, considering the whole statute; and that no one need be misled as to their meaning, or need suffer by reason of any supposed uncertainty." 299 U.S. at pages 196-197, 57 S.Ct. at page 146. Besides, as stated in one of the cases cited, the expression "unfair competition" had a "well-settled meaning at common law". *Federal Trade Comm. v. Raladam Co.*, 283 U.S. 643, 648, 51 S.Ct. 587, 590, 75 L.Ed. 1324.

In *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468, 472, 82 L.Ed. 607, the court found the term "like necessary services" sufficiently definite. Quite naturally so, for those words occurred in a portion of the Home Owners' Loan Act, 12 U.S.C.A. § 1467(e), which prohibited the making of a charge in connection with a loan "except ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like necessary services." 303 U.S. at page 3, 58 S.Ct. at page 470. "The phrase 'like necessary services' in the section describes services which are cognate to those mentioned in the preceding clause 'for examination and perfection of title' and 'appraisal.'" 303 U.S. at page 9, 58 S.Ct. at page 472. We see no analogy between that and the provisions of our section 16723.

In *Gorin v. United States*, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488, "national defense" was deemed sufficiently certain to sustain convictions under the National Espionage Act, 50 U.S.C.A. §§ 31, 32, for unlawfully furnishing information relative to national defense. These words had acquired a historical and special meaning well enough known to enable those within their reach to apply them correctly. Said the court: "* * * the use of the words 'national defense' has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911 [36 Stat. 1084]. The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning. * * * The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process." 312 U.S. at page 28, 61 S.Ct. at page 434. We are unaware of any usage which has

given the words "reasonable profit" any greater specificity than they had in 1927 when the Cline case was decided. loud speaker or sound amplifier, or * * calliope."

A statute which prohibited the calling of another by an "offensive or derisive name" Pub.Laws N.H.1926, c. 378, § 2, was upheld in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. The state court had interpreted the statute as one designed to preserve the peace and as prohibiting only such words, uttered in a public place, " * * * as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed' ". 315 U.S. at page 573, 62 S.Ct. at page 770. The word "offensive" was not defined in terms of what a particular person would think. The test was what men of common intelligence would understand would be words likely to cause an average addressee to fight. "Derisive" words were taken as coming within the purview of the statute only when they had this characteristic of plainly tending to excite the addressee to a breach of the peace. As thus limited, those words had an understandable meaning, sufficiently definite to guide a person in complying with the mandate of the statute.

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513, involved an ordinance which prohibited the operation, upon a public street, of " * * * any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places * * * ." 336 U.S. at page 78, 69 S.Ct. at page 449. Of the words "loud and raucous" the court said: "While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." 336 U.S. at page 79, 69 S.Ct. at page 449. Especially, we would add, when preceded and illustrated by such definitely descriptive words as "sound truck, loud speaker or sound amplifier, or radio or phonograph with a

In *United States v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 1540, 91 L.Ed. 1877, the court upheld that provision of the Federal Communications Act, 47 U.S.C.A. § 506, which made it unlawful to coerce a licensee to employ in connection with the conduct of the licensee's broadcasting business any person or persons "in excess of the number of employees needed by such licensee to perform actual services". The court did not agree with the contention that "persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need." 332 U.S. 6, 67 S.Ct. 1541. The court recognized there were difficulties in applying such a clause: "Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees 'needed' is not conclusive as to that question. It, like the alleged wilfulness of a defendant, must be decided in the light of all the evidence." 332 U.S. at page 6, 67 S.Ct. at page 1541. Respondent's argument amounted to the claim that no statutory language could meet the problem Congress had in mind. Of this the court said, "The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress", adding that "it would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees." 332 U.S. at page 7, 67 S.Ct. at page 1542. The court apparently adopted the Government's view that Congress intended to prevent extortion, as distinct from bona fide demands

relating to conditions of employment, a view which Justice Reed criticized in his dissenting opinion 332 U.S. at page 16-18, 67 S.Ct. at pages 1546-1547. As an anti-extortion statute, it does not furnish a basis for predicting that the Cline case is due soon to be overruled.

This brings us to the question of separability of the provisions of section 16723 from the rest of the Cartwright Act. There really is no question. That issue was settled in favor of separability by our Supreme Court in *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 46-48, 172 P.2d 867. Yet, defendants argue that "the care of the Legislature in preserving the 1909 amendments in the codification process, affords strong evidence that the Legislature has refused to pass a state antitrust law *sans* the qualifications of § 16723 and § 16725, the more so because the Legislature has not changed its position either before or since the *Speegle* case." The first part of this argument misses the purpose expressed in section 16701 of the code, that of preserving the separability, if any, of the 1909 amendments to the Cartwright Act, a pur-

pose discussed and given effect in the *Speegle* case, 29 Cal.2d at page 48, 172 P.2d 867. That purpose was stated in considerable detail by the Code Commission in its 1941 report to the Governor and the Legislature,² the report which accompanied the Code Commission's bill to codify the Cartwright Act as sections 16700-16758 of the Business and Professions Code. Additionally, in furtherance of that purpose, no express repeal of the original act of 1907, or of the 1909 amendment, was included in the 1941 codification bill. See Stats.1941, ch. 526, p. 1834, § 2 at p. 1847, Bus. & Prof. Code, § 30028. In other words, if it should prove impossible to preserve the separability of the 1909 amendment in the process of codification, then the codification would fail, leaving the 1907 and 1909 enactments on the books uncoded. It is difficult to see how the Legislature could more clearly and emphatically have indicated its intention to preserve the separability of the 1909 amendment.

The argument that legislative inaction since 1941 might in some way indicate the intent with which the Legislature acted in

2. In that report, at page 10, the following statement appears: "The commission desires to call particular attention to its solution of a problem which arose in preparing the codification of the Cartwright Anti-Trust Act (Chapter 530, Statutes of 1907, as amended). In 1909 (Chapter 362) the act was amended, among other things, to provide certain exemptions in Section 1.

"The Federal District Court for the Southern District of California has held that these exemptions, added to the California Act in 1909, are unconstitutional and not separable and that, therefore, the entire California act is invalid. *Blake v. Paramount Pictures, Inc.*, 1938, 22 F.Supp. 249. This decision relies on the United States Supreme Court decision which held unconstitutional a Colorado antitrust statute, containing exemptions substantially identical to those added to Section 1 of the California act in 1909, on the ground that these exemptions, a part of the Colorado statute as originally enacted, made the required standard of conduct too uncertain for a penal statute. *Cline v. Frink Dairy Co.*, 1927, 274 U.S. 445, [47 S.Ct. 681, 71 L. Ed. 1146].

"The Attorney General of California is of the opinion that this 1909 amendment was invalid in view of the holding in *Cline v. Frink Dairy Co.*, never became a part of the 1907 act, hence that Section 1 of the Cartwright Act in the form in which originally enacted is valid and operative. (Opinion NS 2806, July 29, 1940.)

"In the absence of a decision by the California Supreme Court, the commission has prepared a codification of the entire California act, as amended. As thus codified, without substantial change, it will, of course, have neither greater nor less validity, operation or effect than prior to codification. Business and Professions Code, Sec. 2: *San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, at pages 233 and 234 [128 P. 924]; *Sobey v. Molony*, 40 Cal.App. 2d 381, [104 P.2d 868]. However, as a special precaution, the commission has inserted a specific saving clause (Section 16701) which is specially designed to leave as it is the question of separability, so that the 1907 Cartwright Act, and the 1909 amendments thereto, will manifestly have no greater (and no less) validity, operation, or effect than if they had not been codified."

1941 or in 1909, is utterly without foundation.

Because of the unconstitutional vagueness of Section 16723 and the separability of its provisions, the legality of defendants' conduct is to be tested by reading the statute as if it did not contain that section.

As to The Constitutionality and Separability of Exceptions Expressed in Section 16725.

An additional qualifying clause was added to the Cartwright Act in 1909, which in 1941 was carried into the Business and Professions Code as Section 16725. It declares it is not unlawful to enter into *agreements* or form *associations or combinations* "the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or *which are in furtherance of trade.*" (Emphasis added.)

Defendants make no claim that the questioned agreement promotes, encourages or increases competition. They do claim that its purpose and its effect are in furtherance of trade. That is correct as to the purpose. The parties' stipulation is that the defendants entered into the agreement "with the intent and for the object and purpose * * of acting in furtherance of trade." But the stipulation stops short of saying that the agreement is one "which is" in furtherance of trade.

Defendants emphasize this clause of the stipulation: "There is no evidence, except as stated in this stipulation, if any is stated herein, that the effect of the admitted agreement has exceeded, exceeds, or will exceed the stated intentions, objects or purposes." Whatever these words may mean, we do not find in them a statement that the agreement has the effect of furthering trade. To say that there is no evidence, outside the stipulation, that the effect of the agreement "exceeds" the purpose of furthering trade, is not to say the agreement does further trade or that there is evidence that it furthers trade. Nor do we find elsewhere in the stipulation a statement or the basis for an inference that the agreement is in furtherance of trade. The restrictions which the agreement imposes may well further the trade of the individual

member but not that of trade as a whole. Those restrictions seem totally inconsistent with any conceivable concept of furtherance of trade.

Defendants have suggested that this agreement operates to do no more than protect existing contracts from unjustifiable interference, and as such is commendable and lawful, citing *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 112 P.2d 631. We do not see the applicability of that case, which holds that an action will lie for unjustifiably inducing a breach of contract. By the questioned agreement none of the defendants has undertaken to refrain from inducing the breach of a contract. He has, instead, agreed under certain conditions not to accept a building owner's invitation to bid except at a price appreciably higher than currently specified in a fellow member's contract which is about to expire. Each defendant assures to each of the others the continued renewal of his contractual relationships without price competition from his fellow members. Even if there were directly involved some degree of prevention of unwarranted induction of breach of contract, that would not necessarily characterize the restraint as being one in furtherance of trade.

[2,3] The burden of proving that the questioned agreement comes within one of the exceptions (such as those expressed in 16723 or in section 16725) rests upon the defendants in this case, *People v. H. Jevne Co.*, 179 Cal. 621, 178 P. 517. In the absence of evidence that the questioned agreement is "in furtherance of trade," defendants have failed to meet this burden and are unsuccessful in invoking the exception provided by section 16725.

[4] However, a complete answer is not furnished by saying there is a failure of proof under any conceivable concept of "furtherance of trade." The question remains whether that expression furnishes a sufficiently definite and certain standard. We think not. It is virtually impossible to apply it to any of the inhibitions expressed in section 16720. For example, what "restrictions in trade or commerce" subd. (a) of § 16720 is "in furtherance of trade" §

16725? What limitation or reduction of production or increase of the price of a commodity, subd. (b), furthers trade? What combination to prevent competition in manufacturing, transporting, selling or purchasing a commodity, subd. (c), furthers trade? What agreement whereby the price of a commodity to consumers is controlled or established in any manner, subd. (d), is "in furtherance of trade"? That term is too indefinite and uncertain to serve as a standard. The reasoning of the court in the Cline case applies to render this provision invalid and inoperative. This invalid exception, added in 1909, is separable from the original enactment for the same reasons that section 16723 is separable.

**Is the Questioned Agreement a Trust
as Defined in Section 16720?**

Defendants claim they have not violated the Cartwright Act, irrespective of the validity or invalidity of sections 16723 and 16725. They say that this Act is a statutory enactment of the common law rules against restraints of trade and that California decisions demonstrate that the questioned agreement is not one of the proscribed restraints.

They rely in part upon cases concerning exclusive trading contracts, *Schwalm v. Holmes*, 49 Cal. 665, and *Twomey v. People's Ice Co.*, 66 Cal. 233, 5 P. 158, and agreements by a producer with his customers for the maintenance of the price of his products. *Grogan v. Chaffee*, 156 Cal. 611, 105 P. 745, 27 L.R.A.,N.S., 395; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 P. 1041, and *Munter v. Eastman Kodak Co.*, 28 Cal.App. 660, 153 P. 737, cases which do not bear upon our problem. Two of their cases held certain cooperative marketing agreements valid under the 1909 amendment of the Cartwright Act, *Anaheim Citrus Fruit Ass'n v. Yeoman*, 51 Cal. App. 759, 197 P. 959, and *Poultry Producers of Southern Cal. v. Barlow*, 189 Cal. 278, 208 P. 93, but were decided prior to the rendition of the decision in the Cline case.

This leaves *Herriman v. Menzies*, 1896, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L.R.A. 318. It involved a contract, between sev-

eral stevedoring firms at San Francisco, which provided for the fixing of prices for stevedoring services tendered by them and for the division of their profits and losses. It did not appear that the contracting parties were in the control, or anything like the control, of that business in San Francisco, to an extent to enable them to exclude competition therein, or to control the price of such labor or business. There was nothing to show that they comprised more than the most insignificant part, in number or volume of business, of those engaged in that trade in that community. The court held the contract valid,—not a monopoly, not an unreasonable restraint of trade.

Defendants claim that they too control but a small portion of the building maintenance business in San Francisco: For example, they are but 14 of the 44 contractors; all the contractors, including defendants, service but 24% of the buildings serviced by members of unions; defendants service less than .5% of the buildings, exclusive of private homes, that are serviced in San Francisco. More significant are the figures concerning defendants' position in the contracting end of the building maintenance business. That is the portion of the business that counts. It is the entire area of the business in which defendants operate and in which there is competition. Defendants have 90% of that business, whether measured by percentage of buildings serviced or by number of persons employed by defendants and by all building maintenance contractors. This fact alone makes the holding in the *Menzies* case inapplicable here.

Later decisions indicate that the holding in the *Menzies* case should not be extended beyond the facts of that case. In *Endicott v. Rosenthal*, 216 Cal. 721, at page 726, 16 P.2d 673, the court, quoting from an intervening decision, said: "In the *Menzies* Case it was held that the contract was not illegal, for it was not shown that it was designed to or did effect a control of business to an extent enabling the contracting firms to exclude competition or control the prices of the commodity." 216 Cal. at page 726, 16 P.2d at page 675. The *Endicott* case involved an agreement

between all but one of the cleaning and dying firms in Los Angeles and Orange Counties and had for its purpose the increase of prices and the elimination of competition. The court found it a restraint upon trade prohibited by section 1673 of the Civil Code (now section 16600 of the Bus. & Prof. Code) and that the reasonableness of the prices fixed was immaterial, quoting, at pages 726 and 727 of 216 Cal., at page 673 of 16 P.2d, from Pacific Factor Co. v. Adler, 90 Cal. 110, 27 P. 36, and from United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700. See, also, U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-218, 60 S.Ct. 811, 84 L.Ed. 1129, and Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213, 71 S.Ct. 259, 95 L.Ed. 219, concerning the price-fixing agreement as illegal *per se*. In *People v. Sacramento Butchers' Ass'n*, 12 Cal.App. 471, 107 P. 712, it was held that an information charging a combination for the purpose of destroying full and free competition in the retail meat business need not allege that the defendants "were in a position to control the market with respect to meat. As we have stated, the object of the statute is to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein, and if the purpose of such combination is to restrict trade or destroy competition in the sale and purchase of 'merchandise, produce, or any commodity,' or if such combination tends to restrict trade or to prevent free competition therein, such combination is against the letter and paramount object of the law. It is, therefore, not necessary to prove, and much less to allege in the information in order to state the offense denounced by the statute, that the defendants or any of the persons referred to in the information as being connected with the alleged combination were in a position to control the market in the sale and purchase of the commodity to which the charge relates." 12 Cal.App. at page 481-482, 107 P. at page 717. A petition for a hearing by the Supreme Court was denied. 12 Cal.App. at page 497, 107 P. 712.

Of the Cartwright Act it can be said, as has been said of the Sherman Act: "'Congress [the Legislature] was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" *Standard Oil Co. v. Federal Trade Comm.*, 340 U.S. 231, 249, 71 S.Ct. 240, 249, 95 L.Ed. 239. In *Kold Kist, Inc., v. Amalgamated Meat Cutters*, 99 Cal.App. 2d 191, 221 P.2d 724, the court overruled a contention that only those combinations are in unlawful restraint of trade which seek to control prices and create a monopoly: "A complete answer to this contention is found in the statute itself. Under subdivisions a, b and c of section 16720, Business and Professions Code, it is unlawful for two or more persons to combine to create or carry out restrictions in trade or commerce; to limit or reduce the production of any commodity; or to prevent competition in the sale or purchase of merchandise, produce or any commodity. These enactments are distinct from the remainder of the section which has to do with price fixing. Although price fixing and monopolistic practices tend to affect competition, production and restrictions in trade, the legislature has not limited illegal combinations in restraint of trade to those which involve price fixing or monopoly." 99 Cal.App.2d at page 201, 221 P.2d at page 731. A petition for a hearing of this case was denied by the Supreme Court, 99 Cal.App.2d at page 204, 221 P.2d 724.

[5] We conclude that the questioned agreement was a trust as defined by section 16720 of the Business and Professions Code.

Was The Injunctive Relief Granted By The Judgment Broader and More Extensive Than The Facts Warrant?

Defendants have suggested that in enjoining any agreement to raise, fix, maintain or bring about the use of "uniform" mark-ups, price differentials, terms or conditions with respect to the furnishing of labor, materials or services, the judgment restrained acts not involved in the questioned agreement, acts which none of the defendants has committed or threatens to commit.

[6] We do not so view it. The promise of each defendant to bid from 5% to 20% higher than the existing contract rate, under certain circumstances, has an aspect of uniformity which justified the use of the word "uniform" in the judgment. Thus, if the current job price per month is \$100 or less, the minimum bid must exceed it by 20%; if \$101 to \$250, 15%; \$251 to \$500, 10%; \$501 to \$1,000, 7½%; \$1,001 and up, 5%. Such a schedule is uniform in its application. Each rate of mark-up applies uniformly to all cases which come within its range. For a discussion of the principle involved, see *Rainey v. Michel*, 6 Cal.2d 259, 268-271, 57 P.2d 932, 105 A.L.R. 148; *In re Weisberg*, 215 Cal. 624, 629, 12 P.2d 446; and *In re Nowak*, 184 Cal. 701, 709, 195 P. 402.

Did The Superior Court Have
Jurisdiction To Consider A
Motion For New Trial?

Plaintiff claims that when, as here, the facts were stipulated, there was no "trial" of an issue of fact, hence no basis for a "new" trial. It advances this as an additional reason for reversal of the order for a new trial.

Such a process of reasoning would be sound if the stipulation set forth all the ultimate facts as well as the evidentiary facts.

Defendants claim that the stipulation omits the ultimate facts, that the court failed to find the ultimate facts, hence the judgment is not supported by the decision and the order for a new trial should be affirmed.

The position of neither party is correct. The stipulation abounds in evidentiary facts but leaves ultimate facts to be found by the court. It happens that the ultimate facts are so closely connected with questions of law as to be almost inextricably bound up with them. In such a case the finding of the ultimate facts seem necessarily implied or contained in the conclusions of law which the court put in express terms by reference to the complaint. Thus, when the court drew and declared the legal conclusion that plaintiff was entitled to a judgment enjoining the defend-

ants from participating in any agreement to raise, fix or maintain prices or to bring about the use of uniform mark-ups, or from carrying out any restrictions in the building maintenance industry, the court thereby impliedly found that the questioned agreement is a trust as defined in section 16720 of the code.

Precedents for implying the finding of ultimate facts from the conclusions of law in such a situation as this are furnished by *Stanwood v. Carson*, 169 Cal. 640, 147 P. 562, and *Taylor v. George*, 34 Cal.2d 552, 212 P.2d 505. The *Stanwood* case involved the validity of certain street assessments. The trial was had upon a stipulated statement of the evidence, most of which consisted of the record of the proceedings on file in the City Clerk's office. The trial court did not in express terms find the ultimate facts. It concluded and declared, from the stipulated facts, that each of the assessments was valid. The questions presented at the trial were questions "of fact mixed with and determinable upon more or less intricate questions of law." 169 Cal. 646, 147 P. 564.

In the *Taylor* case, there was a failure to find, in express terms, whether or not a testator intended to satisfy his obligation to support his child by means of the proceeds of a policy of insurance upon the testator's life. The evidentiary facts had been stipulated. The Supreme Court stated the problem and gave its solution in these words: "Ordinarily, the necessity for findings of fact is dispensed with where the case is submitted upon a stipulation of facts. [Citations.] It has been held, however, that where the stipulation sets forth evidentiary material only, it is proper for the trial court to make findings of the ultimate facts. [Citations.] Although all of the evidence in this case was embraced within the stipulation and exhibits attached thereto, it is at least arguable that the ultimate fact of whether the decedent intended to satisfy his obligation of support by means of the insurance benefits was a fact to be found by the trial court. But the failure to make a specific finding on that subject does not require a reversal. The judgment rendered on the

stipulated facts in the defendant's favor may be deemed in itself an implied determination of the ultimate fact. *Stanwood v. Carson*, 169 Cal. 640, 646, 147 P. 562." 34 Cal.2d 556, 212 P.2d 507.

We conclude that in our case there is no such defect in the findings of fact and conclusions of law as would justify an order for a new trial.

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.



116 Cal.App.2d 556

In re CREELY'S ESTATE.

McKENNA et al. v. ROCHE.

Civ. 15513.

District Court of Appeal, First District
Division 1, California.

March 6, 1953.

Hearing Denied April 30, 1953.

Proceeding on objections to first count of administrator appointed pending application to prove allegedly destroyed will. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered an order allowing administrator's claim for services rendered decedent prior to death, exculpating administrator from personal liability for loss of an automobile, and allowing attorney's fees, and legatees claiming under alleged will appealed. The District Court of Appeal, Fred B. Wood, J., held that legatees claiming under allegedly destroyed will were entitled to be heard on objections to administrator's account, though will had not yet been admitted to probate.

Order affirmed.

4. Executors and Administrators

⌋504(2), 507(2)

Legatees claiming under allegedly destroyed will were entitled to be heard on objections to first report of administrator appointed pending application to prove such will, though will had not yet been admitted

to probate, but statute authorizing probate court to restrain administrator from doing anything which would be injurious to such legatees did not entitle them to hold up proceedings on administrator's account, requesting allowance of his claim for services rendered decedent prior to death, exculpation from personal liability for loss of automobile and allowance of fees to his attorney, until question of probate of alleged will had been determined. Probate Code, § 352.

2. Wills ⌋231

Statute authorizing probate court to restrain administrator or executor appointed pending application to prove a lost or destroyed will from doing anything which would be injurious to devisees or legatees claiming under such will was designed to implement policy of conserving and administering property of estate and policy of giving proponents of will their day in court to establish it and prevention meanwhile of anything injurious to their interests. Probate Code, § 352.

3. Executors and Administrators

⌋510(8, 11)

Where legatees claiming under allegedly destroyed will objected to any action by probate court on first account of administrator pending determination of application to prove alleged will and refused to tender any evidence on the merits of administrator's requests in account for allowance of claim for services rendered decedent prior to death, exculpation from personal liability for loss of automobile and allowance of fees to administrator's attorney, legatees were in no position to complain of order granting such requests and order, being supported by substantial evidence, would be affirmed. Probate Code, § 352.

Anthony S. Devoto, San Francisco, for appellants.

Charles R. Collins, San Francisco, for respondent.

FRED B. WOOD, Justice.

During the pendency of appellants' application to prove a will of Thomas R. Creely, deceased, which they alleged had

been fraudulently destroyed, M. Cleveland Roche was appointed administrator of Creely's estate. Some months later, while appellant's application to prove the will was still pending, see *Swift v. Superior Court*, Cal.App., 235 P.2d 624, Id., Cal., 241 P.2d 217, Id., 39 Cal.2d 358, 247 P.2d 6, Roche filed his first account and report as administrator.

Appellants, as legatees under the destroyed will, filed objections to the following items of the account: (1) the administrator's request for the allowance of his claim for \$6,600 for services rendered decedent prior to his death, (2) a request for a finding that the loss to the estate of a certain automobile occurred without fault of the administrator, and for an order exculpating him from any personal liability to the estate in respect thereto, and (3) a request for the allowance of fees to the administrator's attorney for ordinary and extraordinary legal services rendered.

In support of their objections, appellants alleged that "in the event said alleged fraudulently destroyed will is hereafter admitted to probate, affiant and said legatees hereinabove mentioned intend to, and will, contest each and every one of the * * * items hereinabove set forth; that, therefore, it would be injurious, damaging and prejudicial to affiant and said legatees for this Court to hear and determine said matters at this time and before the rights of affiant and said legatees, under said alleged fraudulently destroyed will, are determined."

They invoked section 352 of the Probate Code which declares that if, before or pending an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, "the court may restrain the administrators or executors, so appointed, from any acts or proceedings which would be injurious to the devisees or legatees claiming under the lost or destroyed will."

At the hearing of the administrator's first account and report, appellants appeared by counsel and objected to the probate court hearing and determining any of the three

items mentioned. The court stated that appellants had a right then and there to be heard. Their counsel took the position that they had no standing until after admission of the will to probate, saying "they have no right to come in here but they have a right to stop your Honor from passing upon those matters until the question of the lost or destroyed will is determined," to which the court responded: "Let us hear the testimony." The administrator then took the witness stand and was examined at some length concerning the various items of the account. Thereupon the court asked counsel for the appellants if he wanted to ask any questions. He replied "No, I just want the record to show that we object to your Honor hearing and determining three matters," specifying the three items above mentioned.

Subsequently, the probate judge filed an order allowing Roche's \$6,600 claim, exculpating him from personal liability for the loss of the automobile, and allowing his attorney \$1,000 on account of ordinary services rendered. That is the order involved upon this appeal.

The order must be affirmed. The trial court correctly interpreted and applied the statute.

[1, 2] When the statute says that if an administrator is appointed pending an application to prove a lost or destroyed will "the court may restrain" the administrator from any acts or proceedings "which would be injurious" to the devisees or legatees claiming under the will, the meaning seems too clear to require any words of exposition. Obviously, it was designed to implement two policies: the policy of conserving and administering the property of the estate and the policy of giving the proponents of the will their day in court to establish it and the prevention meanwhile of the doing of anything injurious to their interests. Consonant with those policies the statute gives the probate court authority to restrain the doing of such injurious acts and accords the beneficiaries under the alleged will an opportunity to invoke such remedial action by the court upon a proper showing.

[3] Appellants were given every opportunity to show that the allowance of the

administrator's claim, the allowance of his attorney's fees, and his release from potential liability for the loss of the automobile, were "acts or proceedings which would be injurious to the * * * legatees claiming under the lost or destroyed will," but failed, indeed deliberately refused, to tender any evidence on the subject. They are in no position now to complain of the order made. It is supported by substantial evidence.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



DEXTER v. DEXTER.*
Civ. 19284.

District Court of Appeal, Second District,
Division 1, California.
March 2, 1953.

Rehearing Denied March 23, 1953.
Hearing Granted April 30, 1953.

Proceeding for order directing defendant to show cause why he should not pay more money for divorced wife's support. The Superior Court, Los Angeles County, sustained defendant's objection to jurisdiction of court to hear evidence and ordered him to pay plaintiff's counsel fees. Appeals of plaintiff and defendant were consolidated. The District Court of Appeal, Drapeau, J., held that it was duty of trial court to hear evidence as to whether or not provisions for wife's support and maintenance were severable from agreement and were made part of judgment.

Order sustaining objections to jurisdiction reversed; order allowing attorneys' fees and costs on appeal reversed with directions.

1. Divorce $\Rightarrow$ 236

Where wife waives all support and maintenance except as provided in agreement in consideration for receiving a more favorable division of community property and husband agrees to pay wife certain sum and conveys certain property to wife,
* Subsequent opinion 265 P.2d 873.

agreement for support is not severable from rest of agreement and court cannot grant additional alimony.

2. Divorce $\Rightarrow$ 245(1), 269(1)

Where husband and wife enter into agreement prior to divorce whereby parties make an equal division of community property plus agreement for support and maintenance, provisions for support are severable from agreement and if provisions for support are incorporated in interlocutory decree of divorce they may be enforced by wife in contempt proceedings and may be subsequently modified by court.

3. Divorce $\Rightarrow$ 245(3)

Where husband and wife prior to divorce had entered into purported settlement agreement and in interlocutory judgment entered in divorce action by wife court approved agreement and ordered husband to comply with its terms, but wife sought increased alimony and filed affidavit averring facts which if true established that parties had made equal division of community property plus agreement for support, it was duty of trial court to hear evidence as to whether or not provisions for wife's support and maintenance were severable from agreement and were made part of judgment.

4. Divorce $\Rightarrow$ 245(1)

If provisions for support of wife were severable from property settlement agreement and were part of judgment in divorce action, they could be modified in discretion of court as justice required.

5. Divorce $\Rightarrow$ 245(1)

In proceeding for order directing defendant to show cause why he should not pay more money for divorced wife's support, power of court to modify support order would not be limited by fact that in divorce proceeding wife had asked for approval of agreement between parties and for alimony as set forth in such agreement, if provisions for support were severable from agreement.

6. Divorce $\Rightarrow$ 287

In proceeding for order directing defendant to show cause why he should not pay more money for divorced wife's sup-

port, where lower court's order sustaining husband's objection to jurisdiction of court to hear evidence was reversed, order allowing former wife attorneys' fees and costs on appeal would be reversed without prejudice to such award being made if court found order for support and maintenance in interlocutory judgment severable from agreement of parties.

Irving* M. Walker, John L. Martin and Mark Mullin, Los Angeles, for plaintiff-appellant.

Macfarlane, Schaefer & Haun and William Gamble, Los Angeles, for defendant-respondent.

DRAPEAU, Justice.

Plaintiff, Mary Dexter, and defendant, Raymond C. Dexter, were married February 24, 1922. They lived together as husband and wife until March 11, 1944. In that year the wife brought this action for divorce. The husband made no contest, his default was entered, and interlocutory and final judgments followed for the wife. No appeal has been taken from either judgment.

Prior to the divorce the parties entered into what they called an agreement. Whether or not it was a property settlement agreement in the technical sense hereinafter discussed is one of the disputed questions in this case.

In the interlocutory judgment the Superior Court approved the agreement, and ordered defendant to comply with its terms. The court further ordered:

"Pursuant to the terms of the said agreement, defendant is ordered to pay the plaintiff monthly the sum of \$150.00, one-half on the first day of the month, and one-half on the 15th day of the month, commencing June 1, 1944; provided, however, that when the son, Norman Greenaway Dexter, leaves school and goes to work, or when he goes into the military forces of the United States, the said monthly award shall be reduced to the sum of \$100.00 per month."

February 11, 1952, the former wife secured an order from the Superior Court, di-

recting her former husband to show cause why he should not pay her more money for her support. He appeared and presented the agreement in bar of that proceeding.

The Superior Court ordered: "defendant's objection to the jurisdiction of the court to hear any evidence on the order to show cause re modification is sustained."

Plaintiff appeals from this order.

The court later on ordered defendant to pay plaintiff \$400 counsel fees and costs on appeal.

Defendant appeals from this order.

Both appeals have been consolidated, and, by stipulation, will be considered and disposed of together.

The agreement recites that the parties are husband and wife; that there are two children of the marriage, a daughter 21 years of age, and a son 16 years of age; that the parties are separated and have lived apart for some time; that they have made a full and frank disclosure to each other of all property owned by them respectively, and that each has full knowledge of the extent, value, and type of property owned by them; that they desire to effect a division of their community property, and to provide for the support and maintenance of the wife "by friendly agreement, instead of resorting to court for said purpose."

The husband conveys to the wife the family dwelling house, with all the personal property in it except a few items, and a Plymouth station wagon.

The husband agrees: (a) to pay the wife \$150 per month "for her support and maintenance and the support of their adult daughter and minor son", (b) with \$25 more per month for the daughter's expenses in college for the next two years, (c) when the minor son leaves school and goes to work, or into military service, then the monthly payments to the wife shall be decreased to \$100 per month, and (d) payments to the wife shall cease upon her death or remarriage.

The agreement also contains a mutual release of and by each party, "from any and all right of support, care and maintenance, as the husband or wife, respectively, of the other party"; a recital as to the intent of

the parties: "It is the intention of the parties hereto to make a final settlement herein of all rights of support, care and maintenance, one against the other, and to release the other party respectively from all rights of such support, care and maintenance other than as herein provided;" and a waiver: "In any action for divorce or maintenance hereafter brought by either party, second party (the wife) waives any right to alimony, temporary or permanent, other than such amount as is provided for hereinabove for her support."

[1] If the agreement were the sole determinative factor in this case, it would appear that the husband conveyed to the wife everything he had, in consideration of her release of him of more than \$100 per month for her support and maintenance.

If that be true, this case would come within the rules stated in *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265, 268; and squarely within the third category defined in the *Adams* case: "* * * contracts in which the wife waives all support and maintenance, or all support and maintenance except as provided in the agreement, in consideration of receiving a more favorable division of the community property."

As to that category our Supreme Court says: "The court cannot add a provision for alimony to such contracts without changing basically the agreement of the parties as to the division of their property." 29 Cal.2d at page 625, 177 P.2d at page 268.

Later on in the opinion we read: "The contract before the trial court in the present case was clearly one that attempted to settle the property rights of the parties. It contained a waiver of all other payments in consideration of her receipt of the major portion of the community property, and that waiver was inseparable from the remainder of the division of property. A waiver under such conditions is not void *per se*." 29 Cal.2d at page 626, 177 P.2d at page 268.

But there is another and additional factor in this case which must be considered. The wife filed an affidavit in support of her order to show cause in which she averred that when the agreement was executed, "our property" in addition to that listed in the

agreement included a joint bank account of \$15,000 and a late model town car; also that the real property conveyed to her by the agreement was of the fair market value of \$15,000.

[2] Assuming the truth of the facts in the affidavit, and taking those facts together with the facts in the agreement, it would appear that the parties made an equal division of their community property, plus the agreement for support and maintenance.

Under that assumption this case would fall within the first category in *Adams v. Adams*, *supra*. The husband's covenant for the wife's support and maintenance was severable from the agreement, and subject to the principles set forth in *Hough v. Hough*, 26 Cal.2d 605, 160 P.2d 15.

The *Hough* case holds that if provisions for support and maintenance of the wife can be separated from the rest of an agreement between husband and wife, and are incorporated into and made an operative part of an interlocutory decree of divorce, then such provisions are merged into and become a part of the decree. They may then be enforced in contempt proceedings, and may subsequently be modified under appropriate circumstances.

[3] In this case it was the duty of the trial court to hear the evidence, and to find whether or not the provisions for the wife's support and maintenance were severable from the agreement and were made a part of the judgment. *Hough v. Hough*, *supra*, 26 Cal.2d 606, 160 P.2d 15; *Adams v. Adams*, *supra*, 29 Cal.2d 621, 177 P.2d 265. And see 19 West Cal.Digest, Divorce, ¶245, p. 314. And also, see "Legal Problems of Divorce Property Settlements in California", 39 Cal.Law Rev. 250.

[4] Having come to the conclusion that the issues in this case should be tried, no extended comment need be made as to the contention argued in the briefs that the plaintiff is limited by the prayer of her complaint to the amounts stated in the agreement. If the provisions for support of the wife were severable from the agreement and were part of the judgment, they may be modified in the discretion of the court as

justice may require. *Hough v. Hough*, supra.

[5] The prayer in plaintiff's complaint is:

"3. For the approval of said agreement attached to the complaint, and for an order directing the defendant to comply with the terms thereof.

"4. For alimony as set forth and agreed upon in said agreement attached to the complaint."

Nothing in the prayer may be construed to limit the power of the court to modify the order for support, if it be determined to be a part of the judgment not limited by agreement. See *Kroupa v. Kroupa*, 91 Cal. App.2d 647, 205 P.2d 683.

The order sustaining defendant's objections to the jurisdiction of the court to hear any evidence on the order to show cause is reversed.

[6] The order allowing attorneys' fees and costs on appeal is reversed; without prejudice, however, to such an award being made if the trial court finds that the order for support and maintenance in the interlocutory judgment is severable from the agreement of the parties.

WHITE, P. J., and DORAN, J., concur.



116 Cal.App.2d 306

SHIELDS v. SHOAF.

Civ. 4397.

District Court of Appeal, Fourth District,
California.

Feb. 26, 1953.

Action by assignee of payee, a building contractor, upon note given as final payment under construction contract, against maker of note. The Superior Court, Kern County, R. B. Lambert, J., gave judgment for maker and assignee appealed. The District Court

of Appeal, Griffin, J., held that building contractor which at time of performing contract did not possess valid general contractor's license was barred from recovery for the work and contractor's assignee which was not holder in due course was likewise barred from recovery upon note given in payment on construction contract.

Judgment affirmed.

1. Bills and Notes ⇨489(6)

Assignee which was not holder in due course of note given contractor in payment on building contract, must allege and prove that contractor held valid contractor's license during performance of contract in order to establish right to recover on note. Business and Professions Code, § 7031; Civ.Code, § 3133.

2. Evidence ⇨65

Licenses ⇨38

Where responsible managing employee had left employment of building contractor and no qualified replacement was employed and no notice of responsible managing employee's departure was given licensing registrar within the required period, contractor was presumed to know the law which, based on such facts known to contractor, ipso facto suspended the license. Business and Professions Code, § 7068.

3. Licenses ⇨38, 39.43

Where building contractor's license was suspended ipso facto, subsequent acceptance of annual license fees and notation of applicable years upon license by license board without disclosure of contractor's disqualification did not reinstate original license and was insufficient to authorize recovery for construction work performed after suspension of license and before alleged renewal dates of license. Business and Professions Code, §§ 7031, 7068.

4. Bills and Notes ⇨315

Where building contractor, at time of performing contract, did not possess valid general contractor's license and was thus barred from recovering for the work, contractor's assignee which was not a holder in due course was likewise barred from recovery upon note given in payment on contract. Civ.Code, § 3133; Business and Professions Code, §§ 7031, 7068, 7080.

Robert Loundagin, Independence, for appellant.

Deadrich, Gill & Bates, and S. B. Gill, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant Thomas E. Shields, doing business as Inyo-Mono Collection Service, brought this action on a promissory note for \$2735.58, signed by defendant and respondent John T. Shoaff. It was made payable to John L. Surber Company. It was assigned to plaintiff and was the final payment on a construction contract entered into between Surber and defendant on January 1, 1949. On August 10, 1950, there was a balance of \$1483.30, plus interest due, which defendant refused to pay.

Plaintiff alleged that at the time of the execution of the contract and performance of the work the Surber Company was a licensed general contractor. Defendant denied this allegation and affirmatively alleged in his answer that the company did not have a valid contractor's license and accordingly plaintiff, as assignor, was not entitled to recover by reason of that fact, citing secs. 7031, 7080, and 7068 of the Business and Professions Code; *Loving & Evans v. Blick*, 33 Cal.2d 603, 204 P.2d 23; and *Franklin v. Nat C. Goldstone Agency*, 33 Cal.2d 628, 204 P.2d 37. After trial, the court so found and entered judgment for defendant. Plaintiff appealed.

The certificate of the Contractors' State License Board dated October 11, 1951, which was received in evidence, shows:

"That John L. Surber Co., * * * John L. Surber, individual owner and Edward J. Rabensberg, Responsible Managing Employee, was issued Contractor's License No. 89499, classification B-1 (General Building Contractor) on September 24, 1946, and this license was renewed to June 30, 1947; however, said license was *ipso facto* suspended April 25, 1947, for failure of the licensee to notify this Board within 10 days of the disassociation of Mr. Edward J. Rabensberg, Responsi-

ble Managing Employee for John L. Surber Co.

"That no replacement of the Responsible Managing Employee was made within a period of one year and Contractor's license No. 89499 was *ipso facto* revoked April 25, 1948, and no application has been filed for a new license."

Surber testified that there was issued to the company a general contractor's license in the year 1946, and that the company held such a license continuously from that date until the time of trial of this action; and that it had not been revoked or suspended to his knowledge. The original license was presented to the court for examination and it bore the notation: "9/24/46" and "For the years 1950 and 1951 and 1952. B-1 S.C. 10. No. 89499." Surber also testified that the work done was for remodeling a cafe for defendant in December, 1948 and January, 1949; that when he obtained the contractor's license, Rabensberg was his responsible managing employee; that Rabensberg left the employ of the company about April, 1947; that he did not notify the Board of this fact; that therefore he had no such employee licensed by the State Board in his employ; that about December, 1948, Shoaff told him what he wanted done in connection with the work performed.

An agent of the licensing board wrote Mr. Surber a letter in March, 1951, notifying him of the *ipso facto* suspension of his general contractor's license as of April 25, 1947, and stated that if his B-1 (general license) had been renewed without revealing the true facts in this respect, any fees tendered for such renewal would be refunded.

The evidence indicates that one Fox and one Dillon, who had some business arrangements with Surber, and who officed with him, made a deal with Shoaff, agreeing to remodel Shoaff's cafe on a plus 10 per cent cost basis; that the estimated cost was \$2,000; that Fox had no contractor's license at the time; that he saw Surber's general contractor's license in his office; that he and Dillon made the financial arrangements with Shoaff; that Fox brought

Surber into the transaction and he agreed to do the work with his equipment and men; that Fox acted as general overseer of the work and that Dillon assisted; that they were paid by drawing account on Surber; that Shoaff contracted for an additional room and other extras not mentioned in the original agreement; that the work was done and materials furnished and Surber was on the job most of the time; that although Fox was, long after the completion of the work, licensed as a general contractor, he had no such license at the time, and no responsible licensed employee was on the job during that period; that progress payments were made to Dillon; that when the building operations were completed the bill amounted to a sum in excess of \$4,000 and Shoaff later complained about it as being too high; that Shoaff nevertheless made out the note to Surber because he was a licensed contractor; that Dillon told Shoaff he "could pay it the best way" he could or whatever he could afford.

Surber had no individual license as a general contractor. The company's license was predicated upon a responsible managing employee qualifying. The evidence clearly shows that Rabensberg left the employ of Surber in 1947. Plaintiff offered no evidence that Surber did or did not notify the licensing registrar within ten days of this fact, as required by section 7068, *supra*. That section provides that if such notice is not given the license "shall be *ipso facto* suspended" and may be reinstated by a showing that another qualified employee has replaced the former one; and that if such notice is given the license shall remain in force for a reasonable length of time, according to the rules of the board.

[1, 2] To avoid the consequences of the provisions of the sections noted, plaintiff argues that there was no evidence to show that Surber did not notify the registrar of the disassociation of his responsible managing employee and that the burden of proof of that fact rested upon the defendant. We see no merit to this argument. Before plaintiff was entitled to recover, it was necessary for him to allege and prove that the contractor had a valid contractor's license during the performance of

the contract. Sec. 7031, *supra*. The certificate of the registrar indicates that he did not have such a valid license at the time the work was performed. It also recites that the license was *ipso facto* suspended April 25, 1947, for failure of the licensee to notify the Board. The fact that the employee did disassociate himself with the company is not in dispute. Apparently no notice of this fact was given by Surber until Feb. 22, 1951. No other employee was employed and qualified. These facts were known to Surber. He was presumed to know the law which, based on these known facts, *ipso facto* suspended the license. Sec. 7068, *supra*. It was never reinstated thereafter by Surber or any employee qualifying by an examination.

[3] The only possible tenable claim plaintiff could make in this respect is that the original license issued was reinstated by the Board by the acceptance of an annual license fee and the placing on the license of the notations indicated. At most, this only indicates that for the years 1950, 1951 and 1952, the license fee had been paid. The certificate of the registrar shows that the license, *ipso facto*, was *revoked* April 25, 1948, and no application was filed for a new one. Since the work here involved was performed in the year 1949, any claimed renewal by the mere payment of the annual license fee, without disclosing the true facts, would be ineffective. It may be further noted that the renewal date indicated on the license was subsequent to the time the work was performed. It therefore would not be sufficient to authorize a recovery for work performed in 1949.

[4] We conclude that the trial court properly found, from the evidence, that plaintiff assignee, not being a holder in due course, could not recover because the plaintiff's assignor did not, at the time of the performance of the contract, possess a valid general contractor's license as required by law. Sec. 3133, Civ.Code; *Appel v. Morford*, 62 Cal.App.2d 36, 144 P.2d 95.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

**BEERY et al. v. LOS ANGELES
COUNTY et al.**
Civ. 19009.

District Court of Appeal, Second District,
Division 3, California.

Feb. 26, 1953.

Hearing Denied April 23, 1953.

Action by executors for refund of tax assessed on Federal reserve notes and national bank notes contained in safe deposit box of decedent as unsecured personal property by county, city, water district and school district. The Superior Court, Los Angeles County, Daniel N. Stevens, J., entered order dismissing action, and executors appealed. The District Court of Appeal, Parker Wood, J., held that Federal reserve notes and national bank notes were not notes within meaning of statute exempting notes from taxation; and that tax was not violative of Federal statute granting states permission to tax money on hand or on deposit.

Order of dismissal affirmed.

1. Bills and Notes ⇨429

Federal reserve notes and national bank notes may be used to pay an obligation evidenced by usual form of promissory note. 12 U.S.C.A. § 109; 31 U.S.C.A. § 462.

2. Taxation ⇨219

Federal reserve notes and national bank notes are not choses in action, are not intangible property, but are tangible property and are not "notes" within statutory provision exempting notes, debentures, etc., from taxation. Revenue and Taxation Code, § 212; 12 U.S.C.A. § 109; 31 U.S.C.A. § 462.

See publication Words and Phrases, for other judicial constructions and definitions of "Notes".

3. Taxation ⇨219

Statute providing that notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages, and any interest in such property are exempt from taxation, was intended to exempt from taxation all intangible property except solvent credits. Revenue and Taxation Code, § 212.

4. Taxation ⇨204(2)

Statutes granting exemption from taxation are strictly construed to end that such
Cal.Rep. 253-254 P.2d-27

concession will not be extended beyond plain meaning of language employed.

5. Taxation ⇨219

Fact that statute granted exemption from taxation as to notes, etc., on condition that state law would be passed taxing net income indicated that the intangible property listed as exempt was income-producing property and that legislature did not intend to include money, such as Federal reserve notes and national bank notes. Revenue and Taxation Code, § 212; 12 U.S.C.A. § 109; 31 U.S.C.A. § 462.

6. Taxation ⇨74

Federal reserve notes and national bank notes are not debts and are not "solvent credits" within statutes providing for taxation of solvent credits. Revenue and Taxation Code, §§ 113, 2153.

See publication Words and Phrases, for other judicial constructions and definitions of "Solvent Credits".

7. Taxation ⇨73

It was not necessary for State to pass legislation enabling it to levy tax on Federal reserve and national bank notes, in view of fact that State's constitution provides that all property in State, not exempt from taxation, shall be taxed in proportion to its value and that word "property" includes money. Const. art. 13, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Property".

8. Banks and Banking ⇨119, 299

Both commercial accounts and saving accounts in bank create a debtor-creditor relationship.

9. Taxation ⇨7

Where it did not appear that Federal reserve notes and national bank notes contained in safe deposit box were taxed differently than other moneys on hand, tax levied on such notes was not violative of federal statute permitting states to tax money on hand or on deposit, provided taxation shall be in same manner and at same rate that state shall tax money or currency circulating as money within its jurisdiction. 31 U.S.C.A. § 425.

10. Taxation ⇨40(7)

It is not unreasonable taxation to tax intangible property and tangible property at different rates.

11. United States ⇨34

Taxing money on hand as tangible property, or taxing solvent credits as intangible property, does not interfere with power of the Congress to regulate value of money.

12. Taxation ⇨7**United States** ⇨34

Taxation by county, city, water district and school district of Federal reserve notes and national bank notes in safe deposit box was not invalid as discriminatory and did not interfere with power of Congress to regulate value of money. 31 U.S.C.A. § 425.

Loeb & Loeb, Gang, Kopp & Tyre, Irell & Manella, Robert E. Kopp, Louis M. Brown, Adrian A. Kragen, Roger H. Davis and Donald T. Rosenfeld, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, and Arvo Van Alstyne, Deputy County Counsel, Los Angeles, for respondents.

PARKER WOOD, Justice.

Demurrer to amended complaint was sustained with leave to amend within 10 days. Plaintiffs having failed to amend, the action was dismissed. They appeal from the order of dismissal.

In the first cause of action of the amended complaint it is alleged: plaintiffs are the executors of the will of Wallace Beery; defendant Byram is the tax collector, and defendant Quinn is the assessor, of Los Angeles County; defendant City of Beverly Hills authorized the County of Los Angeles to assess and collect property taxes for said city; Wallace Beery died on April 15, 1949, a resident of Beverly Hills; letters testamentary were issued to plaintiffs on April 17, 1949; at noon on the first Monday of March, 1949, and thereafter to and including April 15, 1949, said Beery owned and had in a safe deposit box in a bank in Beverly Hills certain obliga-

tions of the United States Government consisting of gold certificates of the United States, national bank notes, and federal reserve notes; about June 1, 1949, said assessor, acting on behalf of said county, said city, the Metropolitan Water District, and the Beverly Hills Unified School District, assessed said obligations at \$370,000 as unsecured personal property; about June 15, 1949, said collector demanded payment of the tax of \$15,759.41 against plaintiffs based upon said assessments; on July 20, 1949, plaintiffs petitioned the board of supervisors of Los Angeles County, sitting as a board of equalization, to cancel said assessment and tax; said petition was denied on said July 20th; on August 10, 1949, plaintiffs paid to said collector, involuntarily and under protest, the said \$15,759.41; on October 21, 1949, plaintiffs filed a claim for refund of said sum with the auditor of said county, and said claim was denied by the board of supervisors on November 15, 1949; on December 20, 1949, plaintiffs filed a corrected claim for refund with said auditor, and the claim was denied on January 3, 1950, by said board; it was alleged therein that said assessment and tax are void, illegal, and "unconstitutional" for the following reasons: (1) bank notes issued by national banking associations, federal reserve notes issued by Federal Reserve banks, and gold certificates issued by the United States Government are not subject to taxation under the provisions of the Constitution of the United States and the Constitution of California, (2) such bank notes, federal reserve notes, and gold certificates, are exempt from taxation by said county, city, water district, and school district, under the provisions of section 212 of the Revenue and Taxation Code of California. It was also alleged therein that no part of said \$15,759.41 has been repaid by said county or city to any of the plaintiffs.

The second cause of action contained, in substance, the same allegations as the first cause of action, except as to the kind of assessment and the amount thereof. It was alleged in said second cause of action that about June 1, 1949, said assessor assessed said obligations at \$370,000 "as an

escaped assessment of unsecured personal property for the year 1948"; said assessor demanded payment of the tax of \$17,020.16; plaintiffs petitioned said board of equalization to cancel the assessment; plaintiffs paid to said collector, under protest, the said \$17,020.16; plaintiffs' claim and corrected claim for refund were denied by the board of supervisors; that no part of said \$17,020.16 has been repaid by said county or city.

There are ten other causes of action. Each additional cause of action incorporates by reference the substance of the first or second cause of action, except the reasons stated therein for the alleged invalidity of the assessment. In such additional cause of action, a further and different reason for invalidity of the assessment is alleged.

The allegations as to those additional causes of action are as follows:

Third cause of action: The tax of \$15,759.41 (referred to as 1949 tax) is void and illegal for the reason said property constitutes solvent credits subject to tax solely as provided in section 2153 of the Revenue and Taxation Code of California.

Fourth cause of action: The tax of \$17,020.16 (referred to as 1948 tax) is void and illegal for the reason said property constitutes solvent credits subject to tax solely as provided in said section 2153.

Fifth cause of action: The 1949 tax is void and illegal for the reason the assessment and taxation of said notes was part of a general scheme wilfully adopted by the assessor to assess and tax "notes of this type held in a safe deposit vault while, at the same time, failing to classify and assess other property similarly situated other than as solvent credits." Such other property consisting of: similar bank and federal reserve notes and gold certificates when deposited in savings and checking accounts in banks, in escrow, with the county treasurer, and in court; promissory notes; corporate securities; trust and deposit accounts. As to said property similarly situated, reference is made to a general deposit creating a depositor-creditor relationship without segregation of the money deposited and without right to return of the identical money deposited. (It was stipulated that

this last allegation be added as an amendment.) By reason of said assessment and taxation plaintiffs were denied the equal protection and the uniform operation of the law, and their property was taken without due process of law.

Sixth cause of action: (The allegations herein are the same as those in the fifth cause of action, except the allegations herein pertain to the 1948 tax.)

Seventh cause of action: The 1949 tax is void and illegal for the reason the state, said city and county have not passed the legislative amendments necessary under section 425 of the United States Code Annotated, Tit. 31, to subject such bank notes, federal reserve notes, and gold certificates to taxation by the state or its subdivisions.

Eighth cause of action: (The allegations herein are the same as those in the seventh cause of action, except the allegations herein pertain to the 1948 tax.)

Ninth cause of action: The 1949 assessment is void and illegal for the reason the assessment discriminates against national bank notes, federal reserve notes, and gold certificates on deposit in safe deposit vaults.

Tenth cause of action: (The allegations herein are the same as those in the ninth cause of action, except the allegations herein pertain to the 1948 assessment.)

Eleventh cause of action: The 1949 tax is void and illegal for the reason that the obligations of the United States are exempt from taxation by state, county, or municipal authorities.

Twelfth cause of action: (The allegations herein are the same as those in the eleventh cause of action, except the allegations herein pertain to the 1948 tax.)

Appellants contend that federal reserve notes and national bank notes are promissory notes, and therefore are exempt from taxation under section 212 of the Revenue and Taxation Code. That section provides: "*Notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages, and any interest in such property are exempt from taxation.*" (*Italics added.*)

The question is whether the Legislature intended that the word "Notes," as used in said section, should include federal reserve

and national bank notes. Appellants argue that the statements on such notes fit the statutory definition of a promissory note. A negotiable promissory note is defined in section 3265 of the Civil Code as: "[A]n unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer * * *."

A federal reserve note states on its face that the United States of America will pay to bearer on demand a certain specified sum of money. Also such a note states that it is legal tender and is redeemable in lawful money at the United States Treasury or at any Federal Reserve bank. A national bank note states on its face that a certain named national bank will pay to the bearer on demand a certain specified sum of money. Also such a note has statements thereon to the effect that it is National Currency, it is secured by collateral deposited in the United States Treasury, and is redeemable in lawful money at said Treasury or at the national bank that issued the note. Appellants argue further that federal reserve notes and national bank notes are obligations of the banks that issued them; a national bank note is a loan secured by collateral; a federal reserve note is a direct obligation of the United States secured by collateral; national bank notes circulating the same as money are obligatory promissory notes of the issuing banks, and federal reserve notes are also such promissory notes; that it is impossible to distinguish, for the purposes of property tax laws of this state, between a national bank note, designated by law as a promissory obligation of the bank, and a promissory obligation issued by any other financially responsible corporation; there cannot be any justification for a different tax classification of such promissory notes; if the Legislature intended that such notes should not be exempt from taxation, a simple amendment of said section 212 would have accomplished that purpose.

[1,2] By statute, federal reserve notes and national bank notes are legal tender. Title 31 U.S.C.A. § 462. Although such notes are in the form of the usual promis-

sory note, they are issued under the direction and authority of the United States and are redeemable in lawful money at the United States Treasury. They, being legal tender, may be used to pay an obligation evidenced by the usual form of promissory note. Section 109 of Title 12 of the United States Code Annotated provides that national bank notes may be circulated "the same as money." The characterization of federal reserve notes and national bank notes as mere promises to pay, or promissory notes, is overridden by statutory provision that such notes are legal tender, and by the general and common practice of recognizing such notes as money. Federal reserve notes and national bank notes are United States money. Such notes are not choses in action and are not intangible property, but are tangible property. In *Blodgett v. Silberman*, 277 U.S. 1, at page 18, 48 S.Ct. 410, at page 416, 72 L.Ed. 749 at page 760, it was said in referring to bank notes and coin in a safe deposit box in New York, "[W]e think that money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is *tangible property* * * *." (Italics added.) In *In re Waldron's Estate*, 84 Colo. 1, 267 P. 191, 194, the question was whether a transfer of cash in a safe deposit box in Colorado, by a non-resident, was subject to an inheritance tax in Colorado. It was held therein that the cash was tangible property and was subject to such tax. The court said that "cash is tangible property available for use in the hands of any possessor whether it be coin, government notes, or bank notes * * *; it has a situs and is subject to the transfer tax where it is * * *."

In 1894 the Congress granted the States permission to tax money. That law was to the effect that United States legal tender notes and other notes and certificates of the United States intended to circulate as currency, and that gold, silver, and other coins shall be subject to taxation as money on hand or on deposit under the laws of any state, provided that such taxation shall be in the same manner and at the same rate that any state shall tax money or currency circulating as money within its jurisdiction.

28 Stats.Chap. 281, p. 278, Title 31 U.S.C.A. § 425.

Article XIII, section 1 of the Constitution of California provides: "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value * * *. The word 'property,' as used in this article and section, is hereby declared to include *mon-
eys, * * ** and all other matters and things * * * capable of private owner-
ship * * *." (Italics added.) Section 14 of said article provides that the Legislature may exempt entirely from taxation any types or classes of personal property.

The Legislature enacted (in 1939) said section 212 of the Revenue and Taxation Code which provides, as above shown, that "Notes," among other things, are exempt from taxation.

[3, 4] It is to be observed that said section 212 does not expressly state that money is exempt. A question arises as to whether, by implication, the word "Notes" includes money such as federal reserve and national bank notes. All the items of property mentioned in said section 212 are intangible property. Section 111 of the Revenue and Taxation Code states that: "'Intangible personal property' means only notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, and mortgages." A comparison of the items mentioned in those two sections shows that all the items of intangible personal property mentioned in section 111, except solvent credits, are in section 212. It thus appears that said section 212 was intended to exempt from taxation all intangible property, except solvent credits. In *Rochm v. County of Orange*, 32 Cal.2d 280, at page 289, 196 P.2d 550, it was said that the only intangi-

bles (except franchises which are in a class by themselves) subject to taxation in this state are solvent credits, which are taxed at the rate of one per mill on their actual value. Statutes granting exemption from taxation are strictly construed to the end that such concession will not be extended beyond the plain meaning of the language employed. *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal.2d 729, 734, 221 P.2d 31, 15 A.R.L.2d 1045. "[S]ettled principles of statutory construction require that any doubt be resolved against the right to the exemption." *Sutter Hospital of Sacramento v. City of Sacramento*, 39 Cal.2d 33, 244 P.2d 390, 394. Said section 212, in granting exemption from taxation, uses the general term "Notes," and does not mention federal reserve notes or national bank notes which are money and are very different from the ordinary note. Since that section was intended to apply only to intangible personal property, and since money is tangible property, it follows that it was not intended that the word "Notes," as used therein, should include by implication or at all, federal reserve notes or national bank notes.

[5] A further indication that the Legislature did not intend to include money, such as federal reserve notes and national bank notes, in the list of property exempted from taxation under section 212 is that the property therein mentioned was exempted upon condition that a state law would be passed taxing net income.¹ In 1935, such an income tax law was passed. It appears that the intangible property which was listed as exempt under section 212 was income-producing property, and the Legislature intended that the tax on the income therefrom was a sufficient burden on the benefits derived from the ownership of such property

1. Said section 212 of the Revenue and Taxation Code is based upon former section 3627a of the Political Code, Stats.1935, ch. 834, p. 2251. The exemptions stated in said section of the Political Code were made upon condition that a state law would be passed taxing net income. A part of said section of the Political Code recited: "The property aforesaid [referring to the items of property exempted from taxation], except solvent credits,

shall no longer be taxable under the provisions of this section if and when a net income tax shall be passed or adopted in this State. Upon the passage or adoption of such tax and from the time such income tax becomes effective *such net income tax shall be in lieu of the tax herein provided for upon notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages and any legal or equitable interest therein.*" (Italics added.)

See *Roehm v. County of Orange*, supra, 32 Cal.2d 280, 289, 196 P.2d 550. Promissory notes, in the usual form, are customarily income-producing. Federal reserve notes and national bank notes do not bear interest. Since money on hand is nonincome-producing, it appears that the Legislature intended that it should be taxed as other nonincome-producing property is taxed.

[6] Appellants also contend that if federal reserve notes and national bank notes are not "Notes," within the meaning of section 212, they are solvent credits within the meaning of section 113 of the Revenue and Taxation Code, and they are taxable only as solvent credits. Section 113 states: "'Solvent credits' means all credits except notes, bonds, and debentures." Section 112 of said code states: "'Credits' means solvent debts owing to the assessee * * *." A debt is payable in legal tender. Federal reserve notes and national bank notes are money and are legal tender for payment of a debt. Under such circumstances, the notes are not to be classified as debts. Such notes are not solvent credits.

[7-10] Appellants also contend that the federal reserve and national bank notes, which were in the safe deposit box, could not be taxed because the state has not enacted legislation permitting it to levy such tax. As hereinabove stated, in 1894 the Congress granted the States permission to tax money on hand or on deposit, provided that such taxation shall be in the same manner and at the same rate that any state shall tax money or currency circulating as money within its jurisdiction. They argue that the state does not seek to tax the money in the safe deposit box at the same rate it would tax the money on deposit, and therefore has not availed itself properly of the permission to tax money; money on deposit is taxed at various rates; a savings account is not taxed; a commercial account is taxed at the solvent credit rate of one per mill; money held in specie by a county or a bank is not taxed; such taxation is not taxing money on deposit at the same rate as money on hand. The Constitution of California provides as above stated, that all property in the state, not exempt from taxation, shall be taxed in proportion to its value, and that

the word "property" includes moneys. In view of said constitutional provision, it was not necessary to pass enabling legislation. The question is whether the taxes herein were levied in accordance with the permission granted by the Congress. The conditions imposed by the Congress, with respect to permission to tax, were: that the money to be taxed shall be taxed as money on hand or on deposit, and that the taxation shall be in the same manner and at the same rate that the state shall tax money or currency circulating as money within its jurisdiction. A commercial account in a bank creates a debtor-creditor relationship. A savings account also creates such a relationship and bears interest which is subject to an income tax. The amended complaint alleges that money held by a county, a court, in escrow, and in trust accounts are general deposits creating a depositor-creditor relationship without segregation of the money deposited and without right to return of the identical money deposited. It is to be noted that gold certificates were also in the safe deposit box. No question is raised upon appeal with respect to the ad valorem tax on the gold certificates. The federal reserve notes and the national bank notes, which were taxed herein, were not on deposit. They were in the safe deposit box and were money on hand. The amended complaint does not allege that said money was not taxed in the same manner and at the same rate that money or currency circulating as money is taxed by the state. The amended complaint states that the assessor failed to assess and classify other property similarly situated other than as solvent credits, and that such other property so situated consisted of similar notes when deposited in savings and checking accounts, and in other places where a depositor-creditor relationship was created. The complaint shows that such other property, allegedly taxed as solvent credits, was intangible property consisting of creditors' rights created by depositing money, as above stated, the notes involved herein were tangible property consisting of money on hand. It is not unreasonable taxation to tax intangible property and tangible property at different rates. It does not appear that the money on hand

was not taxed in the same manner and at the same rate that other money on hand is taxed, and it does not appear that the taxes were not levied in accordance with the permission granted by the Congress.

[11, 12] Appellants also contend that the taxation of the notes is invalid because it is discriminatory, affects the value of money, and contravenes the power of the Congress to regulate the value of money. Their argument with respect to this contention is similar to their argument regarding the last preceding contention. Taxing money on hand as tangible property, or taxing solvent credits as intangible property, does not interfere with the power of the Congress to regulate the value of money. This contention is not sustainable.

The order of dismissal is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; SCHAUER, J., dissenting.



116 Cal.App.2d 523

In re WILSON'S ESTATE.

SANFORD v. BROWN et al.

No. 15371.

District Court of Appeal, First District,
Division 1, California.

March 5, 1953.

Proceedings on petition of executor for approval of compromise with surviving spouse of testatrix, wherein objections were filed by residuary devisee and legatee. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., ordered approval, and residuary devisee appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained finding that proposed compromise was to the advantage of the estate.

Order affirmed.

1. Executors and Administrators Ⓒ269

Petition for approval of compromise of dispute of surviving spouse's claim

against estate of testatrix, which incorporated text of the proposed agreement, and stated executors belief, after investigation, that it would be for the best interest of the estate to enter into the proposed agreement of compromise, stated facts sufficient to show advantage of proposed compromise within meaning of statute requiring verified petition of executor stating such facts as prerequisite to obtaining approval. Probate Code, § 718.5.

2. Executors and Administrators Ⓒ269

In proceedings on petition of executor for approval of compromise of estate with surviving spouse of testatrix, opposed by the residuary devisee and legatee, record established that probate court had not denied residuary devisee a formal hearing of her objections, and that she had not been obstructed or curtailed in any manner in the presentation of her case. Probate Code, § 718.5.

3. Trial Ⓒ105(2)

An objection that evidence is incompetent because the witness has not been sworn is waived if not made when the evidence is offered or at least while the defect is capable of being remedied.

4. Evidence Ⓒ43(3)

Where petition of executor for approval of compromise with surviving spouse of testatrix specifically mentioned and identified two independent actions between surviving spouse and objecting residuary devisee, as did the objections of the residuary devisee, trial court was warranted in taking judicial notice of those actions in determining whether petition for compromise should be approved. Probate Code, § 718.5.

5. Evidence Ⓒ52

Where circumstances were such that trial court was entitled to take judicial notice in proceedings on petition for approval of compromise with surviving spouse of testatrix, of two independent actions between surviving spouse and the objecting residuary devisee, the record in such cases would be deemed properly admitted in evidence even though not formally offered. Probate Code, § 718.5.

6. Executors and Administrators ⚡269

In proceedings on petition of executor for approval of compromise with surviving spouse of testatrix, wherein residuary devisee filed objections, evidence supported order approving compromise in best interest of the estate. Probate Code, § 718.5.

7. Executors and Administrators ⚡269

In proceedings on petition of executor for approval of compromise with surviving spouse of testatrix, wherein objections were filed by the residuary devisee, evidence sustained findings that the compromise was to the advantage of the estate. Probate Code, § 718.5.

8. Executors and Administrators ⚡269

Fact that issues are present which cannot be settled without litigation in itself furnishes a substantial basis for approval by court of compromise entered into by executor with party claiming adversely to the estate. Probate Code, § 718.5.

9. Trial ⚡105(3)

In proceedings on petition of executor for approval of compromise with surviving spouse of testatrix, wherein residuary devisee filed objections, executor's opinion as to whether compromise was to advantage of the estate was competent in absence of any objection by devisee at time opinion went into the record. Probate Code, § 718.5.

10. Executors and Administrators ⚡269

Fact that residuary devisee of estate was willing to bear cost and furnish legal counsel for litigation of various matters in dispute between estate and surviving spouse of testatrix, without financial cost to estate, did not compel denial of executor's petition for approval of proposed compromise on ground that compromise was without advantage to estate, since properties of estate were in custody of law during administration, and executor and probate court were vested with duties and responsibilities in connection therewith, involving exercise of judgment not subject to a substitution by that of residuary devisee. Probate Code, § 718.5.

11. Executors and Administrators ⚡269

Provision of probate code authorizing approval of compromise on verified peti-

tion of executor or administrator showing advantage thereof, does not obligate or reduce the common law authority of the executor to compromise and settle claims and disputes, but merely affords him additional protection from liability. Probate Code, § 718.5.

12. Courts ⚡202(5)

In probate cases, as in other cases, a reviewing court must resolve all conflicts in the evidence in favor of judgment or order under appeal, and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical.

Sefton & Anderson, San Francisco, for appellant.

Joseph A. Brown, San Francisco, in pro. per.

FRED B. WOOD, Justice.

Carita Sanford, residuary devisee and legatee of Lillian Wilson, deceased, has appealed from an order approving a compromise with Dewey Wilson, surviving spouse of Lillian, of certain claims, demands and suits, proposed by Joseph A. Brown, executor of the estate.

In support of her appeal, appellant claims: (1) the petition for approval failed to state facts sufficient to show the advantage of the compromise, (2) the probate court refused to grant appellant a formal hearing of her objections, (3) the probate court determined the matter without any witnesses or evidence, and (4) the compromise is not to the advantage of the estate.

[1] (1) *The petition for approval stated facts sufficient to show the advantage of the proposed compromise.*

The applicable statute, as a prerequisite to obtaining approval, requires the executor or administrator to file a verified petition "showing the advantage of the compromise, composition or settlement." Probate Code, § 718.5.

In this case, the executor filed a verified petition in which he incorporated the text

of the proposed agreement of compromise, stated that a dispute had arisen between the estate and Dewey Wilson concerning the interest of the latter in two pieces of real property, that he had investigated the matter and was familiar with the facts as asserted by both sides, based upon a court hearing as to one piece of property and a deposition as to the other, and said that "from all this your petitioner is of the belief that it is * * * for the best interests of said estate to enter into" the proposed agreement of compromise, and that "the compromise as set forth * * *, in the judgment of your petitioner is in the best interests of said estate and all parties concerned."

We deem this a sufficient statement that the compromise was of advantage to the estate, to withstand a general demurrer and give the court jurisdiction to consider the petition.

[2] (2) *The probate court did not deny appellant a formal hearing of her objections.*

Upon the filing of the petition for leave to compromise, notice was given of the time and place of the hearing thereof, informing all persons interested in the estate then and there to appear and show cause, if any they had, why the petition should not be granted. Upon the day appointed, the matter was continued to November 16, 1951. Upon that day appellant's counsel appeared and filed appellant's written objections to the petition. The reporter's transcript shows that these objections were presented at the beginning of the hearing. The executor stated that he was acting as his own attorney and proceeded to present the matter to the court, describing the pending law suits, the issues therein, and the proposed compromise agreement, reading the latter aloud in its entirety. Appellant's counsel participated in the discussion. Wilson's attorney also participated. In conclusion, the court said: "Very well, let the matter be submitted."

December 4, 1951, a minute order was made granting the petition and directing that a written order be prepared. December 7, a proposed written order, inclusive of findings, was served upon appellant's

counsel. December 12, it was signed and the next day filed. December 17 appellant filed her notice of appeal. Not until June 13, 1952, when she filed her opening brief upon this appeal did appellant make any objection to or suggest any criticism of this hearing or the manner in which it was conducted.

We find in the record not the slightest indication that appellant was obstructed or curtailed in any manner in the presentation of her case. Her counsel participated fully. His unsworn statements went into the record along with those of the executor and the attorney for Wilson. He made no objection and raised no question concerning the informality of the hearing. He gave utterance to no need or desire for further presentation of anything on behalf of his client and offered no objection to the submission of the matter for consideration and determination by the court. Appellant can not now claim she did not have her day in court.

(3) *There is evidentiary support for the order.*

Appellant claims the trial judge made a determination with no evidence before him, principally because no witnesses were sworn. It is true that no witness was sworn at the hearing. The administrator presented the matter at some length and in detail, without any objection by anyone that he was not sworn. The same was true of appellant's counsel. He stated her case at some length. No one objected that no oath had been administered to him. The same was true of Dewey Wilson's attorney, who participated in similar fashion.

[3] That testimony was none the less competent. An objection that evidence is incompetent because the witness has not been sworn is waived if not made when the evidence is offered or at least while the defect is capable of being remedied. Estate of Da Roza, 82 Cal.App.2d 550, 555-556, 186 P.2d 725; Tennant v. Civil Service Comm., 77 Cal.App.2d 489, 497-498, 175 P.2d 568; Trigueiro v. Skow, 24 Cal. App.2d 253, 254-256, 74 P.2d 836; People v. Duffy, 110 Cal.App. 631, 635, 294 P. 496. In the Da Roza case, a proceeding to con-

firm a probate sale, the unsworn statements of the attorney for the administratrix, the attorney for the purchaser, and the attorney for the contestant-appellant were treated as evidence. The appellant did not at the time object that those persons had not been sworn. Of that, the reviewing court said: "Moreover, the record discloses no objection at the hearing on the part of appellant to their testimony on the ground that the witnesses were not sworn. We must presume that appellant failed to object to the evidence on that ground. He thereby waived his objection to the competency of the evidence." Pages 555-556 of 82 Cal.App.2d, page 729 of 186 P.2d.

In addition, in our case, the court had judicial knowledge of two pieces of litigation between these parties in this very probate proceeding. One was pending to establish the death of Lillian Wilson and the termination of her interest as joint tenant with Dewey Wilson in respect to certain real properties in Morgan Hill and in San Francisco. The other involved a controversy between the administrator and Dewey Wilson concerning property on Howard Street in San Francisco. It culminated in *Wilson v. Superior Court of State, in and for City and County of San Francisco*, the decision reported in 101 Cal.App.2d 592, 225 P.2d 1002.

[4-6] The trial court also had judicial knowledge of two independent actions then pending between these parties in the same court. One was a suit to quiet title to property situate on Bush Street, San Francisco, pending between the executor as plaintiff and Dewey Wilson as defendant. The other was a suit to quiet title to property situate on Howard Street, San Francisco, pending between Dewey Wilson as plaintiff and the administrator as defendant. These two independent actions in the same court were specifically mentioned and identified in the administrator's petition and in appellant's objections. That was sufficient to warrant the trial court taking judicial notice of those actions. *Mann v. Mann*, 76 Cal.App.2d 32, 40-41, 172 P.2d 369; *Estate of McSweeney*, 107 Cal.App. 2d 140, 142-145, 236 P.2d 846; and *Estate of Pailhe*, 114 Cal.App.2d 658, 251 P.2d 76.

Judicial notice is a form of evidence. *Mann v. Mann*, supra, 76 Cal.App.2d 32, 42, 172 P.2d 369, and *Estate of Pailhe*, supra, 114 Cal.App.2d 658, 251 P.2d 76. Those actions and the issues in each were discussed at the hearing as if the records thereof were properly before the court. In such a case, even though not formally offered in evidence, the records of such actions are deemed properly admitted in evidence. *Mann v. Mann*, supra, 76 Cal. App.2d 32, 41-42, 172 P.2d 369; *Walsh v. Walsh*, 108 Cal.App.2d 575, 578-579, 239 P.2d 472; and *Estate of Pailhe*, supra, 114 Cal.App.2d 658, 251 P.2d 76. The record upon this appeal has been properly augmented by the inclusion of the files in those two independent actions and in the proceeding to establish termination of the joint tenancies.

It can not be said that the trial court acted without evidence when it approved the proposed compromise.

(4) *Is the proposed compromise of advantage to the estate?*

The probate court found the allegations of the executor's petition true, appellant's objections untrue and without substance or foundation in law or in fact, that the compromise was made and entered into in good faith by the executor and the other signatories, and that the compromise of the respective claims of the estate and of Dewey Wilson and others, as set forth in the petition on file with the court, "is for the advantage, benefit, and best interest of said estate and those interested therein, including but not limited to the said Carita Sanford."

[7] Appellant claims that the evidence does not support this finding that the compromise is to the advantage of the estate. We are of the opinion that this finding is supported by the evidence and that we may not disturb the order based upon it.

A summary of the salient features of the compromise agreement will aid the discussion.

The Howard Street property, which consists of a hotel building and furnishings, stood in the name of Lillian Wilson at the time of her death but Dewey claims that it

is community property and that he can prove it was purchased during their marriage and was put in Lillian's name for the sake of convenience because he was a merchant seaman and away at sea a great deal of the time. Pursuant to the compromise, this property is to be sold and the proceeds equally divided between the estate and Dewey, after adding or subtracting the net gain or loss made or incurred in operating the property pending the sale; also deducting \$713.85 heretofore advanced by Dewey in respect to this property. The sum of \$292.47 is also to be deducted. It will be paid to Dewey's attorneys. It represents a judgment in a forcible detainer action in respect to the Howard Street property, in favor of Dewey and against Carita Sanford and another. Dewey is assigning this judgement to the estate.

The Bush Street property consists of an apartment building which, at the time of Lillian's death, stood in her name alone. Two days after her death her son recorded a joint tenancy deed from Lillian to herself and son. Later the son deeded the property to Dewey, who claims that he has proof that the deed was delivered prior to Lillian's death. Additionally, Dewey claims this was community property and was acquired under substantially the same circumstances as the Howard Street property. He values the equity in the Bush Street property at \$5,000, with furniture worth \$750 to \$1,000, subject to several chattel mortgages. The estate, under the compromise, will concede that Dewey owns the Bush Street property and contents. He will relinquish and withdraw his claim for \$1,504.60 against the estate for funeral expenses paid by him, and will pay the estate \$1,000 in cash.

The estate concedes to Dewey the ownership of personal property at the home of Lillian and Dewey. The home consists of improved real property on Post Street in San Francisco. It appears that it was held by Lillian and Dewey in joint tenancy and had been homesteaded by them. Dewey's title as the survivor, under section 663 of the Probate Code, apparently is not in dispute.

Dewey has in his possession a diamond bracelet which he claims is his sole property. Lillian asserted ownership by bequeathing it to him in her will. Under the proposed compromise the administrator concedes that it is Dewey's property.

The compromise agreement further provides that the estate will hold Dewey free and harmless against any and all claims and other matters in connection with the estate and that the estate will pay all inheritance, estate and income taxes assessed or levied in connection with the estate or distributions thereunder.

[8] It is apparent that in respect to each of these properties, real or personal, there were issues which could not be settled without litigation. That fact in itself furnished a substantial basis for the executor entering into a compromise and the court approving the compromise. See *Kroger v. Truitt*, 27 Cal.2d 288, 294, 163 P.2d 735. The executor evidently was convinced that Dewey could establish that the Howard Street property belonged to the community. The compromise as to that property will bring the estate approximately the financial equivalent of a one-half interest therein. If the Bush Street action were to be tried, Dewey might win all of the realty, leaving title to the personality still in dispute. The compromise, instead, would seem to bring to the estate nearly, if not entirely, a fair financial return upon a half interest in the realty. In respect to the bracelet, there was the issue of ownership. There would be no particular advantage to the estate in litigating that issue in view of the fact that if the estate should win, the bracelet would go to Dewey under the will. Appellant criticizes the undertaking on the part of the estate to hold Dewey harmless in respect to certain taxes but she has not shown that the estate has thereby assumed any obligation of substance which would tend to offset any of the more advantageous features of the compromise.

[9] We must not overlook the fact that the court had the benefit of the opinion of the executor (based upon his investigation and the experience gained in the handling of the estate) that the proposed compromise

is in the best interest of the estate and that the matter should be compromised. The executor's opinion is competent evidence in the absence of any objection by the appellant at the time when the opinion went into the record, *Estate of Kay*, 30 Cal.2d 215, 224, 181 P.2d 1, and cases cited.

[10] Appellant contends that since she, the sole residuary beneficiary and the principal beneficiary under the will, offered and was and is ready and willing to bear the cost and furnish legal counsel for the litigation of the various matters in dispute, without financial cost to the estate, the conclusion is inescapable that the proposed compromise is without advantage to the estate. Such a claim overlooks the fact that the various properties in the estate are in the custody of the law during administration and that the law vests in the executor and the probate court duties and powers commensurate with their responsibility properly to administer the estate. Accordingly, there are necessarily involved various factors over and above the personal convenience and wishes of the ultimate beneficiary. One of those factors is the element of time, not merely of cost, in settling an estate. And the law looks with favor upon the settlement of litigation. *Estate of Manischewitz*, 113 Cal.App.2d 5, 247 P.2d 572, and cases cited. It is neither for the residuary legatee nor for a reviewing court to undertake to substitute the judgment of either for that of the executor and the probate court in such matters when, as here, there is a substantial basis in the record for the decision which they have made.

[11, 12] At common law the executor or administrator had very extensive authority to compromise and settle claims and disputes. A statute such as § 718.5 of our Probate Code does not abrogate or reduce the scope of his common law authority. It merely affords him additional protection from liability. *Estate of Lucas*, 23 Cal.2d 454, 463-465, 144 P.2d 340. In probate cases, as in other cases, a reviewing court must resolve all conflicts in the evidence in favor of the judgment or order under appeal. "It is common knowledge among judges and lawyers that many cases are

determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical." *Estate of Bristol*, 23 Cal.2d 221, 223-224, 143 P.2d 689, 690.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



116 Cal.App.2d 533

PEOPLE v. CARTER.

Cr. 2368.

District Court of Appeal,
Third District, California.

March 5, 1953.

Defendant was convicted on two counts of forgery. The Superior Court, Sacramento County, Bedeau, J., entered judgment of conviction and entered order denying motion for new trial, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence that defendant had tried to cash counter check in bank for \$98 and was told that there were insufficient funds in account to cover check was admissible as part of *res gestae* in prosecution for forgery of counter check for \$73 drawn on same account and cashed 3 minutes later.

Judgment and order denying motion for new trial affirmed.

I. Criminal Law ¶1170(3)

In prosecution for forgery, defendant was not prejudiced by court's refusal to allow witness, who identified defendant to

police, to testify as to what policeman said to witness on telephone prior to identification, where court by later ruling permitted defendant to go into conversation of officer with witness prior to identification.

2. Criminal Law ⚖️365(2)

Evidence that defendant had tried to cash counter check in bank for \$98 and was told that there were insufficient funds in account to cover check was admissible as part of *res gestae* in prosecution for forgery of counter check for \$73 drawn on same account and cashed 3 minutes later.

3. Criminal Law ⚖️719(1)

In prosecution for forgery, where bank teller testified that defendant had written one of checks in question, comment of District Attorney that a person who commits forgery by writing with both hands is hard to detect, was not improper as an attempt to prejudice jury through use of matters not in record.

4. Criminal Law ⚖️720(1)

In forgery prosecution, where defendant testified that he was in another city at time of alleged crime, it was not misconduct for District Attorney to comment on fact that defendant did not call witnesses to substantiate his story.

5. Criminal Law ⚖️302(4)

In forgery prosecution, mere fact that material witness could not be found and, therefore, third count was dismissed prior to completion of people's case did not compel conclusion that there was a plan to prejudice defendant, in view of fact that defense counsel indicated he had no objection to dismissal of count.

6. Criminal Law ⚖️741(2)

Identification of defendant is a matter for jury's determination.

7. Criminal Law ⚖️339, 741(2)

In forgery prosecution, any want of positiveness in identification of defendant with crimes charged went only to weight of testimony and question of identification was for jury.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Leo V. McInnis, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment of conviction on two counts of forgery and from the order denying a motion for a new trial.

William Carter was charged by information with three counts of forgery. Count No. 1 charged that defendant did, on September 18, 1951, feloniously and with intent to defraud Robert Jordon and the Anglo California National Bank at Sacramento, California, draw a forged instrument, namely a non-negotiable commercial account counter check in the amount of \$700, and uttered and attempted to pass the same to LaRayne Hoover and Ralph Lane as true and genuine, knowing the same to be altered and forged. Count No. 2 charged that defendant did, on September 26, 1951, feloniously and with intent to defraud Harold E. Janes and the Bank of America National Trust and Savings Association at Sacramento, California, draw a forged instrument, namely a non-negotiable counter receipt in the amount of \$73, and uttered and attempted to pass the same to Joseph Perez, as true and genuine, knowing the same to be altered and forged. Count No. 3 charged that defendant did, on September 29, 1951, feloniously and with intent to defraud Harold E. Walton and the Bank of America National Trust and Savings Association at Sacramento, California, draw a forged instrument, namely a check in the amount of \$26.70, and uttered and attempted to pass the same to John W. Boyles as true and genuine, knowing the same to be altered and forged. The defendant entered a plea of not guilty to all three counts.

At the trial before a jury, the people called one John W. Boyles, the owner of a bottle shop, to testify as to Count No. 3. He identified appellant as the person who on September 29, 1951, presented a check in the amount of \$26.70, drawn on the Bank of America, Sacramento, California, the drawer thereon appearing as Harold E. Walton, and the payee Thomas W. Jordon, the name of the payee being endorsed on the

Kenneth Cayocca, Sacramento, for appellant.

back. The check was offered to purchase a bottle of whiskey and some cigarettes. Boyles had cashed a check under the same name earlier in the day, so he questioned defendant as to whether he had cashed a check earlier; when defendant replied in the negative, Boyles told him to sit down while the police were called, but defendant left while the call was being made. This testimony was given at the close of the first day's proceedings. At that time the prosecutor stated that he was then unable to present Harold Walton, the alleged drawer of the check, but that Walton would testify the following morning. The Assistant Public Defender, who was representing defendant, indicated that the defense had no objection to this continuance. The following morning, January 4, 1952, the prosecution stated in open court that due to circumstances beyond their control they had been unable to secure the material witness Harold Walton and therefore requested that the third count be dismissed. Upon defense counsel's acquiescence and statement that he had no objection, dismissal of that count was ordered.

The testimony as to Count 1 was to the effect that appellant, on or about September 18, 1951, presented a \$700 commercial account counter check signed by Robert Jordan for payment at the teller's window of LaRayne Hoover in the Anglo California National Bank in Sacramento, California. The teller handed the check to Ralph Lane, the assistant cashier, who found no funds in the bank for the check and so informed defendant; defendant then stated that he kept his funds in the Fruitridge Branch of the bank, whereupon Lane said he would call there to verify the deposit, but before the call could be completed, defendant departed from the bank, leaving the check. The testimony of Robert Jordan was that he operated an automatic car washer and that defendant had worked for him for a few days during the month of September. However, Jordan did not write the check in question, nor had he authorized anyone else, including defendant, to write it.

The testimony as to Count 2 was to the effect that on or about September 26, 1951, appellant presented for payment a counter

check signed by Harold Lee Janes, dated September 26, 1951, in the amount of \$98, to Joseph Perez, teller at the Bank of America, Sixth and K Streets, Sacramento, California. Perez checked the bank records and found that the account had insufficient funds to cover that amount and he so advised defendant. Defendant then took the \$98 check back, went to the counter and made out another one in the amount of \$73, which was cashed. Harold Lee Janes testified that he had not given anyone, including defendant William Carter, authority to write the check, nor had he written it himself.

The appellant took the stand in his own defense and testified with reference to the first count that he was at the Stag Pool Hall during the time he allegedly tried to pass the \$700 check on September 18, 1951, and, as to the second count, that he had been in San Francisco on September 26, 1951. He further testified that he had not seen any of the checks before, that it was not his handwriting appearing thereon, that he had furnished samples of his handwriting to the detectives, and that he did not even know where the Anglo California National Bank was. Appellant was impeached by proof of a prior felony conviction for robbery.

Appellant first contends that the trial court erred in sustaining an objection to cross-examination of the witness Ralph Lane, assistant cashier of the Anglo California National Bank, as to a conversation he had with the police department. Appellant in his brief sets forth the following testimony:

"Q. Where were you at that time, at the bank, when you were called to come over and identify the defendant?

A. Yes.

"Q. What did they say to you when they told you to come over?

"Mr. Cole: Objected to as calling for hearsay, your Honor.

"The Court: That is right."

Appellant argues that this question was asked by the defense attorney for the purpose of bringing out to the jury the fact that the observation made by Ralph Lane

at the time that the defendant was alleged to have passed this counter check was inaccurate and any conversation had with the police department at that time would affect the credibility of the witness as to just how much he remembered of the defendant's characteristics and would tend to prove that the reason he was able to identify this defendant was in some degree due to what was told him over the telephone at that time. However, appellant does not set forth the testimony immediately following the portion quoted by him. This was as follows:

"Mr. Kline: Q. With whom did you talk? A. Walter Lapp.

"Q. Did Mr. Lapp ask you to come over to the jail?

"Mr. Cole: Objected to as calling for hearsay.

"The Court: Overruled. It goes to show interest and so forth.

"A. He asked me to come over there, to, I believe it was the Sheriff's office, over on Sixth Street, the Hall of Justice.

"Q. At the Sheriff's office, and who was there at that time? A. Mr. Lapp, some other police officers that I didn't know.

"Q. Did they bring some people in for you to identify? A. They brought this fellow in to the office and asked me if that is the man that presented the check for \$700.00 and I said it was.

"Q. This is the only man you looked at? A. Yes, sir."

[1] It is clear that the later ruling of the court permitted appellant to go into the conversation of the officer with the witness prior to the identification, and no prejudice could have resulted to appellant from the ruling complained of.

Appellant's second contention is that the court erred in admitting testimony as to appellant having first offered a counter check for \$98 shortly before presenting the check for \$73 which was cashed and which was the basis of the offense charged in Count No. 2. Appellant's counsel objected

to this testimony from the bank teller, Joseph Perez, on the ground that there was nothing charged in the information as to such check. The court ruled that it was admissible as a part of the *res gestae* when it was shown that the \$98 check had been presented within three minutes prior to the presentation of the counter check for \$73, which latter was the check cashed by Perez. Appellant argues that the transaction involving the \$98 instrument was separate and apart from that involving the second check for \$73. However, as pointed out by respondent, the case relied upon by appellant, *Wagner v. Worrell*, 76 Cal.App.2d 172, 172 P.2d 751, involved a lapse of 25 days, whereas here, the sequence of events took place within 3 minutes and there is no indication from the testimony that appellant went outside the bank premises between the offering of the first and second checks.

[2] There was no error in the court's ruling as the offered evidence was clearly part of the *res gestae*. As this court said in *People v. Fong Sing*, 38 Cal.App. 253, at page 258, 175 P. 911, at page 913:

"The doctrine of *res gestae* is so well understood that it is hardly necessary to remark that under that rule evidence is admissible of extrajudicial declarations tending to explain or show the character or motive or purpose or intent of a transaction, itself a fact in dispute, which would under other or ordinary circumstances be excluded as hearsay or self-serving. The rule, in other words, recognizes the competency of certain hearsay testimony, and is an exception to the general rule of exclusion as to that class of proof. Our Code of Civil Procedure, § 1850, thus states the rule: 'Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.'"

Appellant next contends that the District Attorney committed prejudicial error during the course of his arguments to the jury.

He first states that although there was no evidence offered on behalf of the people

that appellant had actually written the forged checks, and although no handwriting experts testified or in any way identified appellant's handwriting as to any of the three counts originally charged, the District Attorney, in his final argument, undertook to give reasons why this evidence was not offered, by commenting that a person who commits forgery by writing with both hands is hard to detect. Appellant submits he was thereby deprived of a fair trial because the prosecution deliberately tried to prejudice the jury through use of matters not in the record.

[3] There was, however, the testimony of the teller, Perez, that appellant had written one of the checks, and we cannot say that the argument of the District Attorney went beyond the bounds of legitimate argument, for as stated in *People v. Willard*, 150 Cal. 543, at page 552, 89 P. 124, at page 128: "Counsel have a right to present to the jury their views of the proper deductions or inferences which the facts warrant. Their reasoning may be faulty, their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel." See, also, *People v. Eggers*, 30 Cal.2d 676, 693, 185 P.2d 1. Furthermore, the trial court, when objection was made by appellant's counsel, stated: "This is just a theory on the thing and I will permit him to point out his theory and the jury will be instructed that they will take the evidence from the witnesses and from the witnesses only."

Appellant contends also that the District Attorney was guilty of prejudicial misconduct resulting in a miscarriage of justice in making the following statement in his argument to the jury. "How he planned to get away with the \$700 check; how anybody could be that stupid, I don't know, only Mr. Carter knows that."

Respondent first counters by saying that the record does not indicate any objection to this remark by defense counsel, and that the issue cannot be raised for the first time on appeal, since timely objection would have permitted the trial court to properly admonish the jury. Respondent then de-

fends the propriety of the statement by citing two cases, *People v. Kromphold*, 172 Cal. 512, 157 P. 599, and *People v. Vickroy*, 41 Cal.App. 275, 182 P. 764, where far stronger language was held to not constitute misconduct.

[4] The third instance of prejudicial misconduct urged by appellant is that the District Attorney in his argument commented on the fact that appellant did not call a witness to prove his whereabouts on September 26, 1951, the date of the offense charged in Count No. 2 of the information, and by implying that this failure to substantiate his alibi should be held against him. The record shows that appellant had testified that he was in San Francisco on September 26, 1951, from 9:00 a. m. to 5:00 p. m., but he produced no witnesses who had seen him there that day.

There is no merit in this contention of appellant. As this court said in *People v. Fitzgerald*, 14 Cal.App.2d 180, at page 205, 58 P.2d 718, at page 731: "It is undoubtedly the rule that the district attorney may comment upon the failure of the defendant to produce material witnesses who would substantiate his story. *People v. Piero*, 79 Cal.App. 357, 249 P. 541. It is not misconduct for the district attorney to refer in his argument to the fact that a co-defendant was not called upon to testify on behalf of the defendant. *People v. Ye Foo*, 4 Cal.App. 730, 89 P. 450, 453; *People v. Ruef*, 14 Cal.App. 576, 114 P. 48, 54, 72." See, also, *People v. Gist*, 28 Cal.App.2d 287, 292, 82 P.2d 501; *People v. Piero*, 79 Cal.App. 357, 360, 249 P. 541.

[5] Appellant next contends that he was deprived of a "fair trial" and "due process of the law" by the consolidation of Count No. 3 of the information with the other two counts. Appellant argues that the prosecution knew all along that the third count would be dismissed prior to completion of the people's case, but as a matter of strategy put on as much of the evidence as they could to present to the jury as unfavorable a picture of appellant as possible, thereby using Count No. 3 only to strengthen the weak points in the first two counts. There is no merit in this contention. The transcript shows that the prosecution

planned to have the material witness Harold Walton present on the following day, but that he could not be located. The fact that a material witness cannot be found and therefore one of the counts is dismissed does not compel a conclusion that there was a plan to prejudice the defendant. Furthermore, the record shows that defense counsel was questioned and indicated he had no objection to the dismissal of the third count.

the judgment of conviction, and that no prejudicial error was committed.

The judgment and the order denying the motion for a new trial are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



[6, 7] Appellant's final contention is that the proof offered by the people as to the first two counts was not sufficient to justify a conviction as to those counts. As to the first count, appellant contends the identification by Ralph Lane was very vague because he testified that there was nothing outstanding about appellant, that there was nothing about appellant's face which caused him to identify appellant, that he noticed no identification marks, that he did not talk to appellant when making the identification at police headquarters, that he was not called to identify the appellant until several weeks after the offense, and that he was only shown appellant and no one else. As to the second count, appellant points to Perez' testimony that he paid no attention to what appellant was wearing, that he believed appellant had a mustache but did not know for sure, and that to the best of his knowledge he thought appellant was the man. This identification, too, is attacked as too vague and uncertain; appellant urges that the jury must have improperly considered the testimony of Boyles, the bottle shop owner who was called in connection with the third count, in accepting the identification of appellant as to the first two counts and reaching their verdict thereon. However, as pointed out by respondent, identification is a matter for jury determination, and the record shows that the identification of appellant by both Lane and Perez at the trial was without qualification. Any want of positiveness would go only to the weight of the testimony and the question was one for the jury to determine.

In view of the foregoing we conclude that the appellant received a fair and impartial trial, that the evidence abundantly supports

116 Cal.App.2d 504

MACKAY et ux. v. WHITAKER et al.

Civ. 15255.

District Court of Appeal, First District,
Division 1, California.

March 5, 1953.

Rehearing Denied April 4, 1953.

Hearing Denied April 30, 1953.

Action for declaratory judgment, for a decree quieting title to realty in plaintiff, and for other relief. The Superior Court, Contra Costa County, entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Peters, P. J., held that where action was in fact one for specific performance of an agreement to convey realty, judgment decreeing such relief could not properly be entered in absence of plea and proof of adequacy of consideration.

Judgment reversed.

1. Specific Performance ⇨117

Where action "for declaratory relief and to quiet title" to realty was in fact one for specific performance of an agreement to convey, judgment granting such relief could not properly be entered in absence of plea and proof of adequacy of consideration. Civ.Code, § 3391.

2. Specific Performance ⇨117

In specific performance action, plaintiff has burden of pleading and proving adequacy of consideration. Civ.Code, § 3391.

3. Appeal and Error ⇨193(9)

Contention that complaint does not state cause of action, or that court failed to find on an essential issue, may be raised for first time on appeal.

4. Declaratory Judgment ⇨365

If, in an action for declaratory relief, other problems arise, court can and will consider such problems, even though a different type of pleading might have been required had the case simply involved such other problems.

5. Declaratory Judgment ⇨312

By labeling a pleading an action for declaratory relief, and then alleging other causes of action, pleader cannot be released from necessity of properly pleading such other causes of action.

6. Declaratory Judgment ⇨251, 329

Declaratory judgment statutes do not abrogate ordinary rules of pleading, practice, procedure, and evidence, and courts cannot grant affirmative relief by way of declaratory judgment in absence of pleading and proof warranting such relief.

7. Declaratory Judgment ⇨312, 321

If an application for injunctive relief is coupled with an action for declaratory relief, pleading would have to comply with usual requirements of suits seeking such injunctive relief.

8. Declaratory Judgment ⇨253

When declaratory judgment proceeding partakes of nature of equity it calls into play appropriate equitable principles, and when it partakes of an action at law, it utilizes any available legal principles for proper determination of issues.

9. Specific Performance ⇨120

In action for specific performance of an agreement to convey realty, exclusion of defendant's evidence tending to show the inadequacy of the consideration, was improper. Civ.Code, § 3391.

10. Evidence ⇨419(1)

Truth of recital in a written instrument concerning consideration is not conclusive, but extrinsic evidence may be received to show the true consideration. Code Civ. Proc. § 1962, subd. 2.

PETERS, Presiding Justice.

This is an appeal by all of the defendants (although it is conceded that only the Emslies are beneficially interested) from a judgment, in a declaratory relief and quiet title action, quieting the title of the Mackays, enjoining interim conveyances of the property, compelling the execution of certain conveyances upon certain conditions, and decreeing that upon the performance of those conditions the Emslies shall deliver possession of the property to the Mackays. On this appeal the Emslies urge (1) that the judgment is one for specific performance, and, as such, is erroneous because of the failure of plaintiffs to plead or to prove or the trial court to find that the consideration agreed to be paid for the property was fair and adequate, and (2) that the trial court improperly prohibited the Emslies from showing that the consideration was inadequate. Both contentions are sound, and, for that reason, a reversal must be ordered.

This case was before us on a prior occasion when this court denied a motion to dismiss the appeal. *Mackay v. Whitaker*, 112 Cal.App.2d 112, 245 P.2d 521. At that time the general background of the proceeding was set forth as follows, 112 Cal. App.2d at page 114, 245 P.2d at page 522:

"The Mackays brought this action against the Whitakers, the Emslies, James C. Philips and the Philips corporation for declaratory relief and to quiet title to a parcel of property on which the Emslies had been conducting a kennel. The kennel property was subject to a first deed of trust given by the Emslies to a loan company to secure a \$10,000 note. The claim of the Mackays to the property grows out of the following circumstances: In 1948 the Mackays and the Emslies entered into an informal joint adventure for the purchase of dogs for show purposes, the Mackays advancing most of the money. In November of 1949 the parties entered into a written agreement setting forth their respective rights and obligations. This agreement, executed on November 25, 1949, provided that the Emslies

Robert H. Kroninger, Oakland, for appellants.

Royal E. Handlos, San Francisco, Lewis P. May, Oakland, for respondents.

should deed the property to the Whitakers, disinterested third parties, who should hold it as security for a third deed of trust given as security for a \$10,000 two-year note executed by the Emslies and payable to the Mackays. A second deed of trust to the Philips corporation was authorized to secure certain advances that might be made. The agreement authorized the Emslies and the Whitakers to increase the loan company indebtedness, if necessary, to \$12,500, and also provided that upon maturity of the Mackays' note a new installment note should be executed. The agreement then provided that in the event the Emslies defaulted in payments on the first deed of trust loan, or on their payments to the Mackays, the Mackays had the option, on the 61st day after such default, to purchase the property for the balance then owed to them, upon their assumption of the obligations of the first deed of trust.

"The Mackays' note required the Emslies to make monthly payments of interest. No interest was paid, the Mackays elected to exercise their option, the Whitakers refused to convey, and this action was commenced in November of 1950."

The complaint is entitled "Complaint for Declaratory Relief, to Quiet Title; and for Money," and purports to state four causes of action. The first alleges execution of the note by the Emslies, nonpayment, demand and election by the Mackays to declare the whole principal sum and interest due. The making of the contract is also alleged, the failure of the Whitakers to execute a third deed of trust or to convey the fee upon the Mackays exercising their option to purchase. It is then alleged that a controversy exists. The second cause of action realleges the above and, in addition, sets forth the Mackays' equitable ownership of the property, the adverse claims of the defendants, and the Mackays' right to a conveyance. The third cause of action is for attorney's fees, while the fourth is for money damages for breach of contract and refusal to convey.

The prayer of the complaint requests (1) a determination of the interests of the parties in the property; (2) that the court order the execution and delivery of the conveyances and documents needed to give effect to the agreement; (3) that the Mackays' title be quieted against the claims of all defendants; (4) that the court order the Emslies to surrender possession of the property; (5) that interim conveyances or further advances by Philips be enjoined; (6) that the Mackays be awarded \$20,000 damages or (7) in the alternative, if the above relief be not granted, that they be awarded the amount of the note with interest; (8) that they be awarded attorney's fees, and (9) costs; and (10) a prayer for further relief.

The Philips and Whitakers answered with general denials, as did the Emslies, who, in addition, pleaded that the parties were partners; that the note was executed to protect the present and future investments of the Mackays in the partnership; that when the note was executed the Emslies were advised that the correct amount involved was \$8,000 and that later an accounting would be had to correct the note and agreement, and that an accounting had been refused. By way of cross-complaint and defense the Emslies also pleaded an oral agreement, made upon the creation of the partnership, to the effect that no payments should be made on the note until the partnership was dissolved.

On these pleadings the cause proceeded to trial. The Mackays testified to the arrangements between the parties but denied the existence of any partnership; Mackay then testified that he had made advances to the Emslies of \$9,265.37 at the time the agreement was drawn and at that time turned over his interest in certain dogs to the Emslies, bringing the figure to \$10,000. Mackay was unable to produce an actual contemporaneous record of the advances but did produce a statement, which was admitted, purporting to list them. During Mackay's cross-examination some uncertainties were developed in this statement.

The Emslies testified that the agreement between the parties was executed in some

haste because a creditor of the Emslies was threatening foreclosure and Mackay refused to pay off this creditor unless an agreement was signed. The Mackays denied any coercion. The then attorney for the Mackays who drafted the agreement testified that in the first discussions between the parties he had used "round" figures, but that before the discussions ended the \$10,000 figure was agreed to by all the parties. The Mackays corroborated this. Mr. Emslie testified that about a month before the agreement was executed the Mackays had sent him a list of the items claimed to be due, and he had requested time to check the list; that he had complained about many items on the list; that the \$10,000 figure was agreed upon subject to an agreement that it was to be corrected upon an accounting after going over the checks. The Emslies claimed that the maximum amount owed to the Mackays was \$8,000, and at one place in the record claimed that they owed but \$6,200. But when the Emslies sought to testify about the correctness of the various items presented by the Mackays they were met with a series of objections that to controvert the \$10,000 figure would be to vary the terms of the contract. These objections were sustained.

The trial court found all of the major allegations of the complaint to be true, except as to the allegation of damage, the court finding that damages had been waived in open court. The court also found "that the note and agreement of November 25, 1949 superseded any and all prior agreements" between the parties. The allegations of the cross-complaint were found to be untrue.

The conclusions and judgment provided that the Mackays were owners of the kennel property, subject to the first two deeds of trust; that they were entitled to immediate possession upon condition an escrow was opened in which they were to deposit a cancellation of the Emslies' note, a release of the Whitakers, written evidence of taking the property subject to the first two deeds of trust, and a deposit of sufficient money to repay Philips cor-

poration and the Whitakers for advances and to discharge the second deed of trust. The Whitakers, upon being released, were ordered to deposit a grant deed conveying the property to the Mackays. It was further decreed that the Emslies had no interest in the property, and they were ordered to surrender possession of the premises upon the close of the escrow. All defendants were enjoined from making any interim conveyances or from further encumbering the property.

[1,2] It is perfectly obvious that the complaint prays for and the decree grants specific performance of the agreement to convey contained in the option agreement. The Emslies correctly point out that there is neither pleading, proof nor findings upon the essential issues of such a cause of action. There is no finding of the value of the kennel property as compared with the \$10,000 note, nor is there any finding that the amount of the advances actually made equalled the value of the property, or equalled the face value of the note. The complaint merely alleges that the note was given for a "valuable consideration," but there is no allegation of adequacy. There can be no doubt that, in a specific performance action, the plaintiff must plead and prove adequacy of consideration. Section 3391 of the Civil Code provides in part:

"Specific performance cannot be enforced against a party to a contract in any of the following cases:

"1. If he has not received an adequate consideration for the contract;

"2. If it is not, as to him, just and reasonable; * * *."

The cases fully establish the rule to be that the burden is on the plaintiff to plead and prove these facts. *Miller v. Gusta*, 103 Cal.App. 32, 283 P. 946; *Joyce v. Tomasini*, 168 Cal. 234, 142 P. 67; *Cooper v. Cereghino*, 101 Cal.App. 290, 281 P. 630; *Jacklich v. Baer*, 57 Cal.App.2d 684, 135 P.2d 179. Adequate consideration is needed for all parts of the contract, *Miller v. Gusta*, 103 Cal.App. 32, 283 P. 946, which in the instant case means for the property and for the principal sum of the note.

[3] The Mackays in an attempt to meet this contention first urge that the point is raised for the first time on appeal, and constitutes an attempt to raise a new theory on appeal, which they urge should not be permitted. The rule is too well settled to require extended discussion that the contention that a complaint does not state a cause of action, or the failure to find on an essential issue, may be raised for the first time on appeal. *Moen v. Art's Café*, 95 Cal.App.2d 577, 213 P.2d 393.

[4] The second contention of the Mackays is that this is an action for declaratory relief, and they urge that in such an action adequacy and reasonableness of the consideration need not be shown. This argument is based on two major premises, first, that this is an action for declaratory relief and not for specific performance, and that in such action adequacy need not be pleaded nor proved, and second, that once a court has taken jurisdiction of an action for declaratory relief it will grant any relief that is appropriate. Of course, if in an action for declaratory relief other problems arise, the court can and will consider these problems even though had the case simply involved those problems a different type of pleading would be required. Thus *Decter v. Stevenson Properties, Inc.*, 39 Cal.2d 407, 247 P.2d 11, was an action for declaratory relief relating to a lease that was the subject of an actual controversy as to its termination, which involved a question of construction. The court properly held that the failure to plead a mutual mistake of fact for reformation did not prevent the court from passing on the same in the course of its construction, because that problem was directly connected with the declaratory relief problem. That is obviously not the problem here.

[5] In the instant case the action is not solely for declaratory relief. While the pleading is entitled "Complaint for Declaratory Relief, to Quiet Title; and for Money," the caption does not accurately describe the nature of the action. An examination of the allegations of the pleading and the prayer demonstrates that it is an

action for damages, for an injunction, to quiet title, and for specific performance, as well as an action for declaratory relief. Obviously, by labelling a pleading an action for declaratory relief, and then alleging other causes of action, the pleader cannot be released from the necessity of properly pleading those other causes of action.

[6] There is another and complete answer to the arguments of respondent. If it be assumed, contrary to the fact, that this action was solely for declaratory relief in which any appropriate relief may be granted, it is the rule that the other independent relief granted can only be granted when the pleading and proof warrants such relief. The proper rule is stated as follows in 1 *Anderson, Declaratory Judgments*, section 198, at p. 410: "In any event it is plain that the declaratory judgment statutes do not abrogate the ordinary rules of pleading, practice, procedure, and evidence. Even the most liberal construction that can be placed upon such statutes will not warrant the courts in granting affirmative relief by way of a declaratory judgment in the absence of pleading and proof warranting such relief."

[7] In section 214, at page 468, it is stated: "* * * if an application for injunctive relief is coupled with an action for declaratory relief, the pleading would have to comply with the usual requirements of suits seeking such injunctive relief."

[8] In section 216, at page 471, appears the following: "The declaratory judgment statute does not create any new or substantive rights. It is procedural in nature, and in determining the issues presented under the statute, such principles as are peculiarly applicable are applied * *. The true rule is that when the proceeding partakes of the nature of equity it calls in to play appropriate equitable principles, and when it partakes of an action at law it utilizes any available legal principles for proper determination of the issues."

These rules have been applied by the California courts. *Rolapp v. Federal Bldg. etc. Ass'n*, 11 Cal.App.2d 337, 53 P.2d 974; *Sunset Scavenger Corp. v. Oddou*, 11 Cal.

App.2d 92, 53 P.2d 188; Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422.

These rules are applicable in the instant case. It would amount to an entrapment and a miscarriage of justice to permit a litigant to entitle his pleading an action for declaratory relief, and then plead and pray for other types of relief, and secure such relief, without pleading, proof or findings entitling him to such relief.

[9] The trial court also committed reversible error in excluding evidence controverting the consideration recited in the note and contract. The record shows that the Mackays were allowed to testify as to the items making up the claimed total of \$10,000, and were permitted to introduce a statement setting forth such items, but the Emslies were not allowed to controvert these items, except to a limited degree on cross-examination of the Mackays, the trial court ruling that such evidence would vary the terms of a written instrument. It is no answer to say, as do the Mackays, that the evidence that was introduced supports the finding that \$10,000 was advanced. The point is that the Emslies were prevented from showing that, in fact, much less than \$10,000 was advanced.

[10] The trial court sustained the objections to these questions on the theory that such evidence constituted an attack on the recitals of consideration supposedly contained in the note and contract. An examination of the two documents discloses that they merely contain promises to pay and that neither contains a recital of consideration. However, even if the note and contract contained recitals of consideration, "parol evidence was admissible to show the true consideration, and the association was not bound by the recitals of consideration in the writing. It is elementary that the truth of the recital in a written instrument concerning the consideration is not conclusive, but that extrinsic evidence may be received to show the true consideration." *Shiver v. Liberty Building-Loan Ass'n*, 16 Cal.2d 296, 299, 106 P.2d 4; see, also, § 1962 subd. 2, of the Code of Civil Procedure; *Simmons v. Cal. Institute of Technology*, 34 Cal.2d 264, 209 P.2d 581.

These two errors require a reversal.

The judgment appealed from is reversed.

BRAY and FRÉD B. WOOD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



116 Cal.App.2d 559

STEIN et al. v. SIMPSON.

Civ. 19216.

District Court of Appeal, Second District,
Division 1, California.

March 6, 1953.

Rehearing Denied March 30, 1953.

Hearing Denied April 30, 1953.

Action to quiet title to realty and vacate a trust deed, wherein judgment was entered quieting plaintiffs' title on condition that they pay beneficiary under trust deed stated sum within specified time. From an order of the Superior Court of Los Angeles County, Daniel M. Stevens, J., denying motions to substitute trust deed beneficiary's assignee as defendant and enforce prior judgment, beneficiary under trust deed appealed. The District Court of Appeal, Doran, J., held that under judgment conditionally quieting plaintiffs' title, title to realty did not vest in trust deed beneficiary or his assignee upon failure of plaintiffs to comply with condition.

Order affirmed.

Quieting Title ⇐52

Judgment quieting plaintiffs' title to realty on condition that they pay beneficiary under second trust deed on realty stated sum within specified time and declaring that plaintiffs were owners in fee of realty and that defendants had no interest therein and no lien or incumbrance thereon fixed amount of plaintiffs' indebtedness to trust deed beneficiary and made payment thereof a condition to record quieting of plaintiffs' title, but judgment did not order payment of indebtedness or vest title to realty in trust deed beneficiary or his assignee upon failure of plaintiffs to make specified payment.

David Welts, Los Angeles, for appellant.
Arthur E. T. Chapman, Max Tendler,
Los Angeles, amici curiae.

DORAN, Justice.

This is a third appeal by the defendant in the present action which was instituted by plaintiffs Stein to quiet title to certain real estate, and to vacate a trust deed sale by appellant Simpson, the beneficiary under a second trust deed executed by the Steins. The trial court found that, as alleged by plaintiffs, the trust deed in question was executed to secure Simpson's usurious loan in the amount of \$20,000; that the unpaid balance thereon did not exceed \$12,000, which amount was tendered to Simpson on several occasions and refused. The judgment in plaintiffs' favor was affirmed in *Stein v. Simpson*, 37 Cal.2d 79, 230 P.2d 816.

From "the unchallenged findings of fact", as set forth in the above opinion, it appears that plaintiffs' property had a value of over \$50,000, encumbered by a first trust deed of \$18,000 in favor of the Hollywood State Bank. "Simpson loaned \$20,000 to plaintiffs and demanded and received therefor two notes, each for \$22,000, the additional \$2,000 on each being a bonus demanded by Simpson. The notes called for interest at 7 per cent. One of the notes was secured by a trust deed on the property and the other by a chattel mortgage on the furniture. At Simpson's request the notes were made payable to a third party, Simons (an employee of Simpson) who was to and did assign them to Simpson. (This was an attempt to avoid a claim of usury.) * * * The \$2,000 bonus was usurious interest charged by Simpson."

It was further found that plaintiffs had paid \$8,000 on the notes, reducing the principal to \$12,000; that Simpson, refusing tenders of the balance, gave notice of default and election to sell, the sale being scheduled for July 23, 1947, and continued from time to time at Simpson's request to September 10, 1947. An hour before the sale, plaintiffs offered to pay the full amount claimed by Simpson, and upon being advised by the Realty Title Company that \$16,641.13 was all that was required,

made a cash tender to Simpson of \$17,000, which was refused.

Simpson stated that "he was interested in acquiring the property, not the money. The sale proceeded, Simpson bidding \$36,000 and the plaintiffs' agent, Bassett, \$50,000. Bassett having only \$17,000 in cash with him, the title company, at Simpson's request, declared 'all bids off' and started a new sale. The title company then announced that Simpson had paid the plaintiffs' debt to the Hollywood State Bank under the first trust deed in the sum of \$17,380.85, and hence the sale would be for the amount represented by both trust deeds, Simpson had paid the bank the amount due on the first trust deed the morning of the sale. Bassett's request for a 24-hour postponement of the sale to obtain funds to cover his \$50,000 bid was refused at Simpson's directions. The sale proceeded, Bassett bidding \$17,000 and Simpson \$18,000. The property was sold to Simpson."

The trial court found that the trust deed sale, "conducted unfairly and in a fraudulent and deceitful manner, and in such a way as to enable Simpson to become the successful bidder", was invalid. The judgment decreed that the plaintiffs Stein "are the owners in fee of their home" therein-after described, and that the defendants "have no right, title or interest therein, and no lien or encumbrance of any nature or kind therein, and that plaintiffs' title to their said real property is quieted, and is free and clear of any lien or encumbrance or claim in favor of the defendant Russell Brown Simpson, the quieting of said title to said real property is conditioned upon the payment to the defendant, Russell Brown Simpson, of the sum of \$12,000.00 less allowed costs herein, within a period of thirty (30) days from the date of notice of entry of this judgment and decree". Plaintiffs' ownership of furniture and fixtures was likewise established.

In affirming this judgment in 37 Cal.2d 79, 230 P.2d 816, 819, the reviewing court states that the undisputed facts "depict a shocking and unconscionable course of conduct by Simpson"; that in paying off the first trust deed on the day of sale, after previously refusing plaintiffs' tender of

payment due under the second trust deed without reason, Simpson was a mere volunteer so that the doctrine of subrogation did not apply, such act being a part of the fraudulent scheme.

The Supreme Court further held that plaintiffs had not lost any rights under the judgment by reason of a failure to pay the \$12,000 within the specified time, where a timely tender had been made with a demand of satisfaction of judgment but was refused by Simpson "on the basis that if he gave a satisfaction he would lose his right to appeal". It was pointed out that there was no dispute about the obligation to pay the \$12,000.00, but that "All that Simpson is asking is that the judgment be modified so as to require payment to him of the \$17,380.85, which he paid the bank (on the first trust deed) in addition to the \$12,000", hence that "the requirement that \$12,000 be paid to Simpson is not put in jeopardy by this appeal". It was held that the judgment adequately set forth the rights of the parties, and that it did not unjustly enrich the plaintiffs.

Another appeal in this matter is found in *Stein v. Simpson*, 96 Cal.App.2d 642, 216 P.2d 117. On October 24, 1949, and after judgment had been entered, the trial court made an order directing the clerk to accept from the Steins \$11,531.02, and to deliver same to Simpson upon receiving from the latter a satisfaction of judgment. As before mentioned, Simpson refused to execute such satisfaction, and moved to amend the court's order by striking out the provision in respect to giving a satisfaction. This motion was denied and Simpson appealed from the order. The opinion in 96 Cal.App.2d 642, 216 P.2d 117, denied plaintiffs' motion to dismiss such appeal, and ordered plaintiffs' motion for return of the court deposit set for hearing.

After affirmance of the judgment in 37 Cal.2d 79, 230 P.2d 816, appellant Simpson assigned all rights under the judgment to Attorney David Welts, and conveyed by quitclaim deed to Welts, all interest in the real estate. Thereafter the two motions now under consideration were filed in the trial court; (1) to substitute Welts as defendant in place of Simpson, and (2)

for an order enforcing the judgment, on the theory that title to the property now rested in Simpson or the assignee Welts for the reason that the Steins had defaulted under the terms of the judgment in that they had not paid the \$12,000, less costs."

On August 7, 1951, Max Tendler, who had been Simpson's attorney at the trial, filed a petition and was given permission to file an amicus curiae brief, "disclosing that he now represented one Lou Miller, the holder of a judgment lien on the real property (as against the Steins), and opposed the motion to enforce the judgment in behalf of Lou Miller, who was not a party to the instant action or judgment.

The motions to substitute Attorney David Welts, assignee, as defendant in place of Simpson, and for an order "to enforce the judgment * * * and to recite that the plaintiffs did not satisfy the conditions of the judgment" by making the \$12,000 payment, and that David Welts, as Simpson's assignee, should be held the owner of the property, were thereafter heard and denied, and the present appeal followed.

In denying the above motions, the trial judge filed the following memorandum: "It by no means necessarily follows from the fact that the Steins have not complied with the conditions of the judgment in their favor that Simpson or his assignee is entitled to a decree vesting title in him. The doctrine of unclean hands or other equitable considerations could justify the court in refusing to render judgment vesting title in Simpson or his assignee."

It is appellant's contention that the trial court should have granted the motions in question which were not opposed by the respondents Stein, but were only opposed in the amici curiae brief on behalf of Lou Miller, a total stranger to the action, and whose only interest was as a judgment creditor of the Steins in another action. The appellant denies that there was any "unconscionable conduct on the part of Simpson, although the same cannot be said in respect to the opposer of the motion, Miller". Appellant further claims that the order denying such motions, "is tantamount to a nullification of the judg-

ment of the Supreme Court, 37 Cal.2d 79, 230 P.2d 816". No brief on behalf of respondents Stein, has been filed in this appeal.

Appellant's brief calls attention to affidavits of Simpson, Welts, and one Harry Bassett, filed in support of the motion to enforce the judgment, setting forth an arrangement to the effect that Bassett, who had a lien on the real property, would pay Simpson \$18,000, instead of the \$12,000 mentioned in the judgment, if and when Simpson obtained title to the realty; that the Steins were insolvent and could not pay the \$12,000, nor could they refinance the property. There was also an agreement between Bassett and Lou Miller, dated September 9, 1949, to the effect that both recognized the judgment and that either party might pay Simpson the \$12,000, in which event the lien of the other on the real estate would be subordinated to the claim of the paying party.

The main point for consideration on this appeal involves an interpretation of the original judgment which was affirmed in 37 Cal.2d 79, 230 P.2d 816, hereinbefore set out in detail. Appellant's position is that by reason of the Steins' failure to make the \$12,000 payment to Simpson within the prescribed time, title to the real property became vested in Simpson. On the other hand, the amici curiae maintain that this judgment "did not intend to divest the Steins of title and possession upon failure to pay the \$12,000.00 recited in the judgment". The condition of payment is said to relate "only to the removal of the extinguished trust deed lien of record and the monetary obligation which clouds their title, but does not divest them of title".

Appellant's contention that Simpson or assignee Welts now has title to the premises in question because of Steins' failure to pay the \$12,000, is untenable. To sanction such an interpretation would amount to a distinct modification of the judgment by making it say something which it does not say, completely ignoring the direct adjudication that the Steins "are the owners in fee of their home", and that defendants "have no right title or interest there-

in, and no lien or encumbrance of any nature or kind therein".

The clarity of the judgment in question was considered by the reviewing court in 37 Cal.2d 79, 86, 230 P.2d 816, Simpson having asserted "that the judgment is not clear that plaintiff's title is quieted, subject to the payment of the \$12,000.00 less costs". Answering this contention, and calling attention to the fact that plaintiffs are adjudicated to be "the owners in fee", and the defendant has no right, title, interest, claim or lien in or to the property, but that the "quieting of title to said real estate is conditioned upon" such payment within 30 days, the opinion says: "We believe it (the judgment) is clear enough and adequately sets forth Simpson's rights."

Simpson's "rights", under the explicit language of the judgment, do not include any title, interest or lien. Moreover, it does not order Steins to pay \$12,000 or any other amount, nor does it purport to give judgment to Simpson for anything. The payment of the money is merely made a condition to the record quieting of plaintiffs' title which has been decreed to be "in fee simple". The amount of the Steins' indebtedness is, of course, determined by the judgment, but Simpson has no title, interest or lien in reference to the property. It is impossible to read the judgment in any other manner.

Nowhere, either in the judgment itself or in the opinion affirming such judgment, is there any indication or inference that Simpson, whose conduct is designated as "fraudulent", is to get title to the land under any circumstances, or any interest therein. The judgment is one in favor of the Steins, not Simpson. Bearing in mind that the facts, in the language of the opinion, "depict a shocking and unconscionable course of conduct by Simpson", in an endeavor "to unlawfully obtain plaintiffs' property for less than its value", it is impossible to believe that the court intended to reward Simpson in the manner now claimed.

As noted in the amici curiae brief, had the Supreme Court intended to grant Simpson the affirmative rights now

claimed, the judgment would have been modified accordingly. No authority exists for now modifying such judgment nor for employing a forced interpretation which will vest title in Simpson or Welts, the assignee.

Whether Lou Miller, as judgment creditor of the Steins, has a right to attack the judgment collaterally or otherwise, is beside the point. Whatever the result may be, Miller is not a party to this appeal, and the brief filed by Attorneys Chapman and Tendler by consent of court, is presented only in the capacity of amici curiae. No merit is found in any of appellant's contentions.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SCHAUER, J., dissenting.



FOX v. FOX. *
Civ. 19235.

District Court of Appeal, Second District,
Division 1, California.

March 6, 1953.

Rehearing Denied March 30, 1953.

Hearing Granted April 30, 1953.

Proceeding for modification of divorce decree so as to increase monthly payments which had been agreed upon in property settlement agreement. The Superior Court, Los Angeles County, Otto J. Emme, J., entered an order increasing the payments, and the husband appealed. The District Court of Appeal, White, P. J., held that the payments were in the nature of alimony, and, therefore, the court had power to increase them whether they were based upon agreement of the parties and whether agreement was incorporated in the decree.

Affirmed.

1. Divorce ⇨236, 245(1)

In property settlement contract wherein support and maintenance provisions are in nature of alimony, whether payable

* Subsequent opinion 265 P.2d 881.

in lump sum or by monthly payments, and are separable from provisions that divide property, court is empowered to modify provisions for alimony before judgment, or if provisions are incorporated in divorce decree, after judgment, in accord with general power of court over alimony.

2. Divorce ⇨245(1)

Where court, at time of entering interlocutory divorce decree, does not determine, as it should, character of property settlement agreement which contains provisions for support and maintenance, it may properly do so in modification proceedings.

3. Divorce ⇨286

Where determination by trial court of factual issue as to nature of support and maintenance provisions contained in property settlement agreement is not unreasonable, it will not be disturbed on appeal, even though contrary finding might be upheld.

4. Divorce ⇨286

In proceeding for modification of divorce decree which embodied property settlement agreement, trial court by increasing monthly payments provided therein impliedly found that agreement was not one for division of community property alone, but that support and maintenance provisions were in nature of alimony and were separable from provisions that divided the property, and fact that court failed to make explicit finding thereon was immaterial.

5. Divorce ⇨236, 245(1)

Where property settlement agreement denominated monthly payments agreed upon as alimony, and payments were so characterized in interlocutory divorce decree, and were to cease upon remarriage of wife, and were governed to some extent by husband's ability to pay, and husband had right to change beneficiary under his life policies in event of remarriage of wife, and no other provision was made for support of wife in event of husband's death, the payments were in the nature of "alimony," not a "division of property."

See publication Words and Phrases, for other judicial constructions and definitions of "Alimony" and "Division of Property".

6. Divorce $\Rightarrow$ 236, 245(1)

Where provision in property settlement agreement for monthly payments to wife was in nature of alimony, court had power to modify such provision, whether payments were based upon agreement of parties and whether agreement was incorporated in divorce decree.

Wright, Wright, Green & Wright, Loyd Wright, Charles A. Loring, Dudley K. Wright, Los Angeles, for appellant.

Stahlman & Cooper, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from an order modifying a provision in a divorce decree so as to increase monthly payments to the wife from \$400 per month to \$500 per month and awarding attorney's fees for services rendered in connection with the application for such modification. The payments of \$400 per month were provided for by the terms of an "Agreement and Property Settlement" which was approved by the superior court at the trial of the divorce action brought by the wife, respondent herein. The trial court further incorporated the "alimony" provisions of the agreement in the interlocutory judgment of divorce.

Appellant presents three contentions: "(1) The property settlement agreement was an integrated agreement and must be wholly approved or wholly rejected. (2) Once an integrated property settlement agreement has been judicially approved, the trial court cannot make an award contrary to its provisions. (3) Regardless of whether or not the property settlement agreement was an integrated agreement, after its approval, the trial court cannot make an award contrary to its provisions."

Respondent argues that the payment provisions were separate and severable from the property division provisions of the agreement, and that such payments constituted alimony rather than periodic payments in lieu of a more favorable division of the community property; and further, that the respondent did not waive her

right to alimony either in the agreement or by her amended and supplemental complaint wherein she sought no relief other than that the court approve and incorporate in its interlocutory judgment the terms of the agreement and order its performance by the defendant.

The "Agreement and Property Settlement" (entered into in April, 1948) recites that "the parties hereto are mutually desirous of entering into a property settlement agreement for the purpose of finally and forever settling, adjusting and determining their respective rights and interests in and to any and all property, real and personal, community and separate, now owned or that may at any time hereafter be owned by or be acquired in any manner whatsoever by them and to determine, settle and adjust forever any and all matters or questions in connection with any such property."

In consideration of their mutual covenants, the parties agreed that each was released from liability for future acts of the other; that earnings or property acquired by each party after the date of the agreement should be the separate property of the party earning or acquiring the same, except as provided in the agreement; and that the custody of the minor children be awarded to the wife, subject to reasonable rights of visitation by the husband. By paragraph Sixth of the agreement, as amended, the parties agreed as follows:

"Husband agrees to pay to the wife, *as alimony*, the sum of four hundred dollars (\$400) per month, commencing May 12th, 1948, and continuing thereafter to and including the month of December, 1953, (except as otherwise herein provided) at which time all obligation on the part of the husband to make the aforesaid or any other payments to the wife for her support shall thereupon terminate.

"In the event the parties hereto are hereafter divorced, and the wife shall remarry prior to January 1, 1954, the obligation of the husband to make the aforesaid payments or any other payments for the support of the wife shall ipso facto terminate. Upon such re-

marriage of the wife, if such event shall occur, or on December 31, 1953, whichever shall be earlier, all payments of alimony to the wife shall cease. Then, and thereafter, during the minority of said Stuart Fox (a minor child then aged six years), the husband shall pay to the wife the sum of one hundred dollars (\$100) per month for the support, care, education and maintenance of said Stuart Fox. In the event the parties shall have been divorced and the wife shall have remarried prior to January 1, 1954, (and prior to the date said Stanton Fox (a minor child then aged 18 years) shall have attained the age of twenty-one (21) years), the husband shall likewise pay to the wife, for the support and education of said Stanton Fox the sum of one hundred dollars (\$100) per month from the date of said remarriage until said Stanton Fox shall have attained the age of twenty-one (21) years.

"Notwithstanding the foregoing provisions, it is agreed that should the present United States Government pension now being received by the husband as a disability retirement pension be reduced or discontinued, then the obligation of the husband as above provided to make said alimony payments to the wife, or to make payments to the wife for the support, care, maintenance and education of said children, or either of them, shall be proportionately reduced, such reduction to be at the rate of three and 33/100ths dollars (\$3.33) for each ten dollars (\$10) reduction in such payment; provided, however, that in no event shall such reduction reduce the amount of alimony payable to the wife as hereinabove provided to a sum less than two hundred dollars (\$200) per month.

"In consideration of the foregoing provisions and the promises of the husband, the wife agrees that she will support the minor children of the parties during the time the husband is obligated to pay alimony to the wife as above provided."

By paragraph Seventh the parties agreed upon a division of their property, making certain provisions with reference to shares of stock which need not be here detailed. The parties further agreed in paragraph Ninth to hold a certain pension fund as their common property. With reference to two \$10,000 insurance policies on the life of the husband, he agreed to maintain them in force for the benefit of the wife and children, subject to certain rights in the husband to change the beneficiaries upon remarriage of the wife or the majority of the children. The husband also paid the wife \$8,000 in cash.

By paragraph Tenth, the husband agreed to pay the fees of the attorneys for the wife, in consideration whereof the wife agreed that she would not seek recovery of further fees or costs in any action for divorce or separate maintenance between the parties. This paragraph also contained the following provision: "The wife further agrees that she will not, in any such action, apply for or seek from the husband any payment of alimony or support money for the children of the parties except in accordance with the provisions of this agreement."

Each of the parties further waived all right or interest in, or right to administer the estate of the other.

The problem presented upon this appeal must find its solution under the law as enunciated by our Supreme Court in *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265. In that case the court points out the difficulty of problems arising from property settlement contracts which contain support and maintenance provisions. In that class of contracts the court suggests that they generally fall into three categories.

On page 624, 29 Cal.2d, on page 267, 177 P.2d of *Adams v. Adams*, supra, the court says: "The first (category) includes contracts in which the support and maintenance provisions are in the nature of alimony, whether in lump sum or monthly payments, and are separable from the provisions that divide the property. The contract may even provide solely for support and maintenance without reference to a division of property. These contracts, if equitable, are enforceable even though not presented to

the court in a divorce action." The court then goes on to state that if such a contract is presented in an action for divorce the court has power to modify the provisions for alimony before, or if the provisions are incorporated in the decree, after judgment, in accord with its power over alimony generally.

Again quoting from the decision of the Supreme Court in *Adams v. Adams*, supra, 29 Cal.2d at page 625, 177 P.2d 267: "The second category includes, among others, contracts in which the 'support and maintenance' provisions are not in the nature of alimony but are part of the division of property. This category also includes contracts that provide solely for the payment of monthly or lump sums 'in lieu of community property.' Such contracts must be treated like other property settlement agreements dealing solely with divisions of property. (Citing authority.) If the contract was not fraudulent when made, and there was no violation of the confidential relationship, it will be binding on the court and there can be no modification of the payments after the decree without the consent of the parties."

The court then goes on to say:

"The third category includes contracts in which the wife waives all support and maintenance, or all support and maintenance except as provided in the agreement, in consideration of receiving a more favorable division of the community property. The court cannot add a provision for alimony to such contracts without changing basically the agreement of the parties as to the division of their property."

[1-3] In a contract wherein the support and maintenance provisions are in the nature of alimony, whether payable in a lump sum or by monthly payments, and are separable from the provisions that divide the property, the court is empowered to modify the provisions for alimony before, or if the provisions are incorporated in the decree, after judgment, in accord with the general power of the court over alimony. *Adams v. Adams*, supra, 29 Cal. 2d at page 624, 177 P.2d 265. Where the court, at the time of entering the inter-

locutory decree, does not determine, as it should, the character of the agreement, it may properly do so on modification proceedings. *Adams v. Adams*, supra, 29 Cal. 2d at page 625, 177 P.2d 265; *Hough v. Hough*, 26 Cal.2d 605, 615, 160 P.2d 15; *Tuttle v. Tuttle*, 38 Cal.2d 419, 421, 240 P.2d 587; *Alexander v. Alexander*, 88 Cal.App. 2d 724, 727, 199 P.2d 348; *Wallace v. Wallace*, 136 Cal.App. 488, 493, 29 P.2d 314. And, if the determination of that factual issue by the trial court is not unreasonable, it will not be disturbed on appeal, even though a contrary finding might be upheld. *In re Estate of Rule*, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; *Davis v. Stulman*, 72 Cal.App.2d 255, 269, 164 P.2d 787.

[4] In the instant proceeding the trial court, from the very nature and character of its order, impliedly found that the agreement was not one for division of community property alone, but that the support and maintenance provisions were in the nature of alimony and were separable from the provisions that divided the property. That the court failed, to make an explicit finding thereon is immaterial. *Atlass v. Atlass*, 112 Cal.App. 514, 517, 297 P. 53.

[5] Whether the determination by the trial court that the agreement here in question comes within the first category of that class of contracts as set forth in *Adams v. Adams*, supra, 29 Cal.2d at page 624, 177 P.2d 265, was justified, is the question presented to us on this appeal. We are satisfied that the reasonableness and justification of the order made are fully supported by the terms of the agreement.

The parties denominated the monthly payments as "alimony" and they were so characterized in the interlocutory decree. The agreed payments partake of the nature of alimony, since they are to cease upon the remarriage of the wife. Neither the usual propensities or habits of people nor the course of business dictate that if such payments were to be made as a share of the wife's community property they should cease upon the happening of a contingency prior to the payment of a specified amount. The monthly payments further resemble alimony in that under the terms of the agreement and decree they are governed, to

a limited extent, by the husband's ability to pay. Should the latter's pension be reduced, his obligation to make the payments was to be reduced at the rate of \$3.33 for each \$10 reduction in his pension, except that in no event should his payments be reduced to an amount lower than \$200 per month.

Another factor that tends to support the conclusions of the trial court is found in the provisions of paragraph 9, subdivision 2, wherein it is provided in subdivision 2 (a): "If the wife shall remarry prior to the remarriage of the husband, the husband shall have the full right to change the principal beneficiary under either or both of the aforesaid (insurance) policies" which were specified in subparagraph 2. It would seem only reasonable to assume that the purpose of this provision with reference to the insurance policies was to provide for the support and maintenance of the wife in the event the husband died while she was still otherwise entitled to receive monthly payments and would be in lieu thereof. The reason for this would of course be that upon the husband's death the wife's right to receive such monthly payments (if alimony) would cease. On the contrary, had the parties intended the monthly payments to be in the nature of property, then the obligation of the husband would not cease by reason of his death and would be a charge against his estate. No other provision being made for the support of the wife in the event of the husband's death, it would seem obvious that the provisions were intended to be alimony.

[6] All of the foregoing facts and circumstances persuade us that the trial court at the modification hearing was reasonably warranted in concluding that the monthly payments were intended to be and were in the nature of alimony and not a division of property. *Weedon v. Weedon*, 92 Cal.App. 2d 367, 369, 207 P.2d 78; *Pearman v. Pearman*, 104 Cal.App.2d 250, 252, 253, 254, 231 P.2d 101. Therefore, the court had power to modify, whether such payments were based upon the agreement of the parties and whether or not the agreement was incorporated in the decree. *Adams v. Adams*,

supra, 29 Cal.2d at pages 624, 626, 177 P.2d 265; *Hough v. Hough*, *supra*, 26 Cal.2d at page 612, 160 P.2d 15.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.



116 Cal.App.2d 485

**HOUSE GRAIN CO. v. FINERMAN
& SONS et al.
Civ. 19215.**

District Court of Appeal, Second District,
Division 3, California.

March 4, 1953.

Action against partnership and brother of a partner for breach of contract for sale of barley. The Superior Court, Los Angeles County, Ralph K. Pierson, J., entered judgment for buyer, and partnership and brother of partner appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support jury's findings that a partner, either intentionally or by want of ordinary care, caused buyer's manager reasonably to believe brother to be agent of partnership and that manager in good faith and without want of ordinary care incurred liability to third party upon faith thereof.

Affirmed.

I. Pleading ☞420(3)

In action against partnership and brother of a partner for breach of contract for sale of barley, where theory on which cause was tried, without objection, as between plaintiff and partnership was whether brother was ostensible agent of partnership, court did not err in permitting plaintiff to file amended complaint alleging that contract was made with principal without requiring it to plead facts on which it relied to create ostensible agency, in view of fact that partnership did not show that it was prejudiced by courts allowing amendment

2. Principal and Agent ⇨24

Issue of whether an ostensible agency exists is one of fact. Civ.Code, §§ 2300, 2315, 2317, 2334.

3. Principal and Agent ⇨23(5)

In action against partnership and brother of partner for breach of contract for sale of barley, evidence was sufficient to support jury's finding that partner either intentionally or by want of ordinary care caused manager of plaintiff to reasonably believe brother to be agent of partnership, and that manager in good faith incurred liability to third party upon faith thereof. Civ.Code, §§ 2300, 2315, 2317, 2334.

4. Evidence ⇨378(6)

Where buyer's manager allegedly told agent of partnership seller that he would send telegram confirming terms and conditions of sale and asked that similar telegram be sent to buyer, fact that the two telegrams may have crossed in transmission could not alter fact that agent's telegram was sent in reply, and agent's telegram was admissible without proof of identity of its sender.

5. Evidence ⇨378(6)

Telegram received in reply to telegram addressed to sender is presumed genuine, and is admissible without further proof of identity of sender.

6. Sales ⇨53(1)

In action for breach of contract for sale of barley, where telegram of sellers sent in reply to telegram of buyer confirming sale was admitted in evidence, question of genuineness of seller's telegram was for jury.

7. Principal and Agent ⇨20(1)

In action against partnership and brother of partner for breach of contract for sale of barley, evidence of conversation between buyer's manager and a partner concerning fact that partner had sold crop already sold for partnership by brother was admissible to prove ostensible agency of brother.

8. Evidence ⇨249(1)

In action against partnership for breach of contract for sale of barley allegedly entered into for partnership by brother of a partner, any act, declaration, or con-

duct of partner which jury could reasonably construe as admission that brother had acted as ostensible agent of partnership was admissible.

9. Sales ⇨416(2)

In action against partnership and brother of partner for breach of contract for sale of barley, check which buyer gave to third person with whom he had contracted to sell barley was admissible to prove liability incurred and paid as result of alleged breach.

10. Sales ⇨420

In action against partnership and brother of partner for breach of contract for sale of barley, reasonableness of amount given by buyer to third party, with whom buyer had contracted to sell barley, for liability incurred to that party as result of breach was for jury.

11. Trial ⇨296(2)

Failure of court to include in instruction as to whether brother of partner had ostensible authority to act for partnership in sale of partnership barley that plaintiff must have incurred liability as result of reliance on such ostensible authority was not error, in action for breach of contract for sale of barley, in view of fact that jury was instructed that if seller knew of buyer's commitment to third party and that liability would result because of breach buyer would be entitled to recover amount of liability incurred to third party.

12. Trial ⇨252(13)

In action against partnership for breach of contract for sale of barley, where ostensible agency of partner's brother to act for partnership was not established by acts, declarations, or conduct of brother, but by acts, etc., of partner, and there was no evidence that buyer's manager made investigation of brother's authority to act for partnership, refusal of instruction that if buyer relied wholly on statements of brother to establish existence of authority and on results of own investigation, buyer could not recover was proper.

13. Trial ⇨296(9)

In action against partnership and brother of partner for breach of contract

for sale of barley, instruction that where agent signs contract in own name and plaintiff knows agent to be acting within his authority, principal contract is contract of principal was not objectionable as assuming agency of brother, in view of fact that in other instructions court related instruction to facts of case and to fact that ostensible agency of brother had to be proven.

14. Trial ⚡252(13)

In action against partnership for breach of contract allegedly entered into for partnership by brother of partner, where there was no evidence of actual agency of brother and case was tried on theory of ostensible agency, it was not error to refuse to instruct jury on actual agency.

15. Trial ⚡252(1)

It is not error to refuse to instruct jury on issue which is not developed by evidence.

16. Sales ⚡418(1)

In absence of an available market, measure of buyer's damages for breach of contract is loss directly and naturally resulting in ordinary course of events from seller's breach. Civ.Code, § 1787.

17. Sales ⚡420

Whether there was an available market, and whether, if there was not, a particular loss directly and naturally resulted in ordinary course of events from defendants' breach were questions of fact in action against partnership and brother of partner for breach of contract for sale of barley. Civ.Code, § 1787.

18. Trial ⚡296(11)

In action for breach of contract for sale of barley, where different inferences could be drawn on question of availability of barley on market at time of alleged breach, it was not error to instruct that if there was not an available market measure of damages would be loss directly and naturally resulting from sellers' breach, in view of fact that court instructed that it was duty of buyer to use reasonable diligence to minimize damages.

19. Sales ⚡418(9)

In action for breach of contract for sale of barley, where jury found that there was not an available market, jury was war-

ranted in finding that buyer's liability to third party with whom he had contracted to sell barley directly and naturally resulted in ordinary course of events from breach.

20. Sales ⚡421

In action for breach of contract for sale of barley, where evidence warranted inference that buyer lost profit of \$1,600 by reason of breach, instruction that if buyer was entitled to recover it would be entitled to loss of profit which it would have made under resale if such loss was direct and proximate result of breach was not error.

21. Sales ⚡421

In action for breach of contract for sale of barley, instruction that if jury found buyer was entitled to recover and that amount of damages recoverable was certain in amount or capable of being made certain by calculation, buyer would be entitled to interest, was proper. Civ.Code, § 3287.

22. Sales ⚡418(15)

Where buyer allegedly incurred liability to third party to whom he had agreed to sell barley and loss of profits from such sale were capable of being made certain and buyer's right to recover was vested as of date of breach by sellers, buyer was entitled to interest on amount of lost profits in action for breach of contract for sale of barley.

23. Appeal and Error ⚡974(1)

Trial ⚡349(2)

Whether special findings should be submitted to jury is optional with trial court and its ruling is not subject to review unless there is manifest a clear abuse of discretion.

Horton & Knox, El Centro, and Schwartz & Alschuler, Beverly Hills, for appellants.

J. G. Moser, Daniel A. Weber, Leonard Cohen, Beverly Hills, for respondent.

VALLÉE, Justice.

Plaintiff brought this action against Finerman & Sons and George Finerman for damages for breach of contract for the sale of barley. The cause was tried by a jury which returned a verdict for plaintiff. Finerman & Sons and George Finer-

man appeal separately from the resulting judgment.

Plaintiff is a corporation. Newton House is its owner, president, and general manager. All transactions on behalf of the corporation were handled by House and by P. O. Palmer who was employed by House as a buyer and seller of grain and was authorized by him to sign purchase contracts. Defendant Finerman & Sons is a partnership consisting of Harry Finerman, Mary Finerman, his wife, Melvin Finerman, his son, and Edith Root, his daughter. Harry Finerman is the managing agent of the partnership. Defendant George Finerman, not a member of the partnership, is a brother of Harry Finerman. Al Kalin is a grain buyer in the Imperial Valley.

On February 20, 1950,¹ plaintiff and defendants entered into a written contract whereby defendants agreed to sell to plaintiff and plaintiff agreed to buy the yield from 1100 acres of barley growing in Imperial Valley at \$1.92½ per cwt. to be delivered during May and the first half of June, f. o. b. Brawley, California. On February 28, the contract was amended in writing, whereby the commitment was changed to 1600 tons. At that time defendants knew that plaintiff, in reliance on the contract, had contracted for the resale of the barley to Al Kalin at Brawley at \$1.97½ per cwt. Defendants refused to deliver any barley to plaintiff by reason of which it was unable to deliver to Kalin. Plaintiff paid Kalin \$16,800 in satisfaction of its liability to him. Plaintiff alleged damage 1) this sum of \$16,800; 2) loss of \$1,600 profit, being the difference between the price at which defendants agreed to sell the barley to plaintiff and the price at which Kalin agreed to buy it from plaintiff; 3) interest on the \$16,800 paid Kalin and on the \$1,600 loss of profit, amounting to \$1,717; total damage of \$20,117. The verdict and judgment were in that amount.

The partnership owned about 900 acres of land in Imperial Valley on which barley was being grown at the time the contract was executed. There were about 200 acres adjoining the 900 acres on which barley

was also being grown owned by George Finerman and an associate who lived in Chicago. The 1100 acres were farmed by the partnership. The contract of February 20 and the modification of February 28 were made by George Finerman on behalf of himself and the partnership. There was no writing authorizing George to act for the partnership. Plaintiff tried its case on the theory, and the jury necessarily found, that George was the ostensible agent of the partnership in the transaction.

[1] 1. The partnership's first assignment of error is that the court erred in permitting plaintiff to file an amended complaint without requiring it to plead the facts on which it relied to create an ostensible agency. The amended complaint pleaded that the contracts were made with the principal. "Where a pleading alleges a contract according to its legal effect, which may be done under our system. (*Stoddard v. Treadwell*, 26 Cal. [294] 303), the contract, if it is executed by an agent duly empowered, may be pleaded as if it were the contract of the principal, without mentioning the agency. (31 Cyc. 1626). In such case the execution, if denied, may be sustained by proof of signing and delivery by the agent, supported by proof of his authority." *McGibbon v. Schmidt*, 172 Cal. 70, 73, 155 P. 460, 462. See also *Simpson v. Bergmann*, 125 Cal.App. 1, 9, 13 P.2d 531. Without objection, the theory on which the cause was tried as between plaintiff and the partnership was whether George was the ostensible agent of the partnership. The partnership has not shown that it was in any way prejudiced by the ruling of the court. *Mountain States Creamery Co. v. Tagerman*, 39 Cal.2d 355, 246 P.2d 21.

2. The partnership's next assignment of error is that the evidence was insufficient to establish an ostensible agency. About the middle of February, Harry Finerman, in George Finerman's house, asked George to look up the names of grain brokers. George did, and gave him the name of House. Harry telephoned House in the presence of George and told him he and his brother had some ranches in the Imperial Valley on which they raised about 1100

1. All dates refer to the year 1950 unless otherwise indicated.

acres of barley which would produce about two tons to the acre. Harry asked House whether he was interested in buying the barley. House replied that he was, and Harry asked him the market price. House said it was around \$1.90 in the Imperial Valley. Harry asked him if he could get a little better bid, said that he wanted around \$1.92½, and that he would sell at that figure. House said he would try. Harry told him to get the bid, to call him back at George's home, and gave him the telephone number. Later the same day House telephoned Harry at George's home. House told Harry he had contacted his buyers and that he could pay him \$1.90. Harry said that was not enough. House testified: "I asked him what his ideas were and he said \$1.92½, and if I could get that price, either call him or call his brother George and work out the deal." Palmer testified that in this conversation Harry said to House: "Well, see what you can do with it, and if anything comes up in the next few days or a week, why call George because he will handle the deal up here for me."

On February 20, George telephoned to House and told him that "he had talked to his brother, Harry Finerman, and they had not sold their barley in the Imperial Valley and wanted to know if we were still interested in the barley at \$1.92½, and I told him that I would again contact my buyers and see if they were still interested in it." George replied: "Go ahead." House telephoned Kalin who said he would take the barley at \$1.97½. The same day, House called George back and told him "I could use the barley at \$1.92½." George replied, "O. K., it's sold, the entire acreage of 1100 acres grown in Imperial Valley." House then said to George: "Well, I will send a confirmation to you at Finerman & Sons, confirming it, and you read it and talk it over with your brother and answer it by return wire." House then telegraphed as follows:

"1950 Feb. 20

Finerman & Sons—

5111 Franklin Ave LosA (ST)=

This Will Confirm Purchase Of The Entire Yield From 1100 Acres Of Barley Now Growing On Your Ranches In Imperial

Valley At \$1.92½ Per CWT Bulk FOB Cars Or Bulk Delivered Brawley By Trucks Buyers Option May First Half June 1950. This Barley Shall Grade 2 46 Or Better Dockage Over 1% Deductible And Is To Be Free From Melilious Indica (Sour Clover)=

House Grain Co."

and George telegraphed as follows:

"1950 Feb 20

House Grain Co=

124 West 4Th St LosA (HL)=

This Will Confirm Sale 1100 Acres Imperial Barley May And First Half June Delivery At \$1.92½ FOB Brawley= George Finerman"

On February 20, upon receipt of the telegram from George, House sent a purchase confirmation to Finerman & Sons at George's address, and a sale confirmation to Kalin, covering the named crop. On February 24, a signed copy of the latter confirmation was returned to House, signed "accepted" by Kalin. On February 21 or 22, George read to Harry on the telephone the contents of the House-to-Finerman telegram of February 20, confirming the sale of 1100 acres of Finerman barley. Harry did not raise any question about the sale. On February 26 or 27, House sought out Harry in El Centro "to see the barley that I bought." Harry then told House that he had sold the barley to one Hartzog. House showed Harry the telegram which House had received from George on February 20 and said that he (House) had resold the barley, that since he had "a named crop" the sale to Hartzog put him "in an awful position to deliver the named crop of barley to my buyer, who was Mr. Kalin," and threatened legal action unless he received the barley. The sale to Hartzog was not of a named crop, but was of 1300 to 1500 tons of "Imperial" barley. After some discussion and a telephone conversation from Harry to George, Harry told House he was going to have quite a bit more barley than he had sold, that he estimated the barley yield would be two tons or more to the acre. The next day Harry took House out to see the barley, and at Harry's suggestion they "agreed on 1600 tons," i. e., House would accept 1600 tons instead of the yield

from the Finerman 1100 acres because this "would make it very easy for them to fulfill" both commitments. House told Harry he would have to get the consent of Kalin. House then contacted Kalin who agreed to the change. On February 28, Palmer sent a purchase confirmation to Finerman & Sons at George's home in Los Angeles, confirming purchase of 1600 tons at \$1.92½ per cwt. in lieu of the yield from 1100 acres, which contained the following: "Please sign and return for our files." A few days later the confirmation was returned to plaintiff's office in the mail, and it was filed by its office secretary. The part "& Sons" in the name "Finerman & Sons" bore a line through it and the name "Geo." was inserted before the name "Finerman," and it bore the signature of "George Finerman." House did not see the changes until June 11 or 12 when he took the papers concerning the transaction to his attorney. Notwithstanding demands made by plaintiff on defendants for delivery of the barley, none was delivered.

[2,3] Civil Code section 2300 reads: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Section 2315 reads: "An agent has such authority as the principal, actually or ostensibly, confers upon him." Section 2317 reads: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Section 2334 reads: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." The issue of ostensible agency is one of fact. *Henry Cowell Lime & Cement Co. v. Farmers' & Merchants' Nat. Bank of Santa Cruz*, 82 Cal.App. 519, 522, 255 P. 881. The evidence was such as to warrant the jury in concluding that Harry Finerman, either intentionally or by want of ordinary care, caused House reasonably to believe George Finerman to be the agent of the partnership, and that

House in good faith and without want of ordinary care incurred the liability to Kalin upon the faith thereof.

3. The court, over the objection of the partnership, admitted in evidence the telegram of February 20 from George to House. No objection was made by George. The partnership assigns error. The argument is that the telegram was not admissible because there was no proof George sent it nor proof of his handwriting; that it was sent by one Borut, who it appears from the evidence was a business associate of George; and that George testified he did not send it. House testified that in the course of the telephone conversation he had with George on February 20, he told George he would send him a telegram confirming the terms and conditions of the sale and asked him to send a similar confirming telegram back to House. When House finished Palmer took the telephone and told George some of the language to be incorporated in the telegram. In the course of the conversation House had with Harry on February 27, House showed Harry the telegram. Harry did not question its authenticity.

[4-6] The telegram was sent in response to the one sent by House to George. The fact that the two telegrams may have crossed in transmission does not alter the fact. It is settled that a telegram received in reply to a telegram addressed to the sender is presumed to be genuine, and is admissible in evidence without further proof of the identity of the sender. A reply-telegram authenticates itself. *People v. Hammond*, 132 Mich. 422, 93 N.W. 1084, 1085-1086; *Western Twine Co. v. Wright*, 11 S.D. 521, 78 N.W. 942, 943-944, 44 L.R.A. 438; *Peterman v. Vermont Sav. Bank*, 181 La. 403, 159 So. 598, 602; VII Wigmore on Evidence, 3d Ed., 614, § 2154; 32 C.J.S., Evidence, § 706b, p. 608; 20 Am. Jur., Evidence, §§ 195, 963. The question of the genuineness of the telegram was for the jury. There was no error in admitting it in evidence.

[7,8] 4. The next assignment of error is that the court erred in overruling an objection of the partnership to conversa-

tions had between House and Harry Finerman after House had entered into the contract with Kalin. It is argued that no evidence was admissible to prove an ostensible agency after House had made the contract of February 24 with Kalin. There was no error. Any act, declaration, or conduct of Harry which the jury could reasonably construe as an admission that an ostensible agency had been created, was admissible whether it occurred before or after House made the contract with Kalin.

[9, 10] 5. The defendants assign error because of the admission in evidence over objection of the House to Kalin check for \$16,800. The argument is that evidence of the payment to Kalin was self-serving and not shown to have been the proximate result of the breach of the contract. The check was admissible. As we have said, the jury could reasonably conclude from the evidence that House believed George was the agent of the partnership and that he (House), in good faith and without want of ordinary care, incurred a liability to Kalin upon the faith thereof. Plaintiff was entitled to prove the amount of the liability incurred and paid. Whether the amount paid was reasonable under the circumstances was a question for the jury.

[11] 6. The partnership's next assignment of error is that the court did not adequately define an ostensible agency in its instructions. The court gave the instruction set out in the margin.² The contention is that neither this nor any other instruction advised the jury that in reliance on

the ostensible authority plaintiff must have incurred a liability or parted with value. The subject was adequately covered. The jury was told that "where a buyer has entered into a contract to resell the goods and the seller knows of the existence of such commitment on the part of the buyer to such third party, and that the seller's breach or failure to deliver such goods to the buyer will, as a direct and proximate result, disable the buyer from fulfilling the buyer's obligation to deliver such goods to the third party, and subject the buyer to liability to the third party in consequence of the buyer's inability to make good his commitment to the third party, then the buyer is entitled to recover the amount of his liability to the third party or such actual payment as the buyer may have reasonably made in good faith in satisfaction and discharge of his liability to the third party."

[12] 7. The court declined to give the following instruction requested by the partnership: "In determining whether or not an ostensible agency existed in this case, you are instructed that the plaintiff is not entitled to rely on the statements of the supposed agent nor the results of the plaintiff's own investigation, if any. If plaintiff did not know of any facts giving color of authority to George Finerman but relied wholly on the statements of George Finerman as to the existence of his authority and the results of plaintiff's own investigation, plaintiff may not recover from defendant Finerman & Sons even though facts actually existed which had plaintiff

2. "If you should find from the evidence that defendant Harry Finerman, in furtherance of the business of Finerman & Sons, held out George Finerman to the plaintiff as being authorized by the partnership of Finerman & Sons to act as its agent in carrying out the transactions in suit, and that in reliance upon such holding out on the part of Harry Finerman the plaintiff was induced to and did believe that George Finerman had such authority to bind the partnership of Finerman & Sons, and that in reliance thereon the plaintiff entered into such transactions with George Finerman, then the partnership of Finerman & Sons would be estopped and precluded from denying that George Finerman

was authorized to act on its behalf in such transaction or transactions; and the acts of George Finerman as such agent and within the scope of his authority as so held out, would be binding on Finerman & Sons. You are instructed that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. A person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence."

known them would have justified belief in the existence of the authority." Error is assigned. There was no error. The ostensible agency was not established by the acts, declarations, or conduct of George, the agent, but by the acts, declarations, and conduct of Harry, the principal. There was no evidence that House made any investigation of George's authority to act for the partnership.

[13] 8. The court, at the request of plaintiff, gave an instruction which the partnership says told the jury in effect that if they should find there was an actual agency George had authority to enter into a contract on behalf of the partnership. The instruction is set out in the margin.³ The instruction is not subject to criticism. It neither assumes an actual agency nor does it assume that George was acting within the scope of his authority. The court in other instructions specifically relat-

ed this instruction to the facts of this case and to an ostensible agent, if the jury found George to be such.

[14, 15] The partnership also apparently claims the court erred in not giving instructions proffered by it on actual agency. Since the case was tried on the theory of ostensible agency, and since the parties agree there was no evidence of actual agency, it was not error to refuse these instructions. It is not error to refuse to instruct the jury on an issue which is not developed by the evidence. *Popejoy v. Hannon*, 37 Cal.2d 159, 166-167, 231 P.2d 484.

9. Defendants contend the court erred in its instruction on the question of damages. The court gave the instruction set out in the margin.⁴ Defendants assert the court should have told the jury that the only measure of damages, if they found for plaintiff, was the difference be-

3. "Where a plaintiff enters into a contract with the agent of a third party and the contract is signed in the name of such agent, and the plaintiff knows the agent to be acting for and on behalf of said third party in making such contract; and the agent, in entering into said contract, is acting within the scope of his authority, such contract in legal effect is the contract of the third party for whom said agent was acting and the plaintiff may hold said third party liable on such contract. Where, however, the circumstances surrounding the transaction or the terms of the contract or the two combined show an intent on the part of the plaintiff to accept the agent alone as the party liable under such contract, and not such third party, then in such case the plaintiff is deemed to have made an election to accept the agent alone as the contracting party. But if you find it to be a fact that there was no such election or intent on the part of the plaintiff to accept the agent alone as the party liable on the contract, and that the contract made in the name of the agent was entered into by the plaintiff knowing the agent to be acting for and on behalf of a particular person or entity and within the scope of the agent's authority, then and in that event such person or entity for whom the agent is acting is bound by the act or contract of the agent."

damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

"Where the seller has committed a breach of his contract in failing to make delivery of the goods to the buyer, and the buyer is unable to obtain such goods in the open market, or there is absent an available market for the procurement thereof, the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach. Where a buyer has entered into a contract to resell the goods and the seller knows of the existence of such commitment on the part of the buyer to such third party, and that the seller's breach or failure to deliver such goods to the buyer will, as a direct and proximate result, disable the buyer from fulfilling the buyer's obligation to deliver such goods to the third party, and subject the buyer to liability to the third party in consequence of the buyer's inability to make good his commitment to the third party, then the buyer is entitled to recover the amount of his liability to the third party or such actual payment as the buyer may have reasonably made in good faith in satisfaction and discharge of his liability to the third party."

4. "Where there is an available market for the goods in question, the measure of

tween the contract price and the market price of the barley at the time of the refusal to deliver. George did not file an opening brief. By letter he adopted the opening brief of the partnership insofar as it is applicable to his case. In its opening brief the partnership conceded there was a "definite conflict" in the evidence concerning the availability of barley during May and the first part of June. George filed a reply brief in which he contends there was no conflict.

[16-19] Section 1787 of the Civil Code provides: "(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery. (2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. (3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." In the absence of an available market, the measure of damages is the loss directly and naturally resulting in the ordinary course of events from defendants' breach. *Walpole v. Prefab Mfg. Co.*, 103 Cal.App.2d 472, 481, 230 P.2d 36. When there is an available market, the measure of damages is generally the difference between the contract price and the market price as stated in section 1787. Whether there was an available market, and whether, if there was not, a particular loss directly and naturally resulted in the ordinary course of events from defendants' breach, are questions of fact. *Walpole v. Prefab Mfg. Co.*, supra, 103 Cal.App.2d at page 490, 230 P.2d

36. Defendants correctly conceded in the opening brief that there was a conflict in the evidence on the question of availability of barley. No purpose would be served in relating the evidence which supports the implied finding of the jury. Having found there was not an available market, the jury was warranted in finding that plaintiff's liability to Kalin directly and naturally resulted in the ordinary course of events from defendants' breach of the contract. *O'Connell v. Main etc. Hotel Co.*, 90 Cal. 515, 520-521, 27 P. 373. Further, the court instructed the jury that it was the duty of the buyer to use reasonable diligence to minimize the damages and to make them as light as possible.

[20] 10. The court instructed the jury that if plaintiff was entitled to recover it would be entitled to the loss of profit which it would have made under the resale if such loss was the direct and proximate result of the seller's breach, provided the amount of such profit was shown with sufficient certainty. Defendants assign error. The jury was warranted in inferring from the evidence that plaintiff lost a profit of \$1,600 (the difference between the contract price of \$1.92½ per cwt. and \$1.97½ which it would have received under the sale to Kalin), and that such loss directly and naturally resulted in the ordinary course of events from the breach of the contract. *Walpole v. Prefab Mfg. Co.*, 103 Cal.App.2d 472, 481, 230 P.2d 36; *Grupe v. Glick*, 26 Cal.2d 680, 690, 160 P.2d 832.

[21, 22] 11. Defendants assert the court erred in instructing the jury "that plaintiff was entitled to interest as an element of damages." The court did not tell the jury that plaintiff was entitled to interest. What it said was that if the jury found plaintiff was entitled to recover and that the amount of damages recoverable was certain in amount or was capable of being made certain by calculation, plaintiff would be entitled to interest.⁵ The instruc-

5. "Every person who is entitled to recover damages which are certain in amount, or which are capable of being made certain by calculation, where the right to recover is vested in him upon a particular day, is entitled also to recover interest there-

on from that day. Therefore, if you should find in accordance with these instructions that the plaintiff is entitled to a recovery, and that the amount of damages recoverable is certain in amount or is capable of being made certain by cal-

tion was a correct statement of the law. Civ.Code, § 3287; *Lineman v. Schmid*, 32 Cal.2d 204, 209 et seq., 195 P.2d 408, 4 A. L.R.2d 1380. Although not specifically stated, it seems that defendants also claim that as a matter of law plaintiff was not entitled to interest. Plaintiff's damage—its liability to Kalin and its loss of profits—was capable of being made certain by calculation, and the right to recover was vested upon a particular date—the date of the breach. It was, therefore, entitled to interest.

[23] 12. Lastly it is urged that the court erred in denying defendant's request for special findings. Whether special findings should be submitted to the jury is optional with the trial court and its ruling is not subject to review unless there is manifest a clear abuse of discretion. *King v. Schumacher*, 32 Cal.App.2d 172, 183, 89 P.2d 466. No abuse appears here.

Affirmed.

PARKER WOOD, J., concurs.

SHINN, P. J., did not participate.



116 Cal.App.2d Supp. 921

MOORE et al. v. BALBOA
ESCROW CO. et al.

Superior Court No. 177538.
Municipal Court No. 53875.

Appellate Department, Superior Court
San Diego County, California.

Feb. 18, 1953.

Action to recover commission paid by plaintiffs to broker. The Municipal Court, San Diego Judicial District, County of San Diego, entered judgment for plaintiffs, and defendants appealed. The Superior Court, County of San Diego, Appellate Department,

Burch, J., held that under 30 day exclusive listing given to broker to sell business, equipment and on sale general liquor license to purchaser acceptable to plaintiffs, contract was fully performed when plaintiffs executed valid contract with purchasers produced by broker, and broker was entitled to commission even though business was eventually sold to another.

Judgment reversed.

1. Brokers ⇨60

Under 30 day exclusive listing given to broker to sell business, equipment and on sale general liquor license to purchaser acceptable to owners, contract was fully performed when owners executed valid contract with purchasers produced by broker, and broker was entitled to commission even though business was eventually sold to another, regardless of whether prospective purchaser could have qualified as liquor licensee, in absence of fraud or actionable mistake.

2. Brokers ⇨62

Rule that broker is entitled to commission when he produces purchaser who executes contract for purchase with seller is applicable to exclusive business opportunity listings.

3. Brokers ⇨60

Right of business opportunity broker to commission is measured by his employment contract.

4. Brokers ⇨13

Broker's listing contract to "sell" gives only authority to broker to introduce an acceptable purchaser.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Sell".

5. Brokers ⇨60

Where sellers gave business opportunity broker exclusive listing to sell business, equipment and on sale general liquor license, broker produced purchasers who entered into contract for purchase of business and all parties were aware that approval of Board of Equalization was necessary for transfer of liquor license, facts negatived mutual mistake as to necessity

ulation, the plaintiff would be entitled to interest upon the amount of such dam-

ages at the rate of seven per cent (7%) per annum from the date thereof."

for board's approval which would invalidate such contract and broker was entitled to commission although business was eventually sold to another.

Yale & Wilson, San Diego, for appellants Onn Looper and Victor De Lu.

James B. Abbey and James S. Lowrie, San Diego, for respondents.

BURCH, Judge.

This appeal is from a judgment for plaintiffs rendered by the court sitting without a jury in an action to recover back a broker's commission paid by plaintiffs to defendant Looper. The facts are not in dispute.

On July 19, 1951, plaintiffs gave defendant Looper a thirty-day exclusive business opportunity listing "to sell" their business known as Golden Pheasant Cocktail Bar, with equipment, and an on sale general liquor license to any purchaser "acceptable" to plaintiffs for \$22,000, and agreed to pay a ten percent commission. On August 7 next, plaintiffs and Victor and Violet Ganil, through escrow instructions with defendant Balboa Escrow Company, executed a purchase and sale contract for the properties at a price of \$19,000. Plaintiffs accepted a deposit in escrow of \$10,000 and directed the escrow agent to pay \$1,000 as commission earned to the defendant Looper, and thereafter ordered disbursed the balance of the \$10,000 deposit. However, before the sale was consummated, some question arose as to the ability of the Ganils to qualify under the law as transferees of the liquor license. Mr. Ganil assigned his interest to Mrs. Ganil. The parties again modified their contract on October 19, 1951, through a second escrow opened with defendant Balboa Escrow Company, which evidenced a sale by Mrs. Ganil to one Vital Haynes of all the properties they had purchased from plaintiffs, except the license, the consideration for which was \$10,224.58 cash and \$8,775.42 by secured promissory note payable to plaintiffs. This sale was then consummated.

[1] As part of this latter transaction plaintiffs, with the approval of the Board

of Equalization, transferred the liquor license directly to Vital Haynes. It was stipulated at the trial that one Berry, if called, would testify that Mr. Ganil would have been unable to qualify with the Board of Equalization and that Mrs. Ganil could qualify only if Mr. Ganil had nothing to do with respect to the business operated by her. This evidence was received on the question whether the Ganils, as purchasers, had the qualifications to satisfy the implied duty of the broker under his employment contract to introduce to the owner a purchaser "ready, willing and able" to buy. We have some doubt as to whether a witness is competent to foretell what action might be taken were the question before the board officially in the exercise of its administrative discretion as vested in it by law. See *Anno: The Doctrine of Primary Administrative Jurisdiction*, 96 L. Ed. 585; *Far East Conference v. United States*, 342 U.S. 570; 72 S.Ct. 492, 96 L.Ed. 576; *Zottman v. City and County of San Francisco*, 20 Cal. 96. Putting that question to one side, we think the employment contract was fully performed when the plaintiffs executed a valid contract with the purchaser produced by the broker; that from that time the owner carried all the responsibility for the purchaser's qualifications, barring fraud or actionable mistake. See *Edwards v. Billow*, 31 Cal.2d 350, 359, 360, 188 P.2d 748. The rule is thus stated in *Restatement of Agency*, Section 445.

Illustration:

"P promises to pay A a commission on land sold by P to customers produced by A, a broker. A introduces T, who executes with P an enforceable contract for the purchase of the land. T fails to perform. A is entitled to his commission."

California cases are in accord.

"Furthermore, the execution of a contract of sale by the owner of real property is conclusive proof that he was satisfied as to the qualifications of the purchaser and of his ability to perform the contract, thus rendering the owner liable for the payment of the broker's commission. *McNamara*

v. Steckman, 202 Cal. 569, 572, 262 P. 297; Deeble v. Stearns, 82 Cal.App. 2d 296, 299, 186 P.2d 173." Ralston v. Demirjian, 86 Cal.App.2d 124, 126, 194 P.2d 41, 42. See also the following cases: Malmstedt v. Stillwell, 110 Cal. App. 393, 294 P. 41; Vickery v. Valdez, 113 Cal.App. 135, 298 P. 151; Grove v. Lewis, 125 Cal.App. 357, 13 P.2d 847.

[2,3] The case is the same for a business opportunity broker—the employment contract gives the measure of the broker's right. Rutherford v. Berick, 82 Cal.App. 2d 331, 186 P.2d 23.

[4] The words "to sell" in the listing have uniformly been considered as only authority to introduce an acceptable purchaser. Holway v. Malloy, 70 Cal.App.2d 317, 319, 320, 160 P.2d 893.

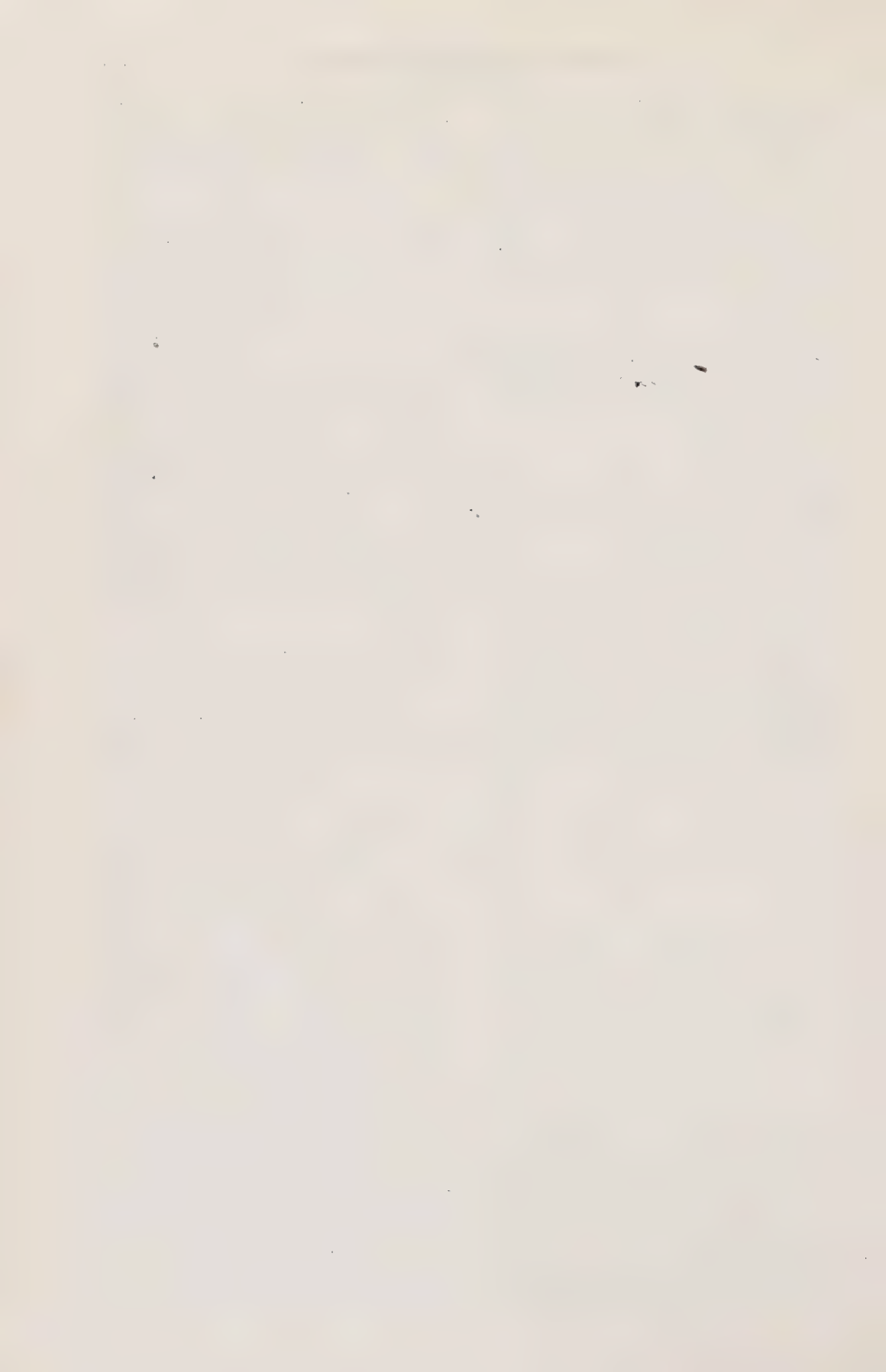
"If the * * * owner is dissatisfied with the purchasers * * * he should * * * decline to enter into the contract of sale, but where he accepts them as worthy of confidence, without being misled in any respect by the broker, he is bound to pay for said services." United States Farm Land

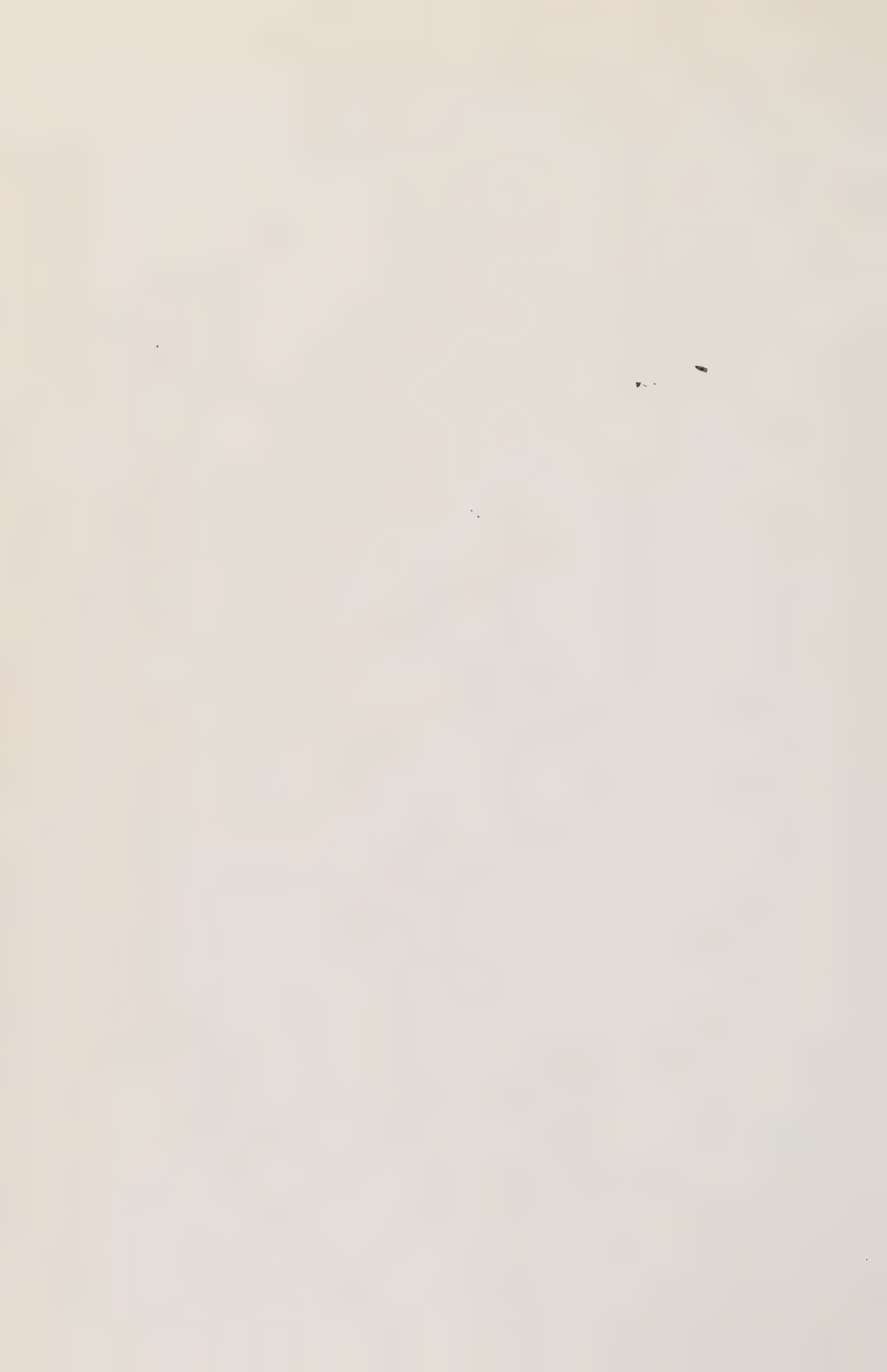
Co. v. Darter, 42 Cal.App. 292, 183 P. 696.

[5] Neither do we think there was here any mutual mistake to invalidate the contract. There is no mistake. All parties were well aware that the purchasers were required by law to have the transfer of the liquor license approved by the Board of Equalization. If all parties assumed on August 7 that this approval would be forthcoming and later became doubtful, the owners' estoppel by contracting and use for themselves of the \$10,000 principal would nonetheless apply to the facts of the case. Had the owners refused to contract until the administrative fact was settled, the broker's right would not be established. But, by entering into a binding contract, the owners will either consummate the sale or have a right of action on the contract to compensate them for their loss through its breach, and they should therefore pay for the services which obtained them these rights.

Judgment reversed, with costs to defendants.

TURRENTINE, P. J., and GLEN, J., concur.







CALIFORNIA REPORTER

254 PACIFIC REPORTER

SECOND SERIES

40 Cal.2d 461

SMITH v. SMITH.

L. A. 22323.

Supreme Court of California, in Bank.

March 10, 1953.

Proceeding by wife for modification of interlocutory decree, awarding nominal alimony, to increase such award. The Superior Court, Los Angeles County, entered order refusing modification on ground that decree approved property settlement agreement containing provision waiving alimony, and wife appealed. The Supreme Court, Traynor, J., held that wife's complaint, which had requested that property settlement agreement be approved, except provision waiving alimony, and that she be granted nominal alimony, constituted an attack on the validity of the agreement and a request that court reserve jurisdiction to award substantial alimony in the future; and that decree granting request was determination that waiver was not binding.

Order reversed.

Carter and Schauer, JJ., dissented.

Prior opinion, 248 P.2d 777.

1. Divorce ⇨255

In proceeding by wife for increase in alimony, where it appeared that husband had never appealed from interlocutory divorce decree which approved property settlement agreement, except for provision therein for waiver of alimony, and which awarded nominal alimony, husband's collateral attack on decree did not raise question whether court erred in granting relief inconsistent with property settlement agreement but only whether it had jurisdiction to do so.

2. Divorce ⇨200, 236, 249(1)

When the property rights of parties to a divorce action are put in issue, the court has jurisdiction to determine them, and,

similarly, it has jurisdiction to determine whether a property settlement agreement is equitable and should be enforced, and to award alimony in a proper case. Civ.Code, § 139.

3. Divorce ⇨239, 253

In action by wife for divorce, request that court withhold approval of property settlement agreement provision waiving alimony was, in effect, an attack on validity of agreement, but request that remaining provisions thereof be approved was tantamount to claim that wife was entitled to property agreement provided she should have, and prayer for nominal alimony was, in effect, request that court exercise its power to reserve jurisdiction to award substantial alimony in future if justified by changed circumstances. Civ.Code, § 139.

4. Judgment ⇨503

If a complaint apprises defendant of nature of the plaintiff's demand, its failure to state a cause of action does not render a default judgment thereunder vulnerable to collateral attack.

5. Divorce ⇨255

Wife's divorce complaint, which requested that property settlement agreement be approved, except for waiver of alimony, and that she be granted nominal alimony, was sufficient to sustain default judgment as against collateral attack, even if it were conceded that wife did not allege sufficient facts to show invalidity of agreement, or to show that, regardless of its terms, she was entitled to award of property she received.

6. Husband and Wife ⇨280

Where trial court, in wife's divorce action, approved property settlement agreement, except for waiver of alimony, and awarded wife nominal alimony, waiver was

not binding upon wife, and, thus, receipt by wife of increased alimony under petition for modification of decree would not render her liable in damages for breach of the property settlement agreement. Civ.Code, § 139.

Jesse Blattel, Beverly Hills, for appellant.

Erb, French & Picone and John L. Stennett, Beverly Hills, for respondent.

TRAYNOR, Justice.

On January 21, 1947, plaintiff secured an interlocutory decree of divorce from defendant by default on the ground of extreme cruelty. The parties had previously executed a property settlement agreement in which plaintiff waived all right to any payments for support and maintenance. She alleged in her complaint that "the parties have heretofore concluded a property settlement agreement, which plaintiff confirms and asks the Court to approve, save and excepting any provision therein respecting payment of alimony. She is asking that an award of at least token alimony be made at this time." She prayed "for a judgment of divorce against the defendant; that the custody of the minor child of the parties be awarded to her; that the property settlement be confirmed, excepting provision for alimony; that she be awarded nominal alimony, and that she have such other and further relief as may be equitable." The interlocutory decree provided in part that "the property settlement agreement filed herein is hereby approved and the defendant is ordered and directed to carry out the terms thereof," and "It is further ordered that the defendant pay to plaintiff the sum of \$1.00 per month for her support commencing February 1, 1947, and continue each month thereafter until further order of Court." In November, 1951, plaintiff sought to have the support award increased to \$100 per month on the ground of changed circumstances. The trial court refused to hear any evidence on the issue of changed circumstances and entered its order refusing modification of the interlocutory decree on the ground that the decree approved the property settle-

ment agreement containing a provision waiving alimony. Plaintiff has appealed.

She contends that the interlocutory decree clearly provided for an award of alimony and that under Civil Code section 139 the trial court has jurisdiction to modify that award. Defendant, on the other hand, contends that the property settlement agreement, having been approved in the interlocutory decree, now stands in the way of any award inconsistent with its terms.

Although the interlocutory decree purports to approve the property settlement agreement in its entirety, it is clear when it is read in the light of the complaint that it did not do so. Plaintiff expressly requested that approval be withheld from the provision waiving support and prayed that nominal alimony be awarded. Such an award was made, and accordingly, the decree may only be interpreted as approving that part of the agreement dividing the property and not as approving the waiver of alimony.

[1] Relying on *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265, defendant contends that the trial court did not have jurisdiction to modify the property settlement agreement by providing for relief inconsistent with its terms. In that case, on an appeal from a decree similar to the one here, we said, "It is true that public policy requires the protection of the wife and that in a divorce action the court in its discretion may award her necessary alimony. Civ.Code, § 139. Such discretion, however, does not empower the trial court to modify valid agreements of the parties pertaining to the division of their property. The court cannot, as was attempted in the present case, purport to approve the agreement and at the same time order payment of support and maintenance contrary to its terms." 29 Cal.2d at page 627, 177 P.2d at page 269. Since in that case the plaintiff made no showing that the agreement was inequitable or obtained by improper means, it was held that the agreement was binding on the parties and the court. In the present case, however, defendant did not appeal from the interlocutory decree. That decree is now final, and in this proceeding

defendant seeks collaterally to attack the provision awarding alimony. Accordingly, we are not concerned with whether the court erred in granting relief inconsistent with the property settlement agreement but only with whether it had jurisdiction to do so.

[2,3] When the property rights of the parties are put in issue, the court in a divorce action has jurisdiction to determine them. *Huber v. Huber*, 27 Cal.2d 784, 793, 167 P.2d 708. Similarly, it has jurisdiction to determine whether a property settlement agreement is equitable and should be enforced, *Adams v. Adams*, supra, 29 Cal.2d 621, 628, 177 P.2d 265, and to award alimony in a proper case. Civ.Code, § 139. All of these questions were raised by the pleadings in this case, and the relief granted was in accord with the prayer of the complaint. By asking that approval be withheld from the provision of the agreement respecting alimony, plaintiff in effect attacked the validity of that agreement. On the other hand, her request that the remaining provisions be approved was tantamount to a claim that she was entitled in any event to the property the agreement provided she should have. In addition, by praying for nominal alimony, she in effect asked the court to exercise its power to reserve jurisdiction to award substantial alimony in the future if changed circumstances should justify such an award. See *McClure v. McClure*, 4 Cal.2d 356, 359, 49 P.2d 584, 100 A.L.R. 1257; *Puckett v. Puckett*, 21 Cal.2d 833, 841, 136 P.2d 1; *Wilson v. Superior Court*, 31 Cal.2d 458, 464, 189 P.2d 266; *Gebhardt v. Gebhardt*, 69 Cal.App.2d 723, 727-728, 160 P.2d 177; *Soule v. Soule*, 4 Cal.App. 97, 101, 87 P. 205.

[4,5] It may be conceded that she did not allege sufficient facts to show the invalidity of the agreement, or to show that regardless of its terms, she was entitled to the award of the property she received. The failure of a complaint to state a cause of action, however, does not render a default judgment vulnerable to collateral attack. It is sufficient if it apprises the defendant of the nature of the plaintiff's demand. *Trans-Pacific Trading Co. v.*

Patsy F. & R. Co., 189 Cal. 509, 513-514, 209 P. 357; *Christerson v. French*, 180 Cal. 523, 525, 182 P. 27; *In re James' Estate*, 99 Cal. 374, 376-377, 33 P. 1122; *Svetina v. Burelli*, 87 Cal.App.2d 707, 709, 197 P.2d 562; *Henderson v. Henderson*, 85 Cal.App. 2d 476, 479, 193 P.2d 135; see also, *Wells Fargo & Co. v. City, etc., of San Francisco*, 25 Cal.2d 37, 40, 43, 44, 152 P.2d 625; *Estate of Keet*, 15 Cal.2d 328, 335, 100 P.2d 1045. Plaintiff's complaint met this test.

[6] Defendant finally contends that the order refusing modification should be affirmed to avoid multiplicity of suits. He argues that any amounts plaintiff might receive if the decree were modified would be in breach of their agreement, and that accordingly, he could recover them back as damages from plaintiff. This argument assumes the validity of the provision of the separation agreement waiving alimony. As pointed out above, however, plaintiff attacked that provision in her complaint, and the court, by granting her the alimony prayed for, determined that it was not binding upon her.

The order is reversed.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree that the token alimony provision of \$1 per month in this case is in harmony with the provisions of section 139 of the Civil Code. That section provides that "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the *maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support*, * * * having regard to the circumstances of the parties respectively * * *." (Emphasis added.) By no stretch of the imagination can it be said that the sum of \$1 per month could be sufficient for the maintenance of the minor child here, or for the support of the wife. Alimony is granted for the express purpose of enabling the wife to maintain the children and support herself, § 139, Civ.Code. It is, therefore, in a different category than the \$1

nominal consideration found in contracts and deeds to property. The legal effect is also entirely different. The legal effect of an alimony provision in a decree of divorce gives the trial court continuing jurisdiction to modify the sum awarded as the need of the one to whom the alimony was awarded increases or decreases, or the ability of the one paying the alimony changes. It is most apparent here that the sum of \$1 per month was not sufficient to support anyone and that there is quite a difference between \$1 and the \$100 per month which the trial court is being asked now to allow the wife. It occurs to me that if the majority opinion is sound, had the trial court made a provision for one cent a month alimony the wife could later request that the one cent be increased to \$1,000 or \$10,000 per month depending upon her ability to show that the defendant had, by some means, come into a large sum of money because, under the conditions prevailing here, it would not be necessary for her to show that her condition had changed since it cannot possibly be said that one cent, or one dollar per month had ever been adequate support for her. *Becker v. Becker*, 64 Cal.App.2d 239, 148 P.2d 381, 18 A.L.R. 2d 10, 35 et seq. To contend, seriously, that the provision for payment of \$1 per month alimony was intended as support for the wife is absurd and ridiculous. Not only that, but in view of the express provision in the property settlement agreement whereby the wife waived all right to alimony, the \$1 token alimony provision in the decree has the effect of perpetrating a fraud on the husband who, at the time, was not represented by counsel. The *only purpose* in inserting the provision for token alimony was to enable the trial court to retain jurisdiction and, in view of the waiver provision, is a fraud upon the husband.

In my opinion, the majority holding in this case is in conflict with *Adams v. Adams*, 29 Cal.2d 621, 177 P.2d 265. We said there, 29 Cal.2d at page 625, 177 P.2d at page 268: "The third category includes contracts in which the wife waives all support and maintenance, or all support and maintenance except as provided in the agreement, in consideration of receiving a more

favorable division of the community property. The court cannot add a provision for alimony to such contracts without changing basically the agreement of the parties as to the division of their property. We are confronted with such a situation in the present case. Plaintiff contends that the trial court did not make a new property settlement agreement for the parties but approved the agreement *except for the provision in which she waived all support and maintenance.* * * * The contract before the trial court in the present case was clearly one that attempted to settle the property rights of the parties. It contained a waiver of all other payments in consideration of her receipt of the major portion of the community property, and that waiver was inseparable from the remainder of the division of property. A waiver under such conditions is not void *per se.*" (Emphasis added.) It was further held that "It is true that public policy requires the protection of the wife and that in a divorce action the court in its discretion may award her necessary alimony. Civ.Code, § 139. Such discretion, however, does not empower the trial court to modify valid agreements of the parties pertaining to the division of their property. The court cannot, as was attempted in the present case, purport to approve the agreement and at the same time order payment of support and maintenance contrary to its terms." (Emphasis added.) We concluded that since nothing was shown to indicate that the agreement entered into between the parties was inequitable the parties are bound by the agreement. It is conceded in the majority opinion that plaintiff did not attack the terms of the property settlement as inequitable and there was no finding to that effect. There was not even a finding that the term thereof waiving alimony was disapproved. It appears to me that the trial court had no jurisdiction to award alimony in the face of the clear provision *which it approved* in the property settlement agreement waiving it. In the *Adams* case, *supra*, 29 Cal.2d 621, 177 P.2d 265, we said the trial court was not *empowered* to modify valid agreements of the parties.

What does that mean except that the trial court does not have jurisdiction to do so? Or are we to use the word "jurisdiction" in one case and the word "empower" in another and leave the attorneys to guess just what we do mean? That it is a guess is apparent from the briefs in this case because the plaintiff conceded that the opinion of the District Court of Appeal, 248 P.2d 777, which affirmed the trial court is correct "If the Adams case holds that a judgment rendered contrary to the rule [set forth above] is void or in excess of its jurisdiction" but that "If this court by the Adams and subsequent cases merely intended to say that a judgment awarding alimony contrary to the Adams case rule is subject to attack on a motion for a new trial or by appeal then the District Court of Appeal is in error." (Emphasis added.) The majority of this Court now adds to the confusion in holding that the plaintiff really meant to attack that portion of the agreement waiving alimony and that she requested the balance thereof to be approved and "In addition she asked for alimony." As I have heretofore pointed out, the sum of \$1 per month cannot reasonably be said to constitute alimony within the meaning of the code section, Civ.Code, § 139, and was only inserted in the decree so that continuing jurisdiction might be retained by the trial court. In so doing, the trial court perpetrated a fraud upon the husband in which the majority of this Court now joins.

The holding of the majority here is also contrary to the decision of this Court in *Patton v. Patton*, 32 Cal.2d 520, 196 P.2d 909, in which this Court held that where a property settlement agreement declaring that the wife releases the husband from "all claims whatsoever" for support or attorney's fees has been determined to be valid in a prior action, the trial court in a divorce action has no power to make an award of alimony pendente lite and suit money contrary to the provisions of such agreement. Here there is no question as to the validity of the agreement as it was prepared by the wife's attorney. She submitted it for the approval of the court at the trial of her divorce action and the same was approved by the court at her request. I can see no

distinction in the legal problem involved in the two cases. In the *Patton* case this Court held that in a case where by a valid property settlement agreement, the wife waived all claim to alimony, the court had *no power* to make an award of alimony to her in a subsequent action for divorce. Here there can be no question in regard to the validity of the agreement. At least its validity is not questioned by the wife, and since it was approved by the trial court in a divorce action, its validity is beyond question. Therefore, in the language of the *Patton* case the court had "*no power*" to make an award of alimony in her favor. If the court had "no power" to make an award of alimony in her favor, the spurious award of \$1 in the interlocutory decree was obviously void.

Furthermore, it should follow that if the court had no power to make an award of alimony in favor of the wife because of the valid property settlement agreement in which she waived all her claim for support, it would then have been an idle act for the trial court to take evidence in support of her application for an increase in the amount of alimony awarded her by the interlocutory decree, as the court was likewise powerless to increase an award which it originally had no power to make. Therefore, even if we concede that the award of \$1 per month alimony to the wife was mere error and not jurisdictional (which I do not) the trial court was certainly not required to take up the time of the court listening to evidence of changed conditions when it knew in advance that it was powerless to grant the relief demanded.

I would therefore affirm the judgment.

SCHAUER, Justice (dissenting).

I think that we should abide by the authorities cited by Justice CARTER. It seems to me that it is neither logical nor legally sound or otherwise becoming for this court to give the dignity of its support to what appears to be essentially a subterfuge whereby a contract—the terms of which admittedly the court could not alter—is held to have been both approved and disapproved; and whereby, further, it is held in effect that a party to a court-ap-

proved contract may take all the benefits thereof, keep them, and continue to receive them, but disavow at will the obligations which constituted the consideration for making the contract in the first place.

I, too, would affirm the judgment of the trial court.



40 Cal.2d 344

PARKER et al. v. BOWRON, Mayor, et al.
L. A. 22294.

Supreme Court of California, in Bank.
March 6, 1953.

Mandamus proceeding brought to compel mayor and city council to pay salaries at least equal to those prevailing in private employment, in accordance with the city charter. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered judgment discharging an alternative writ and denying a peremptory writ of mandamus, and the petitioners appealed. The Supreme Court, Edmonds, J., held that neither the council of federated municipal crafts, its affiliated unions, or the secretary-treasurer of the council had standing to maintain the representative suit.

Affirmed.

Carter, J., dissented.

Prior opinion 239 P.2d 893.

1. Appeal and Error ⇨174

Parties ⇨1, 76(6)

"Incapacity to sue" is merely a legal disability, such as infancy or insanity, which deprives party of right to come into court, and if question of capacity to sue is not raised by demurrer or answer it is deemed to have been waived and cannot be urged on appeal. Code Civ.Proc. §§ 430, 434.

See publication Words and Phrases, for other judicial constructions and definitions of "Incapacity to Sue".

2. Parties ⇨75(2)

Question of "standing to sue" goes to existence of cause of action, and may be raised at any point in proceeding, objection

addressed to petitioner's lack of standing not being waived by failure to raise it by demurrer or answer. Code Civ.Proc. §§ 430, 434.

See publication Words and Phrases, for other judicial constructions and definitions of "Standing to Sue".

3. Pleading ⇨205(1)

Where complaint states a cause of action in someone, but not in plaintiff, a general demurrer for failure to state a cause of action will be sustained. Code Civ.Proc. §§ 430, 434.

4. Mandamus ⇨7, 10

Granting of writ of mandate is discretionary and writ will not be granted unless it is necessary to protect a substantial right and only when it is shown that substantial damage will be suffered by petitioner if writ is denied.

5. Mandamus ⇨23(1)

Writ of mandate will be issued only upon application of party beneficially interested. Code Civ.Proc. § 1086.

6. Mandamus ⇨23(1)

Writ of mandate will not issue when petitioner has no direct interest in compelling defendant to perform function mentioned in writ.

7. Parties ⇨10

The statutory provision permitting one or more to sue defendant for benefit of all who have common or general interest is based upon doctrine of virtual representation, and is an exception to the general rule of compulsory joinder of all interested parties. Code Civ.Proc. § 382.

8. Parties ⇨11

To maintain representative suit there must be well defined community of interest in questions of law and fact involved as affecting parties to be represented. Code Civ.Proc. § 382.

9. Mandamus ⇨23(1)

Secretary-treasurer of council of federated municipal crafts was without standing to maintain representative suit, to require mayor and city council to pay salaries equal to those prevailing in private employment, where he did not claim to be a member of the interested class and there was

nothing to indicate that he was similarly situated with those he pretended to represent. Code Civ.Proc. § 382.

10. Mandamus ☞23(1)

Neither council of federated municipal crafts nor its affiliated unions had standing to maintain representative suit to require mayor and council to pay salaries equal to those prevailing in private employment, where no benefit could accrue to them if writ were issued, except possibly incidental one of satisfying a very small proportion of their members. Code Civ.Proc. §§ 382, 1086.

David Sokol, Los Angeles, and Clarence E. Todd, San Francisco, for appellants.

Ray L. Chesebro, City Attorney, Los Angeles, Bourke Jones, Asst. City Attorney, George William Adams, Alan G. Campbell and John F. Feldmeier, Deputy City Attorneys, Los Angeles, for respondents.

EDMONDS, Justice.

The purpose of this mandate proceeding is to compel the respondent city officials to fix a salary or wage for all of the city's employees in certain classifications at least equal to the prevailing scale for similar employment in private industry. The appeal from the judgment of dismissal primarily presents for decision the question as to whether the proceeding is brought by a person or persons having the requisite beneficial interest.

According to the caption of the petition, the proceeding is brought by "Lester A. Parker, individually and as a member of, and Secretary Treasurer of, the Council of Federated Municipal Crafts of Los Angeles, California, a voluntary unincorporated association, and for and on behalf of the following members of said association, all of which are unincorporated labor organizations: United Brotherhood of Carpenters & Joiners of America, Local Union No. 2231; United Association of Plumbers and Steam Fitters, Local Union No. 78; Southern California District Council of Laborers; and Carpenters District Council of Los Angeles County, Petitioners."

The petition is signed by Parker as "Petitioner" and by the "Attorney for Petitioners". It is alleged that the "[p]etitioner, Council of Federated Municipal Crafts" is an unincorporated association, Parker is its secretary treasurer, certain designated unions which are unincorporated associations are members of the council, and "the petitioner brings this action for and on behalf of himself individually and as Secretary Treasurer" of the council "and for and on behalf of" its affiliated unions "and the members thereof".

The council, it is alleged, is "devoted to the improvement of the working conditions of the members of its affiliated unions, and to the stabilization of labor relations between the City of and County of Los Angeles, and the employees of said political subdivisions, and has as one of its aims and objectives the establishment and maintenance of reasonable standards for wages, hours, and working conditions of said employees, and the maintenance of industrial peace". According to the pleading, the labor council represents those members of the affiliated unions who are working for the city and the county. It is stated that of 2,631 members of the United Association of Plumbers and Steam Fitters, 26 are employed by the city; of approximately 35,000 members of the Carpenters District Council the city employs over 250; and more than 110 of about 11,000 members of the District Council of Laborers are municipal employees.

"Your petitioners are the real parties in interest herein", it is said, "since they represent a substantial part of the employees of the City of Los Angeles; that petitioner, the Council of Federated Municipal Crafts * * * is the collective bargaining representative of practically every craft of employee of the City * * * as well as" 28 listed unions. According to the petition, "the sole purpose of the activities of the petitioner, Council of Federated Municipal Crafts * * * is to foster, promote, and develop the welfare of wage earners employed by the City * * * to improve their working conditions and to advance their opportunities for profitable employment".

Section 425 of the city charter provides: "In fixing the compensation to be paid to persons in the City's employ, the Council and every other authority authorized to fix salaries or wages, shall, in every instance, provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations, under similar employment, in case such prevailing salary or wage can be ascertained."

According to the petition, "the respondents in fixing the compensation paid to the members of the 'affiliated Unions'", made a survey of salaries and wages paid by private industry in the Los Angeles area. This survey, it is alleged, disclosed that the rates of pay in private industry were higher than those paid by the city, "in violation of Section 425". The "respondents", it is said, "had available data from which it could ascertain the prevailing salary or wage paid to persons under similar employment for the same quality of services rendered to private persons, firms or corporations, but respondents failed, neglected and refused to pay such prevailing salary or wages and refused to consider, or to take into consideration, such prevailing salary or wages in fixing the salaries or wages of the carpenters, laborers and plumbers". It is alleged that "demand was made on respondents that in fixing the compensation to be paid to the members of the 'affiliated Unions' respondents provide for a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations under similar employment; that at all times since * * * respondents have failed and refused to do so".

"Petitioners have no plain, speedy or adequate remedy at law", the pleading continues, "to compel the respondents * * * to perform the public duty which they have under Section 425 of the City Charter * * * and there is no method except by means of this petition whereby the petitioners can question the * * * acts of respondents and secure complete adjudication of their rights and adequate and complete relief." The "petitioners pray" that

a writ of mandate issue commanding the respondents to provide a salary or wage "for all of its employees classified as laborers, carpenters and plumbers" at least equal to the scale prevailing in private industry.

By answer, the respondents "deny that the petitioner brings this action for or on behalf of himself either individually or as Secretary-Treasurer of the Council * * and deny that the petitioner brings this action for or on behalf of the affiliated unions * * * or on behalf of any members thereof or for or on behalf of anyone whomsoever". It is also denied that the council "represents or can represent any members of the said affiliated unions as to their wages, hours and working conditions, or as to the settlement of grievances in connection with the employment of any of them by" the city, county, or various city agencies. The respondents also deny that the council "represents anyone collectively or otherwise either in bargaining for wages, hours or working conditions or otherwise in respect to his employment by any of the said governmental entities."

Other allegations of the answer are that a survey was made of salaries and wages paid in private industry. The information so obtained, it is said, together with other information, was considered by the members of the city council in reaching the decision that the salaries and wages paid to city employees are at least equal to those prevailing in private industry. According to the pleading, "none of the petitioners is a real party in interest herein, or is employed by the City of Los Angeles, or has any claim herein, nor is any of the petitioners the collective bargaining representative of any employee of" the city or its agencies.

By supplement to the answer, it is alleged that, since the commencement of the proceeding, the city council has amended the salary standardization ordinance. As now in effect, the ordinance fixes increased rates of compensation.

Upon the commencement of the trial, the respondents objected to the introduction of any evidence upon the grounds "that the petitioner, Lester A. Parker, is neither a real party in interest nor a party

beneficially interested" and that the petition failed to state a cause of action. The court sustained the objection upon both grounds. Judgment was entered discharging the alternative writ, denying the petition, and ordering that "the petitioners" take nothing. The notice of appeal recites that the "petitioners", designated in the same manner as in the caption of the petition, appeal from the judgment.

In the briefs upon appeal, the use of the plural designation "petitioners" is, for the most part, abandoned, reference being made to the "petitioner and appellant" in most instances. However, sometimes the labor council is referred to specifically as the petitioner and at other times the reference to "petitioner" appears to mean Parker. It is contended that the "petitioner", apparently irrespective of whether Parker, or the council, or the affiliated unions be so designated, has the requisite beneficial interest and representative standing to maintain the proceeding and that the petition states a cause of action. It is also argued that the trial court erred in denying the "petitioner" the right to inspect the city's survey records and to take the deposition of one Howard E. Earl.

The respondents contend that neither the unions nor Parker, whichever be deemed the "petitioner", is a proper party to bring the proceeding and the petition fails to state a cause of action. According to them, the only reasonable interpretation of the petition is that Parker is the sole petitioner. They also argue that the orders claimed to be erroneous are not reviewable upon this appeal.

It is impossible, either from the caption or the body of the petition, to determine with certainty who is intended to be the "petitioner" or "petitioners". Apparently, it was Parker's belief that, as an individual, he could bring a representative suit upon behalf of all city employees and, as an officer of the labor council sue on its behalf. There is some indication that the named affiliated unions were not intended to be petitioners, but were considered as represented by the council's action.

The respondents argue that the council cannot be deemed to be a petitioner be-

cause it is simply an affiliation of various unions. No individual city employee can be a member of the council. Also, the respondents say, neither the council nor the affiliated unions can be a petitioner because each is an unincorporated association incapable of suing in its own name. The former contention raises the question of the council's standing to maintain this proceeding; the latter challenges the capacity of the unions to sue.

[1-3] Insofar as the question of capacity to sue is concerned, not having been raised by demurrer or answer, it must be deemed to have been waived and cannot now be urged upon appeal. Code Civ.Proc. §§ 430, 434; Klopstock v. Superior Court, 17 Cal.2d 13, 17, 108 P.2d 906, 135 A.L.R. 318. However, the question of standing to sue is different from that of capacity. Incapacity is merely a legal disability, such as infancy or insanity, which deprives a party of the right to come into court. The right to relief, on the other hand, goes to the existence of a cause of action. It is not a plea in abatement, as is lack of capacity to sue. Where the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained. Klopstock v. Superior Court, supra, 17 Cal.2d at pages 18-19, 108 P.2d at page 909. This objection is not waived by failure to raise it by demurrer or answer, and may be raised at any point in the proceedings. Code Civ.Proc. § 434. Here, by the objection to the introduction of any evidence, it has been properly raised as to whomever may be considered the "petitioner" or "petitioners".

[4-6] "The granting of a writ of mandate is discretionary and it will be granted only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if said writ is denied." Ault v. Council of City of San Rafael, 17 Cal.2d 415, 417, 110 P.2d 379, 380; May v. Board of Directors, 34 Cal.2d 125, 134, 208 P.2d 661; Gay v. Torrance, 145 Cal. 144, 147, 78 P. 540. "The writ of mandate will not be issued except upon affidavit on the application of the party

beneficially interested. Code Civ.Proc. § 1086." *Fritts v. Charles*, 145 Cal. 512, 513, 78 P. 1057, 1058. "The writ of mandate will not issue in a case where the plaintiff fails to show that it will subserve or protect some right or interest of his. * * * The writ will not lie 'where it is apparent that the relator has no direct interest in the action sought to be coerced, and that no benefit can accrue to him from its performance.'" *Ellis v. Workman*, 144 Cal. 113, 115, 77 P. 822.

Parker, as an individual, alleges no facts to show that he has any right or interest in the action sought to be commanded. He does not plead that he is an employee of the city, nor even that he is a resident or taxpayer of the city. There is no indication that any benefit could accrue to him if the writ were issued, nor that he will suffer any detriment if it is denied.

The situation is clearly distinguishable from that in *Hollman v. Warren*, 32 Cal.2d 351, 196 P.2d 562, where the petitioner was both an applicant for appointment as a notary and a resident and taxpayer of the city and county. Under those circumstances, the majority of the court held that the petitioner had shown a proper interest to contest the validity of the statute under which the Governor refused to consider her application. There, the petitioner had a direct interest in securing consideration of her application in addition to her interest as a citizen in having a sufficient number of notaries commissioned to serve the needs of the public. In the present case, however, Parker cannot benefit directly by an increase in the pay scale of city employees. Neither has he alleged that he is a citizen interested in having the duty in question enforced.

Parker urges, however, that he has brought this proceeding as a representative suit on behalf of city employees who have a direct interest in the enforcement of the duty. He relies upon the provision of section 382 of the Code of Civil Procedure that, "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all

before the court, one or more may sue or defend for the benefit of all".

[7,8] The statutory provision is based upon the doctrine of virtual representation and is an exception to the general rule of compulsory joinder of all interested parties. *Weaver v. Pasadena Tournament of Roses*, 32 Cal.2d 833, 837, 198 P.2d 514. It is a codification of "the common law theory of convenience to the parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy". *Fallon v. Superior Court*, 33 Cal.App.2d 48, 50, 90 P.2d 858, 859. "[R]egardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, it has been uniformly held that there must be a well-defined 'community of interest' in the questions of law and fact involved as affecting the parties to be represented." *Weaver v. Pasadena Tournament of Roses*, supra [32 Cal.2d 833, 198 P.2d 517]; *Jellen v. O'Brien*, 89 Cal.App. 505, 509, 264 P. 1115.

[9] No facts have been alleged to bring Parker within this well established rule regarding class suits. He does not claim to be a member of the interested class, and there is nothing to indicate that he is "similarly situated" with those whom he pretends to represent. There can be no "common or general interest" in the subject matter of the controversy, *Weaver v. Pasadena Tournament of Roses*, supra 32 Cal.2d at page 842, 198 P.2d at page 518, between Parker, who is not employed by the city, and city employees. Parker cannot give himself standing to sue by purporting to represent a class of which he is not a member.

The cases upon which Parker relies for authorization of a representative action by an individual strengthen this conclusion. In each of them, the individual seeking to maintain the action on behalf of himself and others was a member of the class sought to be represented and raised questions of law and fact common to himself and other members of his class. *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 481, 51 P. 841, individual members of

a church suing on behalf of all members to recover a fund of money; *Weber v. Marine Cooks' & Stewards' Ass'n*, 93 Cal. App.2d 327, 208 P.2d 1009, action by group of members of union on behalf of all members who chose to join with them for declaration of status of constitution and by-laws of the union; *Ellis v. American Federation of Labor*, 48 Cal.App.2d 440, 120 P.2d 79, members of three unions suing in a representative capacity to enjoin the revocation without a hearing of the charter of the Central Labor Council with which their unions were affiliated; *Law v. Crist*, 41 Cal.App.2d 862, 107 P.2d 953, members of a group teaching theosophy seeking to enjoin the use by a competing corporation of the name of their society; *Peterson v. Donelley*, 33 Cal.App. 2d 133, 136-137, 91 P.2d 123, action for an accounting and the removal of trustees by one beneficiary of a trust, upon behalf of some 3,000 beneficiaries with common interests; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 629, 63 S.Ct. 1178, 1181, 87 L.Ed. 1628, members of a religious sect suing "for themselves and others similarly situated" to restrain enforcement of laws and regulations against their sect.

Two of the decisions cited by Parker are not in point. In *Allen v. Hotel & Restaurant, etc., Alliance*, 97 Cal.App.2d 343, 348, 217 P.2d 699, the court refused to consider the proceeding as a representative suit for the reason that the preliminary injunction appealed from applied only to the named plaintiffs and not to the members of the class whom they purported to represent. Dismissal of a class suit by members of a religious sect seeking to restrain threatened criminal prosecution was affirmed in *Douglas v. City of Jeannette*, 319 U.S. 157, 165, 63 S.Ct. 882, 87 L.Ed. 1324, upon the ground, among others, that there was no showing of an identity of issues between the numerous members of the class.

[10] Insofar as the council and its affiliated unions are concerned, whether one or all of them be assumed to be the petitioner or the petitioners, the same reasoning applies and compels the conclusion

that none of them has standing to maintain this proceeding. No facts are alleged which show any right or interest of the unions in the action sought to be commanded. There is no indication that any benefit, except possibly the incidental one of satisfying a very small proportion of their members, could accrue to them if the writ were issued. Nor could they suffer any detriment if it is denied. At best, they can claim to act only on behalf of their members, since they cannot legally be affected by enforcement of the city's duty. None of the unions can have the requisite beneficial interest in enforcing a duty owed by the city to its employees. *Funeral Directors Ass'n v. Board of Funeral Directors*, 67 Cal.App.2d 311, 313, 154 P.2d 39; *Cf. Associated Boat Industries v. Marshall*, 104 Cal.App.2d 21, 23, 230 P.2d 379.

The council argues that it is a "party beneficially interested" within the meaning of section 1086 under the rule laid down in *Board of Social Welfare v. County of Los Angeles*, 27 Cal.2d 98, 162 P.2d 627. That case, however, must be limited strictly to the facts upon which it was based. By statute, the Board of Social Welfare was "designated as the single State agency with full power to supervise every phase of the administration of the public assistance plans for which grants-in-aid are received from the United States Government in order to secure full compliance with the provisions of Titles 1 and 4 of the Federal Social Security Act". *Welfare & Institutions Code*, § 103.5. In upholding its right to sue, the court said: "Generally, when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same." 27 Cal.2d at page 101, 162 P.2d at page 629. Because of its statutory duty, it was held to be "a proper party to maintain mandamus proceedings against county officials who fail or refuse to issue a warrant to a needy aged person who is a member of a class entitled thereto".

Here, however, there is no statutory duty of supervision or representation placed upon the unions. They are not public

boards but private organizations created to foster the diverse personal interests of their members. As purported representatives of city employees in negotiations with the city, they have no legal standing. The city has no duty to bargain collectively or contract with the unions. *Nutter v. City of Santa Monica*, 74 Cal.App.2d 292, 303, 168 P.2d 741. In fact, it may not do so to the extent that the conditions of employment usually arranged by contract are covered by the provisions of the city charter. *City of Los Angeles v. Los Angeles, etc., Council*, 94 Cal.App.2d 36, 46-47, 210 P.2d 305. For these reasons, the unions cannot bring themselves within the rule of the Board of Social Welfare case.

Relying upon *Denver Bldg. & Const. Trades Council v. Vail*, 103 Colo. 364, 368-369, 86 P.2d 267, the labor council argues that a union has sufficient interest in the enforcement of prevailing wage legislation to maintain this proceeding. In that case, a Colorado statute provided that contractors constructing public works must pay the prevailing rate of wages to their employees. Prevailing rates were to be stated in the invitation for bids, and disputes were to be adjusted by the Industrial Commission. The union, which was the collective bargaining agent with contractors for employees in the construction industry, sought an injunction to restrain the state highway engineer from opening certain construction bids. It claimed that the rate in the invitation to submit bids was not the prevailing wage rate and that the dispute should be submitted to the Industrial Commission. At the time suit was commenced, there were neither contractors nor employees for the particular projects involved. The court construed the statutory purpose to be the avoidance of the delays and losses which would result from wage controversies arising during the construction of public works. It concluded that, under the peculiar circumstances existing, the only practical solution to achieve the legislative intent was to hold that the union had a sufficient interest in the subject matter to maintain the proceeding.

The situation here is in no way similar to that in the *Denver Bldg. & Const. Trades Council* case. The labor council cannot be the collective bargaining agent for municipal employees. In the present case, there are employees with a present interest in the subject matter of the action. The city charter is vastly different from the Colorado statute in its objective. There is no purpose to be served by a holding that the union may maintain the action, since a sufficient interest reposes in others to seek compliance with the intent of the charter. In the absence of any similarity between the facts pleaded by Parker and the peculiar circumstances of the *Denver Bldg. & Const. Trades Council* case, it is not persuasive in determining the present controversy.

Likewise distinguishable for the same reasons is *El Paso Building & Construction Trades Council v. Texas Highway Comm.*, Tex.Civ.App., 231 S.W.2d 533, 536-538, which arose upon facts substantially similar to those of the *Denver Bldg. & Const. Trades Council* case and followed that decision. It is also noteworthy that the Texas Supreme Court reversed the judgment of the Court of Civil Appeals in the *El Paso* case upon the ground that the action of the highway commission was not subject to review and refused to discuss the question of the union's standing to sue. *Texas Highway Comm. v. El Paso Bldg. & Const. Trades Council*, 149 Tex. 457, 468, 234 S.W.2d 857.

Equally without merit is the council's contention that it is a proper party to bring a representative suit. Neither it, nor its affiliated unions, are members of the class sought to be represented. Indeed, only a very small number of the members of the affiliated unions are city employees, and there is no allegation that any of them is employed by departments for which the wage and salary scale is established by the city council. For all that appears, it well may be that none of the members of the affiliated unions is a member of the class which is supposedly being represented.

The decisions from other jurisdictions upon which the labor council relies as

stating the proposition that a union may maintain a representative action upon behalf of its members are not in point. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 392, 42 S.Ct. 570, 66 L. Ed. 975, determined that a labor union, an unincorporated association, could be sued in accordance with the provisions of a federal statute. No question of the propriety of the association bringing an action in a representative capacity was raised. In *Hague v. C. I. O.*, 307 U.S. 496, 514, 59 S.Ct. 954, 83 L.Ed. 1423, the court held that only the individual plaintiffs, and not the labor organizations, could maintain a suit for protection of their civil rights.

Stapleton v. Mitchell, D.C., 60 F.Supp. 51, involved an action brought by labor unions and individuals, acting in both individual and representative capacities, to test the validity of a Kansas labor statute which purported to regulate the activities of both the organizations and the individuals. The unions and the individuals all had a direct interest in the enforcement of the statute. There was no question presented concerning the right of a union to sue on behalf of some of its members in a matter in which it had no immediate interest.

Again, in *Brotherhood of Stationary Engineers v. City of St. Louis*, Mo.App., 212 S.W.2d 454, 458, the union had a direct interest in challenging an ordinance which allegedly deprived it of its statutory right. Thus it was permitted to join with individual plaintiffs, a number of its officers and members, although its interest was not identical to that of its members. There is no indication in the opinion that it purported to act in a representative capacity.

Regardless of who may be considered the petitioner or petitioners in this case, it is obvious that none of the parties named in the petition can have any standing to maintain this proceeding. It is, therefore, unnecessary to consider other points presented.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion is predicated on two propositions: (1) That in order to obtain relief by mandamus the petitioner must show substantial damage, and it is discretionary with the Court whether it shall issue, and (2) petitioner has stated no facts from which it would appear that he would benefit by the relief sought. The remainder of the opinion consists of setting up a row of straw men and knocking them down and omitting an important factor.

Neither of the premises is correct. For the first proposition the majority relies upon *Ault v. Council of City of San Rafael*, 17 Cal.2d 415, 110 P.2d 379 and some old cases and erroneously cites *May v. Board of Directors*, 34 Cal.2d 125, 208 P.2d 661. The *May* case did not hold that the remedy of mandamus was discretionary. It held to the contrary. We there said, 34 Cal.2d at page 133, 208 P.2d at page 666: "It has been stated generally in many decisions that whether or not a writ of mandate issues, lies within the discretion of the court. * * * Yet it must be remembered that 'The writ *must* be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. * * *' Code of Civ. Proc. sec. 1086, [emphasis added], and where '* * * the petitioner has shown that the respondents have *refused to perform a clear legal duty* not involving the exercise of any discretion. Under such circumstances, the writ should issue.' *Betty v. Superior Court*, 18 Cal.2d 619, 622, 116 P.2d 947, 949. Or, as otherwise phrased, '* * * where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, *he is entitled, as a matter of right, to the writ*; or, in other words, it would be an abuse of discretion to refuse it.'" (Emphasis added.) On the other hand (necessity of substantial damage), the

rule was adopted quoting from American Jurisprudence, "[B]y the preponderance of authority * * * where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, *the relator need not show that he has any legal or special interest in the result*, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. * * * Generally, when a power or duty is imposed by law upon a public board or officer, and in order to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, it or he may apply for the same.'" (Emphasis added.) *Hollman v. Warren*, 32 Cal.2d 351, 357, 196 P.2d 562, 566. The identical statement is made in *Board of Social Welfare v. County of Los Angeles*, 27 Cal.2d 98, 162 P.2d 627. It should be noted that Mr. Justice EDMONDS, the author of the majority opinion here, dissented in the *Hollman* case and is here stating the same views he expressed in his dissent there.

Attempt is made to distinguish the Board of Social Welfare case but it cannot be done. There the state welfare board was held to be sufficiently interested to seek mandamus to compel the county to pay aid to needy aged persons although the state board had no authority to require the county to act. The basis of permitting it to bring mandamus proceedings in addition to that above mentioned was because "Persons who are members of such a class are ordinarily financially, and often physically, unable to maintain such proceedings on their own behalf, and to deny to them the assistance of the welfare board under such circumstances would tend to defeat the purpose of the legislation which seeks to provide for them during needy old age." *Board of Social Welfare v. County of Los Angeles*, supra, 27 Cal.2d 98, 100, 162 P.2d 627, 628. Here petitioner had the specific duty of protecting the welfare of the members of the union, including the employees of the

city. It is idle to speak of the lack of power to have collective bargaining between the city and the unions, as does the majority, because that is not here involved. The members of the unions, through petitioner, are properly and legitimately seeking redress in the courts.

There can be no doubt of the beneficial interest of petitioner. According to the petition for the writ, plaintiff Parker, is the secretary and a member of the Council of Federated Municipal Crafts of Los Angeles, an unincorporated labor union. Several other named unions are affiliated with and members of that union and the action is brought on behalf of all the unions and their members. The unions' purposes are the improvement of working conditions and wages of their members and represents such members as work for the City of Los Angeles. It is the duty of the City Council to fix the salaries and wages of plumbers, carpenters and laborers and in doing so it must comply with section 425¹ of the City Charter. In March, 1950, in fixing the wages for such employees the council made a survey in conjunction with the county, city schools, county and city housing authority, of wages paid to persons under similar employment for the same quality of service rendered private persons, firms and corporations, which included data obtained from employers in the Los Angeles area representing the major types of industry and business. The survey showed and it is a fact that the prevailing rate of pay in private employment for the above mentioned work classifications is higher than the rates fixed by the council. Thus the council in fixing the salaries and wages "had available data from which it could ascertain the prevailing salary or wage paid to persons under similar employment for the same quality of services rendered to private persons, firms or corporations, but [the council] failed, neglected and refused to pay such prevailing salary or wages *and refused to consider, or to take*

1. "In fixing the compensation to be paid to persons in the City's employ, the Council and every other authority authorized to fix salaries or wages, shall, in every instance, provide a salary or wage at least equal to the prevailing sal-

ary or wage for the same quality of service rendered to private persons, firms or corporations, under similar employment, in case such prevailing salary or wage can be ascertained."

into consideration, such prevailing salary or wages in fixing the salaries or wages of the carpenters, laborers and plumbers as aforesaid."

In a mandamus proceeding, on the return to the alternative writ or on the day on which the application for the writ is noticed, the party upon whom the writ or notice is served may answer the petition under oath in the same manner as an answer to a complaint in a civil action. Code Civ. Proc. § 1089. "On the trial, the applicant is not precluded by the answer from any valid objection to its sufficiency, and may *countervail it by proof* either in direct denial or by way of avoidance." - (Emphasis added.) Code Civ. Proc. § 1091. Here plaintiff made every effort when the case was called for trial to *prove* facts in support of his petition and to countervail the answers but was prevented from so doing by reason of the sustaining of defendants' objection to the introduction of any evidence; he did not rest the case on the pleadings.

Defendants seem to think that a plaintiff in a mandamus proceeding must file an answer or reply to the answer or return of the defendant. That is not the law. It has been stated frequently that in mandamus proceedings the return or answer of the defendant is accepted as true, unless controverted by petitioner. See *Hunt v. Mayor and Council of City of Riverside*, 31 Cal. 2d 619, 191 P.2d 426; *Ertman v. Municipal Court*, 68 Cal.App.2d 143, 155 P.2d 908, 156 P.2d 940; *Vanderbush v. Board of Public Works*, 62 Cal.App. 771, 217 P. 785; *McClatchy v. Matthews*, 135 Cal. 274, 67 P. 134; *Loveland v. City of Oakland*, 69 Cal.App.2d 399, 159 P.2d 70; *Fox v. Workman*, 6 Cal.App. 633, 92 P. 742; *Brown v. Superior Court*, 10 Cal.App.2d 365, 52 P.2d 256; *Charles L. Donohoe Co. v. Superior Court*, 79 Cal.App. 41, 248 P. 1007; *Friedland v. Superior Court*, 67 Cal. App.2d 619, 155 P.2d 90. And a petitioner may file an answer or reply to defendant's answer or return. *Scott v. Superior Court*, 205 Cal. 525, 271 P. 906. That does not mean, however, that a reply to defendant's answer must be filed. That plaintiff may controvert the answer by proof—by evidence—is the plain meaning of section 1091

of the Code of Civil Procedure, *supra*. The foregoing authorities were dealing with situations where the determination of the matter was submitted by the parties on the pleadings alone or one of the parties made a motion for judgment on the pleadings. The question of whether or not defendant's answer could be controverted by proof without filing a reply or answer to the answer was not presented in any of the cases above cited and it clearly appears from most of them that by reason of section 1091, *supra*, plaintiff could meet the allegations in the answer by *either* pleading or proof. *McClatchy v. Matthews*, *supra*, 135 Cal. 274, 67 P. 134; *Vanderbush v. Board of Public Works*, *supra*, 62 Cal.App. 771, 217 P. 785; *Loveland v. City of Oakland*, *supra*, 69 Cal. App.2d 399, 159 P.2d 70; *Fox v. Workman*, *supra*, 6 Cal.App. 633, 92 P. 742; *Charles L. Donohoe Co. v. Superior Court*, *supra*, 79 Cal.App. 41, 248 P. 1007; *Friedland v. Superior Court*, *supra*, 67 Cal.App.2d 619, 155 P.2d 90.

Since plaintiff was entitled to countervail defendants' answer by proof, though they filed no reply thereto, the denial of a right to put in any evidence, was prejudicial error. Hence, if the facts as alleged in the petition state a cause of action the proceedings should not have been dismissed.

Plaintiff Parker brings the action individually and as secretary of the Council of Federated Municipal Crafts of Los Angeles, an unincorporated union, referred to as union, having as its members various other unincorporated unions, called affiliated unions. *He alleges that he brings the action on behalf of himself individually and on behalf of the affiliated unions and the members thereof*; that the union is devoted to the improvement of working conditions and wages of the members of the affiliated unions and *they have authorized the union to represent them in achieving those ends*; that members of those unions work for the city.

It thus clearly appears that plaintiff is acting, in effect, as the authorized agent or representative of the members of the affiliated unions, some of whom are city employees, inasmuch as he is an officer and

representative of the union which in turn represents the members of the affiliated unions. It cannot be doubted that the members of the affiliated unions, who are employed by the city, are definitely beneficially interested in having their wages and salaries meet those paid in private employment as required by section 425 of the Charter, *supra*.

The action was properly instituted by Parker as a member of the unions and their members. The union as such operating in Los Angeles has a substantial interest in the wages paid to all in the class of craftsmen, of which the memberships of the affiliated unions consist, whether they are members of the latter or not; similarly each member of the union has an interest in that matter. They have an interest in what the city pays such craftsmen, because what one employer pays his employees has an impact on what another pays or will pay. The phrase "beneficially interested" person who may apply for a writ of mandate, Code Civ.Proc. § 1086, is given liberal construction.

Moreover, a proceeding is maintainable by Parker as an officer and member of the union and agent and representative of the members of the affiliated unions, including members who work for the city. The interest of such members is common. He would be beneficially interested because those on behalf of whom the proceeding was maintained would have the interest. This is necessary because of the impracticability of all the members joining and the inability of the unincorporated unions to prosecute the proceeding as an association. It is said: "Where there is no statutory authorization of suits by or against an unincorporated association in the association name, the remedy, when a cause of action for or against an association exists, is by an action in the names of the several persons constituting the association, or in the name of a trustee or trustees in whom some right of property is vested or *who is specially authorized to sue*. * * * The doctrine of virtual representation, which recognizes the right of a few persons to sue or defend on behalf of themselves and all others similarly situ-

ated, has frequently been applied in the case of actions by or against voluntary unincorporated associations; and it is well settled that where the members of such an association are too numerous to be joined in the action, or where the society is composed of very many members, one or more of the members may sue on behalf of all the interested parties. * * * Under this general rule, a suit may be brought by the officers of the association or a committee appointed or authorized to prosecute it." 4 Am.Jur., Associations & Clubs, §§ 48, 49. Our law provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Code Civ.Proc. § 382. That provision applies to actions at law as well as equity, *Weaver v. Pasadena Tournament of Roses*, 32 Cal.2d 833, 837, 198 P.2d 514, and in regard to proceedings such as mandamus "Except as otherwise provided in this title (under which mandamus falls), the provisions of part two of this code (the part in which section 382 appears) are applicable to and constitute the rules of practice in the proceedings mentioned in this title." Code Civ.Proc. § 1109.

In *Funeral Directors Ass'n v. Board of Funeral Directors*, 67 Cal.App.2d 311, 154 P.2d 39, it was held that a non-profit corporation of funeral directors composed of persons in that business had not sufficient interest to annul by mandamus an order of the State Board of Funeral Directors granting probation to a licensee whose license it had revoked. In *Associated Boat Industries v. Marshall*, 104 Cal.App.2d 21, 230 P.2d 379, it was held that a non-profit corporation whose members consisted of those in certain industries who were affected by an administrative regulation had not sufficient interest to attack it in an action for declaratory relief under Government Code, section 11440, authorizing such action by any interested persons. Assuming the correctness of those decisions they did not involve a public duty of general public importance, such as section 425 of the Charter, *supra*, nor were the associ-

ations unincorporated and thus without right to sue.

It is defendants' position that a court will not intervene in this dispute because an ordinance fixing the salaries and wages is legislative and its determination that the salaries fixed are in accord with prevailing rates cannot be questioned except for fraud or corruption; that section 425 of the Charter, supra, is directory only.

In *City and County of San Francisco v. Boyd*, 22 Cal.2d 685, 140 P.2d 666, this court considered the charter of the City and County of San Francisco which placed the duty to fix salaries and wages on the Board of Supervisors. It was the duty of the Civil Service Commission to make an investigation and prepare a schedule of rates to be submitted to the board and 22 Cal.2d at page 688, 140 P.2d at page 667: "*The compensations fixed as herein provided shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state*". The salaries and wages fixed thereunder were attacked as being in excess of the prevailing rate elsewhere. It was held that, 22 Cal.2d at page 690, 140 P.2d at page 668: "The determination whether proposed rates of compensation are in accord or in harmony with generally prevailing rates is within the discretion of the rate-making authority. The courts will not interfere with that determination unless the action is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law", and, 22 Cal.2d at page 692, 140 P.2d at page 669: "an ordinance is invalid if the mandatory prerequisites to its enactment are not substantially observed". Also, it is implicit in that decision that the charter provision imposed a mandatory duty on the board to adopt a prevailing compensation rate and it has been so interpreted, *Adams v. City and County of San Francisco*, 94 Cal.App.2d 586, 211 P.2d 368, 212 P.2d 272; see *Adams v. Wolff*, 84 Cal.App.2d 435, 190 P.2d 665. Section 425 here involved is substantially the same as the court considered in *City and County of San Francisco v.*

Boyd, supra, 22 Cal.2d 685, 140 P.2d 666, hence it is not necessary to rely upon *Adams v. Wolff*, supra, 84 Cal.App.2d 435, 190 P.2d 665, where the court dealt with an amended version of the San Francisco charter provision. It is clear, therefore that section 425 is mandatory.

Defendants contend the standard fixed by section 425 is general and vague, leaving complete and unbridled discretion in the council. It is true that such phrases as "quality of service" and "similar employment" are general and flexible leaving much for determination by the council but a "reasonable or just" correspondence between the rates paid by private industry and the city is to be ascertained. I do not take the same "quality" of service to mean of the same competence or perfection. While that is one of the definitions of "quality," it also means of the same class or nature of service, such as a carpenter. Webster's Int. Dict., 2nd ed., p. 2031. The prevailing rate may be ascertained and it is done in many cities.

The question is, therefore, whether the city's action was "fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion". *City and County of San Francisco v. Boyd*, supra, 22 Cal.2d 685, 690, 140 P.2d 666, 668. I believe the petition is sufficient on that point without reaching the question of whether there was an abuse of discretion in fixing the amount of the compensation as compared to that paid in private industry. It will be recalled that it is alleged in the petition, quoted supra, that although defendants had the data of wage rates in private industry and also government units, they refused to give any consideration to it in passing the ordinance. The refused to consider the most cogent evidence available, conduct which would constitute a denial of due process in a judicial proceeding. Certainly such refusal was arbitrary under the test stated in the *Boyd* case, supra.

Furthermore, the compensation fixed may be so completely out of line with that prevailing in private industry that the action of the council would be arbitrary and palpably unreasonable under the test stated in *City and County of San Francisco v. Boyd*,

supra, 22 Cal.2d 685, 140 P.2d 666. A provision such as section 425 of the Charter is, in the language of Justice Cardoza used when he was Chief Justice of the New York Court of Appeals, “* * * an attempt by the state (the people of the city here) to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen, and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view.” *Austin v. City of New York*, 258 N.Y. 113, 179 N.E. 313, 314. The charter of a city within its proper field is the city’s constitution, *Adams v. Wolff*, supra, 84 Cal.App.2d 435, 190 P.2d 665, and the council, the legislative body, must comply with it. It is generally true that the courts will not interfere with a legislative process or determination, see *Johnston v. Board of Supervisors*, 31 Cal.2d 66, 187 P.2d 686; *Santa Clara County v. Superior Court*, 33 Cal.2d 552, 203 P.2d 1, yet: “The character of the action of the city council, called generally the legislative body, in a particular case depends on the nature of the act or duty and the provisions of the statute under which it is performed. Here the statute makes the distinction between nonlegislative and legislative action by directing exercise of the latter function only when the protests are shown to be insufficient.

“This court in other cases has recognized the division between the administrative or other non-legislative function preceding the performance of the legislative act where constitutional or statutory requirements were involved. *McFadden v. Jordan*, 32 Cal.2d 330, 196 P.2d 787; *Gage v. Jordan*, 23 Cal.2d 794, 147 P.2d 387; *Epperson v. Jordan*, 12 Cal.2d 61, 64, 82 P.2d 445, and cases cited.” *American Distilling Co. v. City Council of City of Sausalito*, 34 Cal.2d 660, 665, 213 P.2d 704, 707, 18 A.L.R.2d 1247. In the Sausalito case the precedent fact to be found by the council was whether protests to annexation by a city of additional territory were filed by the owners of more than 50% of the property in the territory. If there were sufficient protests the territory could not be annexed; if insufficient an ordinance of annexation could

be considered by the council. Here the city’s constitution (charter) expressly imposes upon the council the duty of ascertaining the rates of compensation in private industry, a specific factual matter. A specific test with which the ordinance must comply is established. If perchance the prevailing rate in private industry cannot be determined which is very doubtful, then it is excused from the requirement by the last phrase in section 425. While it does not expressly provide that it shall first make a finding on that question (and perhaps hold hearings in aid thereof) before it passes an ordinance fixing its employees’¹ compensation, the clear implication is that such a determination must be made either before or at the time of the adoption of the salary ordinance. Indeed the charter provides that the council and other authority authorized to fix salaries shall appoint a representative to the salary standardization committee (the director of the budget is also a member) which grades and regrades the salaries of all classes of employees so that like salaries shall be paid for like duties and makes its recommendation to the council. (L.A.Charter, § 123.)

The facts alleged are sufficient to state a case. It is charged that the council failed and refused to consider the surveys made by it; that according to the surveys and the city’s rate of compensation the following appears: Plumbers: survey \$435 per month, city pay \$303 to \$375 graduated according to the years of service up to five years with the city; Carpenters: survey \$369 (now \$382) per month, city pay \$259 to \$319 similarly graduated; Laborers: survey, \$273.18 (now \$287.10) per month, city pay \$181.00 to \$221, similarly graduated. Whether there are factors which would defeat plaintiff’s claim of similarity of work and pay in private industry or his other allegations is a matter that should be determined on a trial.

The survey above mentioned was made jointly by the city, Los Angeles County, school district and housing authority. Plaintiff obtained a subpoena duces tecum ordering Howard E. Earl to produce at the taking of his deposition the survey and data upon which it was based. Earl’s move to

quash the subpoena was granted as to the deposition but as to trial he was required to attend and bring the papers except those parts showing the names and identities of the persons from whom the data was obtained. Apparently, Earl is the assistant chief administrative officer of Los Angeles County and had charge of making the survey. Plaintiff moved for a reconsideration and an order permitting him to inspect and copy the survey. This was denied. Plaintiff complains, on this appeal from the judgment, of those denial orders as being erroneous. Defendants reply that those orders were intermediate and do not affect the judgment or plaintiff's rights and are thus not reversible on appeal from the judgment; further, that as plaintiff took no exception to them he has waived any objection to them.

It should be observed that the ground for quashing the subpoena for the deposition and in part for the trial was because of the claimed confidential character of the names and identity of the employers from whom the data was obtained, a question considered by this Court in *City & County of San Francisco v. Superior Court*, 38 Cal.2d 156, 238 P.2d 581. It was there held that the right to inspect public records, Gov.Code, § 1227; Code Civ.Proc. §§ 1888, 1892, did not extend to confidential records under Code of Civil Procedure, section 1881(5), and that the names and identity of the employers furnishing data to the official for ascertaining the prevailing wage rate could and should be withheld. The case refrained from deciding what effect, if any, the withholding of such information would have upon proceedings in mandate attacking the rate of compensation fixed by the city. On that basis alone a portion of the orders of denial could be found valid. Thus the motion for an order to inspect and copy the survey should have been denied insofar as the inspection extended to the names and identities of the employers giving information and the information given by particular employers, but the right to inspect the survey insofar as it related to the method used, the qualifications of the

persons making it, all of which were requested by the motion, is clear.

Under section 1000 of the Code of Civil Procedure an order may be obtained on motion to inspect and copy any paper containing material evidence and in the possession or control of the other party. No appeal lies from an order granting or denying a motion under section 1000 for it is not a final order or judgment in a collateral matter and is not listed as an appealable order in section 963 of the Code of Civil Procedure. See *Collins v. Corse*, 8 Cal.2d 123, 64 P.2d 137; *Union Oil Co. v. Reconstruction Oil Co.*, 4 Cal.2d 541, 51 P.2d 81; *Franchise Tax Board v. Superior Court*, 36 Cal.2d 538, 225 P.2d 905; *In re Estate of Brady*, 32 Cal.2d 478, 196 P.2d 881. While mandamus will lie to attack the order, *Austin v. Turrentine*, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178, such order may be reviewed on appeal from the judgment because it "substantially affects the rights of a party." Code Civ.Proc. § 956. The granting or denial of a motion to quash a subpoena is not appealable and may be attacked by mandamus, *Wemyss v. Superior Court*, 38 Cal.2d 616, 241 P.2d 525, and is reviewable on appeal from the judgment. Code Civ.Proc. § 956; *Brown v. Superior Court*, 34 Cal.2d 559, 562, 212 P.2d 878; see *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 159 P.2d 944.

I refer to the orders of denial of the right to inspect in part and quashing of the subpoena in part as affecting the substantial rights of a party. Clearly they do, because one of the very questions at issue is whether the council acted arbitrarily, and necessarily involved therein were the surveys made and the method of making them. Hence, insofar as plaintiff was deprived of his right to take the deposition and inspect the surveys, excepting the names and identity of the employers furnishing data and the rate of compensation of particular employees, the trial court was in error. It is not necessary to decide whether it was necessary for plaintiff to take exception to the orders because the judgment should be reversed on the grounds heretofore mentioned.

40 Cal.2d 498

ELBERT, Ltd. v. CLARE et al.

L. A. 22250.

Supreme Court of California, in Bank.

March 17, 1953.

Partition action brought against, inter alia, defendant claiming title through tax deed, by plaintiff claiming under treasurer's deed issued to its assignor as purchaser at sale held in connection with foreclosure of street improvement bond. The Superior Court, Los Angeles County, Arthur Crum, J., rendered judgment favoring plaintiff, and the aforementioned defendant appealed. The Supreme Court, Spence, J., held that notwithstanding its determination that the bond foreclosure proceedings had been ineffective, the trial court had properly declared plaintiff's lesser interest as the basis for granting appropriate relief.

Affirmed.

Prior opinion 245 P.2d 368.

1. Municipal Corporations ¶583

Notwithstanding finding that proceedings for foreclosure of street improvement bond had been ineffective, and that treasurer's deed issued after foreclosure was void, lien of unpaid bond continued and was subject to appropriate enforcement by assignee of purchaser at invalid foreclosure sale. Streets and Highways Code, § 6572.

2. Partition ¶17(2)

Where plaintiff claiming title to property by treasurer's deed issued after foreclosure of street improvement bond sued for partition of property, trial court's determination that treasurer's deed was void did not preclude trial court from declaring lesser interest as basis for granting appropriate relief. Gen.Laws 1937, Act 8199; Revenue and Taxation Code, § 3691 et seq.; Code Civ.Proc. § 752.

3. Partition ¶16

Assignee of purchaser at invalid sale held in connection with foreclosure of street improvement bond was entitled, without reforeclosing bond, to partition in its action against, inter alia, claimant under tax deed, validity of which was not attacked. Gen.Laws 1937, Act 8199; Rev-

enue and Taxation Code, § 3691 et seq.; Code Civ.Proc. § 752.

4. Partition ¶81

In action by assignee of purchaser at invalid sale held in connection with foreclosure of street improvement bond for partition as against, inter alia, claimant under tax deed, tax deed grantee's statutory right of redemption would not be applicable, since otherwise provisions of partition statute, which affords relief to holder of lien on parity with that on which owner's title is based, would be nullified. Code Civ.Proc. § 752; Streets and Highways Code, §§ 6530, 6572.

Arthur E. Briggs, Los Angeles, for appellant.

John F. Bender, Compton and Gizella M. Allen, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action for partition pursuant to section 752 of the Code of Civil Procedure. It claimed title to the property by treasurer's deed issued after foreclosure of a street improvement bond authorized under the Improvement Act of 1911, Stats.1911, p. 730; Deering's Gen. Laws 1937, Act 8199. Defendant claimed title through a tax deed issued after conveyance to the state for the nonpayment of taxes. Revenue and Taxation Code, Div. 1, Pt. 6, Ch. 7. Judgment for partition was entered and the rights of the parties were decreed thereunder. Our review of the record convinces us that defendant's challenge of the jurisdiction of the court to render such judgment and the propriety of its terms is without merit.

At the trial plaintiff did not attack the validity of defendant's tax deed, but the latter did successfully attack the validity of plaintiff's treasurer's deed. The trial court concluded that defendant was the owner of the property; that plaintiff's treasurer's deed and the certificate of sale upon which it was based were both void; that plaintiff was the owner of the street improvement bond in question; that the

amount due on plaintiff's bond (\$1,086.40) and the amount paid for defendant's tax deed (\$250) constituted liens against the property; and that said liens were on a parity. Accordingly, the court ordered the property to be sold by designated referees and the proceeds derived from the sale to be applied in this order: (a) payment of the referees' fees and expenses; (b) payment of plaintiff's and defendant's costs of action; (c) allowance of a reasonable sum to plaintiff for counsel fees; (d) satisfaction of plaintiff's and defendant's respective liens, pro rata; and (e) payment of the balance, if any, to defendant holder of the tax deed.

In *Elbert, Ltd. v. Nolan*, 32 Cal.2d 610, at page 615, 197 P.2d 537, partition was declared to be the proper statutory remedy where the plaintiff's lien is on a parity with that on which the owner's title is based. Code Civ.Proc. § 752. There, however, plaintiff's claim was predicated on the ownership of unpaid street improvement bonds on which no foreclosure proceedings had been taken, while here such proceedings were taken but were ineffective because of the failure to comply with certain statutory requirements. Defendant maintains that in these differing circumstances the only course open to the trial court was to order a reforeclosure of the bond. Streets and Highways Code, § 6572. The cited section provides: "If any sale of lands for delinquency in the payment of principal or interest of any bond is held illegal or invalid, or any deed issued to the purchaser at any such sale is held illegal or invalid for any reason whatsoever, the lands described in the bond shall not be released from the lien of the assessment but shall be and remain subject to further proceedings for the enforcement of the assessment, and the further proceedings *may* include additional sales or the issuance of new deeds. In any event, however, the lien of the assessment shall continue only until a valid sale is had and a valid deed issued, or until the expiration of two years after such sale or deed is held illegal or invalid, whichever is sooner." (Emphasis added.) This section clearly does not purport to limit the bondholder's right to the taking of further sale proceed-

ings and the procurement of a new treasurer's deed, but rather provides such course as only an optional means for the enforcement of the assessment consistent with the continuance of the lien for the stated period.

[1,2] Upon the trial court's finding that plaintiff's foreclosure proceedings were ineffective and the treasurer's deed was therefore void, the lien of the unpaid bond continued, Sts. & Hy.Code, § 6572, and was subject to appropriate enforcement by plaintiff as the assignee of the purchaser at the invalid foreclosure sale. *Burns v. Hiatt*, 149 Cal. 617, 624, 87 P. 196. Partition is an equitable action, and in the disposition thereof the trial court will determine the interests of all parties involved so as to effect a complete adjudication of the controversy and avoid a multiplicity of suits. *Adams v. Hopkins*, 144 Cal. 19, 29, 77 P. 712; *Akley v. Bassett*, 189 Cal. 625, 647, 209 P. 576; see 10 Cal.Jur. sec. 41, p. 496. In such action the fact that plaintiff was not entitled to prevail on its claim of legal title under the foreclosure proceedings did not preclude the trial court from declaring a lesser interest as the basis for granting appropriate relief. *Peterson v. Gibbs*, 147 Cal. 1, 5, 81 P. 121; *Sears v. Rule*, 27 Cal.2d 131, 149, 163 P.2d 443; *Hendershott v. Shipman*, 37 Cal.2d 190, 194, 231 P.2d 481; *Hurt v. Pico Investment Co.*, 127 Cal.App. 106, 113-114, 15 P.2d 203. The established invalidity of the foreclosure proceedings and the treasurer's deed issued thereafter relegated plaintiff to the position of a holder of an unencumbered bond lien. Sts. & Hy.Code, § 6572. The street improvement bond was in evidence and the amount due thereon appeared from the admitted record of the ineffective sale proceedings. Upon such basis the trial court computed the total sum owing on the unpaid bond as the lien indebtedness, and defendant at the trial made no objection as to the correctness of such computation. While from this evidence plaintiff was unable to prevail on its alleged claim of title to the property as a tenant in common with defendant, the precise origin, nature and extent of its equitable interest clearly appeared as the premise for relief in the trial court's adjustment of the rights of the par-

ties. In short, the respective interests of both parties in the property were placed squarely in issue for disposition by the trial court, and the evidence showed that plaintiff was within the category of those authorized to sue for partition. Cf. *Gunn v. Gunn*, 102 Cal.App. 606, 607, 283 P. 80. Under these circumstances defendant unavailingly argues the variance between plaintiff's pleading and the evidence substantiating its right to the relief granted.

[3, 4] As above noted, upon the finding of invalidity of the foreclosure proceedings and the treasurer's deed, the lien of the unpaid street improvement bond continued, Sts. & Hy.Code, § 6572, and the case was identical with the situation prevailing in *Elbert, Ltd. v. Nolan*, supra, 32 Cal.2d 610, 615, 197 P.2d 537—a controversy involving the status of an unenclosed bond lien as against a title interest under a tax deed. Having found the lesser interest in plaintiff, *Hendershott v. Shipman*, supra, 37 Cal. 2d 190, 194, 231 P.2d 481, the trial court properly concluded that plaintiff was entitled to partition. Code Civ.Proc. § 752. With the interested parties before the trial court, it would be an idle act for the court to require plaintiff to initiate new foreclosure proceedings, again obtain a treasurer's deed, and then file another action for partition. Defendant argues that unless plaintiff is required to renew foreclosure proceedings incident to the issuance of a proper certificate of sale, Sts. & Hy.Code, § 6572, defendant will be deprived of the statutory right of redemption of the property "within 12 months from the date of purchase". Sts. & Hy.Code, sec. 6530. But such statutory right cannot be said properly to apply here, for otherwise the provisions of the partition statute, which afford relief to the holder of "a lien on a parity with that on which the owner's title is based," would be nullified. Code Civ.Proc. § 752; *Elbert, Ltd. v. Nolan*, supra, 32 Cal.2d 610, 615, 197 P.2d 537. Rather here, having all the parties in this equitable action before it, the trial court properly determined their rights in accordance with the evidence and rendered judgment effecting a complete settlement of the litigation as authorized

by statute. *Elbert, Ltd. v. Nolan*, supra, 32 Cal.2d 610, 618-619, 197 P.2d 537.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



40 Cal.2d 470

**GRIFFITH v. STATE BAR OF
CALIFORNIA.
L. A. 22506.**

Supreme Court of California, in Bank.
March 13, 1953.

Disciplinary proceeding. The Supreme Court held that there was ground for disciplinary action.

Order in accordance with opinion.

Attorney and Client — 42

Deliberately misleading court may be ground for disciplinary action.

Miller & Sinclair, Loren Miller and Harold J. Sinclair, Los Angeles, for petitioner.

Alfred P. Peracca, Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

The local administrative committee of the State Bar in Los Angeles, recommended that petitioner, an attorney licensed to practice law in this state, be disbarred after finding against him on charges of misconduct as alleged in three counts. The Board of Governors of the State Bar adopted (with some exceptions) the findings of the committee and recommended suspension for two years.

The committee found that petitioner was admitted to practice law in this state on November 15, 1932. As to the first count, that petitioner permitted, aided and abetted

Willie Hawkins, a person not licensed to practice law, to practice law and receive compensation therefor, knowingly accepted professional employment from Hawkins resulting from the latter's activities and that Hawkins solicited persons for their legal business. Hawkins' unlicensed practice was known to petitioner, and he aided in permitting him to use the facilities of his office and to use and distribute cards stating that Hawkins was connected with petitioner, an attorney at law. More particularly, on June 30, 1950, Hawkins solicited Vanderbush and Mrs. Kelley, representing that he could obtain a divorce for Mrs. Kelley from her husband. Hawkins obtained a divorce in Texas for Mrs. Kelley and she and Vanderbush were thereafter married. Mrs. Kelley was later charged with bigamy. In January, 1951, petitioner, through the solicitation of Hawkins, was employed by Vanderbush and Mrs. Kelley to annul their marriage and represent her in the bigamy case. The committee found that Hawkins was convicted of practicing law without a license, Bus. & Prof.Code, §§ 6125, 6126. The Board eliminated the latter finding.

On count two it was found that in the representation of Vanderbush and Mrs. Kelley, petitioner filed a complaint for annulment, knowing of the Texas divorce of Mrs. Kelley, and told her and Vanderbush that the Texas divorce was void because Mrs. Kelley had never been in Texas and hence was not a resident there. At the hearing in the annulment proceeding petitioner introduced the Texas divorce judgment which recited that Mrs. Kelley appeared in person (which he knew was not true) and failed to advise the court that she had never been in Texas or resided there. As a result of that misleading statement the court held the Texas judgment valid and denied annulment.

The third count deals with Mrs. Alva Porter who was married to Carol Porter. She employed petitioner to obtain a divorce for her from Porter. At the same time, Oran McDonald employed him to get an annulment of his marriage to Alva, it appearing that she was still married to Porter. She was a resident of California and

never had been in Texas. Petitioner made arrangements with Hemphill, a Texas attorney, to get the divorce in Texas. Hemphill obtained the divorce and sent a copy of the judgment to petitioner which he gave to Alva. The judgment recited that Alva was a resident of Texas and personally appeared in the action. Neither was true and petitioner knew it but he advised Alva that the judgment was valid.

It was found, as amended by the Board, that petitioner has a previous disciplinary record: "suspension by the Supreme Court for a period of three years, effective May 20, 1945, upon the basis of the record in a State Bar disciplinary proceeding entitled L.A. 1179—Lloyd Cornelius Griffith (Mrs. Leon Russell, complaining witness); a public reproof administered by the Board of Governors on June 22, 1945, upon the basis of a State Bar disciplinary proceeding entitled L.A. 1195—Lloyd Cornelius Griffith (Perry Buckner, complaining witness); and suspension by the Supreme Court for a period of one year, effective May 20, 1948, upon the basis of the record in a State Bar disciplinary proceeding entitled L.A. 1194—Lloyd Cornelius Griffith (Mrs. Minnie McFadden, complaining witness)."

It was concluded that petitioner had violated his oath, Bus. & Prof.Code, §§ 6103, 6067, 6068, rule 3 of the Rules of Professional Conduct, and had committed acts involving moral turpitude and dishonesty, Bus. & Prof.Code, § 6106.

Petitioner contends the evidence is not sufficient to support the findings.

On the first count the evidence shows that petitioner had known Hawkins for over ten years and they were quite friendly. Petitioner had represented Hawkins in several legal matters including some law suits. Hawkins was taking an extension course in law and sometimes used petitioner's library; he also occasionally served papers and ran other errands for petitioner. Apparently he had been engaged in a wholesale business of obtaining Texas divorces for persons in California, but petitioner did not know of his extensive activities until after complaints were filed against Hawkins in July, 1951, for unlawful practice of law; he

represented Hawkins in those criminal proceedings. Hawkins used business cards which bore petitioner's name, describing himself as a personal relations counsel and notary public and "connected with" attorney Griffith (petitioner herein) with the latter's address and telephone number. Petitioner testified that he knew nothing of Hawkins' use of these cards until July 1951, but he prepared and notarized an affidavit executed by Hawkins in which it was said that sometime in the early part of 1951 or latter part of 1950, Hawkins asked petitioner for permission to put petitioner's telephone number on his cards and that he was connected with petitioner. Petitioner gave his permission provided Hawkins would use it only in petitioner's business. Two or three weeks later, however, when Hawkins showed the cards to petitioner the latter ordered their destruction.

Mrs. Kelley, or Mrs. Vanderbush, and Vanderbush, both being married, contacted Hawkins by recommendation of a friend of Mrs. Kelley's to obtain Texas divorces for them which he did for \$120 each. Hawkins exhibited one of his cards to them and told them to contact petitioner if there was any difficulty. Mr. Kelley had obtained an interlocutory decree of divorce in California from Mrs. Kelley-Vanderbush and custody of their children. Mrs. Kelley-Vanderbush, by reason of Hawkins' recommendation, telephoned petitioner for an appointment in 1951 and later called to discuss proceedings to modify the custody award. When she got to the office Hawkins was there and introduced her to petitioner and remained during the consultation. Later the Vanderbushes made several business calls on petitioner at one or two of which times they said Hawkins was present. Petitioner testified that he was present only at the first visit. The second call was after Mrs. Kelley-Vanderbush had been advised that a warrant for her arrest for bigamy had been issued. She consulted petitioner in regard to representing her on that charge, and when she showed him her Texas divorce, he told her it was invalid because she had never been in Texas. Petitioner advised Vanderbush to commence

annulment proceedings to show good faith and thus help on the defense of the bigamy charge. That was done, the matter was heard and annulment denied, the Texas judgment being held valid. The Vanderbushes testified that petitioner said he would not charge for his representation of them in the bigamy and annulment proceedings because Hawkins had gotten them in trouble and he would try to get them out. Petitioner testified that while no charge for the services was fixed at the time, the Vanderbushes assured him they would compensate him later.

While the foregoing might furnish some basis for the inference that petitioner permitted Hawkins to use his office for the practice of law, permitted the use of his name on Hawkins' cards, and that the Vanderbush business was solicited by Hawkins for petitioner with his knowledge, we are not disposed to rely thereon as a basis for disciplinary action in the face of petitioner's positive testimony that he never authorized Hawkins to solicit business for him or use his name or office in the conduct of his business. While he did testify that he had an idea Hawkins had arranged for the procurement of Texas divorces prior to his consultation with the Vanderbushes, he also said he had no such arrangement with him. It is also true that Hemphill was the same attorney petitioner used in the McDonald proceedings but that is far from showing solicitation. Moreover, there is no evidence from which it may be inferred that petitioner shared or had an agreement to share any fees charged by Hawkins to the Vanderbushes or anyone else.

The second count also concerns the representation of the Vanderbushes. The evidence shows that petitioner represented them in the bigamy and annulment proceedings. Petitioner knew and advised them that Mrs. Kelley's Texas decree was invalid because she had never been in Texas. At the hearing of the annulment case petitioner did not have proof of the former marriage of Mrs. Kelley-Vanderbush. He put Vanderbush on the stand and he testified to their marriage and that she had not been divorced. Whereupon the court asked

what he had to prove the former marriage, to which petitioner replied that Mrs. Kelley-Vanderbush was present and she had relied upon a Texas decree. The court asked if he had the record, to which he replied that he had a record of the Texas decree, and the court asked for it. Petitioner stated that the decree was being "questioned." To the court's query of who questioned it, petitioner stated her former husband did. The court replied that his (the former husband's) question did not amount to anything, to which petitioner answered that he agreed, and although a bigamy charge had been filed against Mrs. Kelley-Vanderbush, it was his position that the decree was valid; that neither of the parties wanted an annulment. When the court ruled that there should be no annulment and none would be granted because of the asserted invalidity of the Texas decree, petitioner stated that is what he wanted.

The judgment given was a denial of an annulment and declaration that the Texas decree was valid. The Texas decree appeared to be valid on its face inasmuch as it recited (albeit falsely) the personal appearance and Texas residence of the parties. There can be no doubt but that petitioner misled the court because he knew that the Texas decree was invalid for the reason that both Mr. and Mrs. Kelley were in California and were not domiciled in Texas at the time the action for divorce was commenced. There was no reasonable basis for him to assert that he could not tell whether the Texas decree was void due to the complexity of the law on the validity of out of state divorces because in this case it would be obvious to any lawyer that the decree was invalid. He endeavors to excuse his behavior by asserting that, inasmuch as he was representing Mrs. Kelley in defense of the bigamy charge, it would endanger her cause therein to have it appear that the Texas divorce was not valid and hence she was still married to Kelley when she married Vanderbush. That is not a satisfactory explanation because it would appear that in a sense he was representing conflicting interests, that is, Mrs. Kelley in the bigamy case and Vanderbush in the annulment proceeding. It is patent that he

did not want an annulment but rather a declaration of the validity of the Texas decree and he achieved that result by leading the court to believe that the Texas decree was valid when he knew it was not. The second count presents, therefore, grounds for disciplinary action.

The third count condemns petitioner for falsely advising his client Alva Porter McDonald that a Texas divorce decree obtained for her by petitioner through Hemphill, an attorney in Texas, was valid. Alva had married Carol Porter in 1942 in Georgia, separated from him in 1944 and came to California where she resided continuously from early 1945. She married Oran McDonald in April, 1949.

According to Alva's testimony she resided in Texas before she married Carol in Georgia, and in 1944, separated from him in Texas where he remarried. She came to California. She first consulted petitioner in November, 1949, with reference to the existence of her marriage to Carol in connection with a Veterans' Administration matter. Various consultations followed in which she told petitioner she had married McDonald but there was no divorce from Carol; that she lived in Los Angeles County, California, where she was married; that she and Carol separated in Texas, and Carol was probably there. She made arrangements to have petitioner obtain a divorce for her in Texas, the divorce there being her idea. Petitioner said he knew an attorney in Texas and the divorce there would be legal. The fee was \$175 for the divorce and for an annulment for McDonald. She signed the Texas divorce papers presented to her by petitioner. The Texas attorney was Hemphill. She received the Texas decree in June, 1950, by mail from petitioner. It was issued by the court in Dallas County. No annulment proceedings were filed for McDonald and it appears that \$100 of the \$175 fee was returned by petitioner to McDonald. The Texas decree contained recitals of her residence in Texas and personal appearance there for the divorce proceedings.

Petitioner testified that he referred the divorce case to Hemphill who had previously handled a property matter for him and

that the latter sent an interrogatory for Alva to sign and he had her do so; that when he received the decree he sent it to Alva with a letter advising her it was valid and advising the McDonalds to remarry; that he believed a wife (Alva) might retain the domicile of her husband in Texas and that the decree was valid because Hemphill had so informed him; that he was ignorant of the Texas divorce law. Thus he asserts that mere good faith ignorance of the law in conducting a client's affairs is not ground for discipline, see *Friday v. State Bar*, 23 Cal.2d 501, 144 P.2d 564, and that is especially true in a field such as the validity of divorce decrees where the law is far from certain. However, it is not necessary to determine whether this count (count three) is sufficient to justify disciplinary action in view of the result reached on count two.

In view of the previous record of petitioner, *supra*, we believe the punishment recommended is supportable because of petitioner's conduct as charged in count two. Therefore, it is ordered that petitioner be, and he is hereby, suspended from the practice of law for a period of two years, this order to become effective 30 days from the filing of this decision.



40 Cal.2d 477

FRENCH v. RISHELL et al.**S. F. 18728.**

Supreme Court of California, in Bank.

March 13, 1953.

Mandamus proceeding for widow's pension from fireman's relief and pension fund. The Superior Court, Alameda County, Ralph E. Hoyt, J., entered an order granting the writ, and defendants appealed. The Supreme Court, Gibson, C. J., held that the finding of the Industrial Accident Commission upon the widow's application for benefits, which application was resisted by the city as the husband's employer, that the husband's death arose out of his employment, was res judi-

cata on that issue, in view of fact that the board acted merely as an agent of the city, which was the real party in interest, notwithstanding that burden of proof before Commission was less than that before the pension board.

Affirmed.

Prior opinion, 248 P.2d 46.

1. Judgment ⇨540

The doctrine of "res judicata" is applicable where identical issue was decided in prior case by final judgment on merits and party against whom plea is asserted was party or in privity with party to prior adjudication.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Judicata".

2. Workmen's Compensation ⇨1789

The Industrial Accident Commission exercises adjudicatory functions and has power to make final determinations on questions of fact.

3. Workmen's Compensation ⇨1791

Fact that burden of proof was less before Industrial Accident Commission than it was before pension board did not preclude application of res judicata rule on issue on whether fireman's death arose out of and in course of his employment. Labor Code, §§ 3212, 5708, 5709.

4. Judgment ⇨547

In order that adjudication in one tribunal should be regarded as res judicata upon matters there determined when they come again in question in another tribunal, it is not necessary that same rules of law, practice or evidence should prevail in both tribunals, but it is only essential that party should have been given one opportunity for judicial determination of issue by tribunal having requisite authority and proceeding in manner recognized as due process of law.

5. Workmen's Compensation ⇨1792

Finding of Industrial Accident Commission on widow's application for benefits that fireman's death occurred in scope of his employment was res judicata on that issue in subsequent mandamus proceeding against city's pension board for widow's pension, despite contention that giving such effect to such finding would deprive pen-

sion board of its power to deal with funds in its care.

6. Workmen's Compensation §1792

Finding of Industrial Accident Commission, on application for widow's benefits, resisted by city as husband's employer, that death arose out of husband's employment, was *res judicata* on that issue in subsequent mandamus proceeding against city's pension board to obtain widow's pension, in view of fact that board acted merely as agent of city, which was real party in interest.

John W. Collier, City Atty., and Daniel J. McNamara, Deputy City Atty., Oakland, for appellants.

Carroll, Davis & Freidenrich, Roland C. Davis and J. D. Burdick, San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiff, the widow of a captain in the Oakland Fire Department, sought to compel the city of Oakland and its Board of Trustees of the Firemen's Relief and Pension Fund to pay her a pension pursuant to provisions of the city charter. A writ of mandate was granted on her motion for summary judgment on the pleadings, and defendants have appealed.

In a prior proceeding before the Industrial Accident Commission plaintiff asserted that her husband's death resulted from a heart attack, and the commission in making its award found that his death proximately resulted from an injury occurring in the course of and arising out of his employment. Thereafter plaintiff made application to the pension board pursuant to section 104 of the city charter,¹ which provides for the payment of a pension to the family of a member of the fire department who dies as a result of an injury or disability incurred while in the performance of his duty. The board denied the application, and the present proceeding was then brought. The

complaint incorporated a copy of the prior award and alleged that the time for appeal had passed and that the award had become final. It was also alleged that the husband's death was due to a coronary occlusion caused by exertions, emotional and physical strains, exposures to smoke, heat, water and fumes, suffered by him in the performance of his duties. The answer denied that the death resulted from injuries suffered by the husband in the performance of his duties, but it admitted that the Industrial Accident Commission had made its findings and award as alleged, that the time for appeal had passed and that the city had failed to seek any review of the award which had become final.

[1] The sole question presented on this appeal is whether the decision of the Industrial Accident Commission is *res judicata* and binding on the pension board. The doctrine of *res judicata* is applicable where the identical issue was decided in a prior case by a final judgment on the merits and the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication. *Bernhard v. Bank of America Nat. Trust & Savings Ass'n*, 19 Cal.2d 807, 813, 122 P.2d 892. No question is raised as to the identity of the issue involved or as to whether the decision of the commission is a final adjudication, but defendants claim that a decision of the commission is not binding in this type of case and that the pension board is not bound because it was not a party to the prior proceeding.

[2] The Industrial Accident Commission exercises adjudicatory functions and has the power to make final determinations on questions of fact. See *Schaller v. Industrial Accident Comm.*, 11 Cal.2d 46, 50-51, 77 P.2d 836; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 410-413, 156 P. 491; see also 24 Cal.L.Rev. 328. In a number of cases it has been held that findings of the commission are *res judicata* in subsequent civil proceedings where the same

1. Section 104 provides "(1) the Board of Trustees shall, out of the Firemen's Relief and Pension Fund, provide for the family of a member of the Department who may die as a result of an injury or

disability incurred while in the performance of his duty as follows:" and then specifies the pension to be paid a widow or other dependents.

facts are in issue. *Liberty Mut. Ins. Co. v. Superior Court*, 62 Cal.App.2d 601, 609-611, 145 P.2d 344; *Goodman Bros. v. Superior Court*, 51 Cal.App.2d 297, 301-303, 124 P.2d 644; *Gerini v. Pacific Employers Ins. Co.*, 27 Cal.App.2d 52, 54-55, 80 P.2d 499; *Williams v. Southern Pac. Co.*, 54 Cal. App. 571, 574-575, 202 P. 356, certiorari denied 258 U.S. 622, 42 S.Ct. 315, 66 L.Ed. 796; see *United States Fidelity & Guaranty Co. v. Superior Court*, 214 Cal. 468, 470-471, 6 P.2d 243; cf. *Goodspeed v. Great Western Power Co.*, 33 Cal.App.2d 245, 264-265, 91 P.2d 623, 92 P.2d 410 [Railroad Com.]; *Duprey v. Shane*, 39 Cal.2d 781, 249 P.2d 8, finding that plaintiff suffered an injury compensable under the Workmen's Compensation Act; *Merino v. Pacific Coast Borax Co.*, 124 Cal.App. 336, 340-341, 12 P.2d 458. See also annotation 122 A.L.R. 550, 551-552, 614-617.

[3,4] It is nevertheless urged by defendants that the doctrine of res judicata should not be applied in cases like the present because the plaintiff's burden of proof was less before the Industrial Accident Commission than it was before the pension board. Under section 3212 of the Labor Code,² as it read at the time of deceased's death in March 1949, it would be presumed, in the absence of contrary evidence, that heart trouble which manifested itself during a city fireman's employment arose out of and in the course of his employment. This section was applicable to the workmen's compensation proceedings, but the presumption was not available to plaintiff before the pension board. We are of the opinion, however, that the difference in burden of proof does not justify any exception to the general rule of res judicata. See *Keith v. Alger*, 114 Tenn. 1, 85 S.W. 71; *Putnam v. Clark*, 34 N.J.Eq. 532; cf. *Hilton v. Guyot*, 159 U.S. 113, 202, 16 S.Ct. 139, 159, 40 L.Ed. 95. As stated in 2 Freeman

on Judgments, 5th Ed., section 641, pp. 1349-1350, "In order that an adjudication in one court or tribunal should be regarded as res judicata upon the matters there determined when they come again in question in another tribunal, it is obviously not necessary that the same rules of law, practice or evidence should prevail in both tribunals. The attempt to impose any such limitation would defeat the whole purpose of the rule. * * * All that is essential therefore is that a party should have been given one opportunity for the judicial determination of an issue by a tribunal having the requisite authority and proceeding in a manner recognized as due process of law." See also 3 Freeman on Judgments, 5th Ed., §§ 1463, 1465, 1498, pp. 3006, 3009, 3075. The Industrial Accident Commission, from its early days, has not been bound by common law or statutory rules of evidence and procedure, and, in addition to being allowed to receive hearsay evidence and to proceed informally, it has been authorized and permitted to adopt decidedly less stringent rules and regulations. See Labor Code, §§ 5708, 5709; Stats.1917, pp. 831, 871; 27 Cal.Jur., §§ 148-149, pp. 478-481. Despite these procedural differences, there are, as we have seen, a number of cases in which the doctrine of res judicata has been applied to determinations of the commission.

[5] Defendants rely on *Schmidt v. Pension Board*, 63 Cal.App.2d 439, 446, 147 P.2d 90, where the District Court of Appeal, in holding that a finding similar to that involved here was not binding on a municipal pension board, reasoned that a contrary holding would result in giving the Industrial Accident Commission power to deal with funds in the care of the pension board and would deprive that board of its powers and duties. It is clear, however, that a pension board is deprived of no power in such a case except the power to

2. Section 3212 of the Labor Code then provided in part that "in the case of members of such [city] fire departments * * * the term 'injury' includes * * * heart trouble which develops or manifests itself during a period while such member is in the service of such

department" and that "Such * * * heart trouble * * * so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment unless there is evidence to the contrary." Stats. 1947, p. 2721.

make an independent finding on an issue of fact previously determined by another tribunal. This limitation is, of course, inherent in the doctrine and is a necessary result in every case in which it is applied. The Schmidt opinion does not mention any of the cases cited above, and the only authority given in support of its holding is *Drummond v. Drummond*, 39 Cal.App.2d 418, 103 P.2d 217. The *Drummond* case, however, involved private individuals, and it was not in point because it merely held that a prior judgment was not *res judicata* as against one who was not in privity with a party to the prior litigation. The Schmidt case is therefore disapproved, and *McGrath v. Young*, 98 Cal.App.2d 415, 418, 220 P.2d 609, is also disapproved insofar as it relies on the Schmidt case.

[6] It is immaterial that the pension board was not a party to the Industrial Accident Commission proceeding. The city, which is not only a party herein but the real party in interest, was also a party to and appeared in the prior proceeding. Under the city charter, the pension board acts as an agent of the city, and, in this representative capacity, it is bound by the commission's decision if the city is bound. *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 390-391, 101 P.2d 1092; *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502, 513-514, 258 P. 387; *Servente v. Murray*, 10 Cal.App.2d 355, 360-361, 52 P.2d 270. It is likewise immaterial in the present case whether the pension board be regarded as a mere agent without authority to make any determinations of fact or as a local administrative body with power to make final determinations of fact. In either case, the doctrine of *res judicata* is applicable to uphold the trial court's action.

The writ granted by the trial court directs payment of a pension of half the husband's salary less all proper credits in accordance with section 104(b) of the city charter which provides that payments of compensation for disability or death shall be applied as a credit and set-off against any payment of salary or pension. Plaintiff has not appealed or attacked this deduction, and, accordingly, its propriety is not before us.

The judgment is affirmed.

SHENK, EDMONDS, CARTER,
TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.



40 Cal.2d 436

**STATE BOARD OF DRY CLEANERS
v. THRIFT-D-LUX CLEAN-
ERS, Inc., et al.
L. A. 21666.**

Supreme Court of California, in Bank.

March 10, 1953.

Rehearing Denied April 2, 1953.

Action to enjoin defendant dry cleaner from violating the minimum price schedule established pursuant to the Dry Cleaner's Act. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered a judgment of dismissal and plaintiff appealed. The Supreme Court, Shenk, J., held that statutory provision authorizing State Board of Dry Cleaners to establish minimum price schedules for cleaning, dyeing, and pressing services is unconstitutional.

Judgment affirmed.

Prior opinion, 234 P.2d 220.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

1. Constitutional Law ⚖️81

Police power of state extends to legislation enacted to promote public health, safety, morals and general welfare.

2. Constitutional Law ⚖️81

Police regulations may validly be imposed by state if they constitute a reasonable exertion of governmental authority for public good and, if there is a proper legislative purpose, a law enacted to carry out that purpose, not arbitrary nor discriminatory, must be upheld by courts.

3. Constitutional Law ⚖️81

Legislative body of state may not, under guise of providing for general welfare, impose unnecessary and unreasonable restrictions upon pursuit of useful business activities.

4. Constitutional Law ⇨48

Every intendment will be indulged in favor of constitutionality of a legislative enactment.

5. Constitutional Law ⇨81

Where a business is affected with a public interest or clothed with a public use it may be regulated by state for general welfare.

6. Constitutional Law ⇨208(1)

To be supported by concept of general welfare legislation must aim to promote welfare of a properly classified segment of general public as contrasted with that of a small percentage or a special class of that body politic where no such classification can be justified.

7. Trade-Marks and Trade-Names and Unfair Competition ⇨68(2.2)

Statutory provision authorizing State Board of Dry Cleaners to establish minimum price schedules for cleaning, dyeing and pressing services is not valid as being within police power of state because it does not provide for public health, safety, morals or general welfare. Business and Professions Code, §§ 9560-9567.

8. Administrative Law and Procedure ⇨209
Constitutional Law ⇨62

While delegation of governmental authority to an administrative body is proper in some instances, delegation of absolute legislative discretion is not, and to avoid such result it is necessary that delegating statute establish an ascertainable standard to guide administrative body.

9. Constitutional Law ⇨62**Trade-Marks and Trade-Names and Unfair Competition** ⇨68(2.2)

Statutory provision which authorizes State Board of Dry Cleaners to establish reasonable and just minimum price schedule for services of dry cleaners, dyers and pressers, is unconstitutional as assuming to confer legislative authority upon those directly interested in operation of regulatory rule and its penal provision, since Board includes active members of the industry, and as not providing guide for exercise of delegated authority. Business and Professions Code, §§ 9560-9567.

Edmund G. Brown, Atty. Gen., Alberta Gattone and J. Albert Hutchinson, Deputy Attys. Gen., for appellant.

Robert Kingsley, Los Angeles, amicus curiæ on behalf of appellant.

Adele I. Springer, Beverly Hills, for respondents.

SHENK, Justice.

Plaintiff appeals from a judgment of dismissal after the defendants' general demurrer to the amended complaint was sustained without leave to amend. The demurrer is based on the ground that the minimum price provisions of the Dry Cleaner's Act of 1945, Sections 9560 through 9567, Article 5, Chapter 18 of the Business and Professions Code, under which the plaintiff sought injunctive relief against the defendant's alleged violations of that Act, are in violation of the due process clauses of the state and federal constitutions. The ruling on the demurrer presents the sole question on appeal.

The Act provides for the creation of a State Board of Dry Cleaners consisting of seven members: one from the general public; two owners of retail plants; two owners of wholesale plants; and two owners of shops. Article 5, in Sections 9560 through 9567, provides for "Minimum Price Schedules". Section 9560 empowers the Board to act; Section 9561 permits the members of the Board to have access to cleaning establishments; Section 9562 provides for rules of procedure, notice and hearing. Section 9563 provides:

"The board may establish minimum price schedules for the various items of cleaning, dyeing and pressing services for any city or county or other area as may be determined by the board upon the filing of a petition with it, requesting a minimum price schedule for that * * * area signed by seventy-five per cent (75%) or more of the persons in that * * * area who are licensed under this chapter."

Section 9564 provides:

"Upon receipt of a petition under this article the board shall investigate and ascertain those minimum prices

which will enable cleaners, dyers, or pressers in that city or county or other area to furnish modern, proper, healthful and sanitary services, using such appliances and equipment as will minimize the danger to public health and safety incident to such services.

"In establishing minimum price schedules, the board shall consider all conditions affecting the business of cleaning, dyeing and pressing in that city, county or other area and the relation of those conditions to the public health, welfare and safety."

Section 9565 provides that the Board shall conduct a cost survey and states that "the board shall not fix a price for any service at a sum less than that which is shown to be the cost price of such service * * *."

Section 9566 provides for the readjustment of minimum price levels either on the initiative of the Board or on complaint of fifty-one per cent or more of the persons licensed in the area, if the Board determines that "the minimum price so established or any of them are insufficient properly to provide healthful and proper services to the public and to maintain a clean, healthful, safe and sanitary cleaning, dyeing or pressing establishment, or that any minimum price set creates an undue hardship on any licensee under this act * *."

Section 9567 provides for injunctive relief upon complaint by the Board against violators of the minimum price schedules established by the Board.

In July 1947 seventy-five percent of those licensed by the Board in numerous cities in Los Angeles County petitioned the Board to establish minimum prices in both wholesale and retail fields. Basing its action upon its own cost surveys, the Board established and published its minimum Price Schedules. In September 1949 the Board filed a complaint charging the defendants with violations of the price schedule and with threats to continue to do so. The Board had established a minimum price to be paid for cleaning and pressing a man's suit at \$1. The defendant Thrift-D-Lux Cleaner was charging 69 cents for the same service.

[1,2] If the statute can be sustained as constitutional it is because it is a reasonable exercise of the police power of the state. Under the law generally that power extends to legislation enacted to promote the public health, safety, morals and general welfare. It has rightly been said that "Such [police] regulations may validly be imposed if they constitute a reasonable exertion of governmental authority for the public good. If there is a proper legislative purpose, a law enacted to carry out that purpose, if not arbitrary nor discriminatory, must be upheld by the courts." In re Fuller, 1940, 15 Cal.2d 425, 428, 102 P.2d 321, 324. However, in the exercise of the police power the law places limits on the discretion of the legislature. Whether there has been a reasonable exercise of this power is a court question.

It is first contended by the plaintiff that the price fixing features of the statute were designed to protect the public health and safety. The statutory law in California meets this contention head on for it has made detailed and adequate provisions elsewhere for the protection of the public's health and safety through the regulation of the dry cleaning industry. Chapter 2, Fire Protection—Clothes Cleaning Establishments, and Chapter 3, Fire Protection—Spotting, Sponging, and Pressing Establishments, of Part 2, Division 12 of the Health and Safety Code; Subchapter 4, Dry Cleaning Equipment Employing Volatile and Inflammable Solvents, and Subchapter 5, Spotting, Sponging and Pressing Establishments, of Chapter 1, State Fire Marshal, Title 19, Public Safety, of the California Administrative Code; Article 6, Laundry, Dry Cleaning, and Dyeing Industry, Chapter 5, Division of Industrial Welfare, Title 8, Industrial Relations, of the Administrative Code; Chapter 2, Safety Devices and Safeguards, Part 1, Workmen's Safety, Division 5, Safety in Employment, of the Labor Code. It is not contended that the present statute is invalid merely because the legislature could reach the purported objective through the enforcement of the provisions of the above cited statutes. The previous enactment of these statutes furnish support

for the conclusion that they were designed to and do fully protect the public health and safety and that the price fixing features of the present statute have no function to that end. On the contrary they constitute an unnecessary and unreasonable restriction on the pursuit of private and useful business activities. The asserted objective of those portions of the statute are not in fact their real objective. There is therefore nothing relating to the price charged for such services that has any real or substantial relationship to the public health or safety.

The proponents of the validity of the statute would justify it in the light of troubled conditions which they claim existed prior to World War II, although they are adverse to applying legal concepts generally accepted during that same period. The statute does not purport to be nor can it be justified as a war or emergency measure. During periods of emergency such as a state of war or of general economic distress the courts have recognized a broad legislative discretion dealing with such situations in the interest of the public welfare. It does not appear that at the time this legislation was enacted there was any such general emergency affecting all private businesses alike. There is nothing in the dry cleaning business which distinguishes it from the multitude of other businesses offering services to the general public. The disturbances and violence which are said to have existed in the dry cleaning business during the period of economic stress prior to the last World War were common to other businesses. It is important to note that the statute itself in no way purports to prevent destructive and unfair competition or to suppress violence.

[3, 4] It is claimed that the price fixing portions of the statute were enacted to provide for the general welfare. But a legislative body may not, under the guise of providing for this component of the police power, impose unnecessary and unreasonable restrictions upon the pursuit of these useful activities. If a statute has no real or substantial relation to any legitimate police power objective, it is the duty of the

court to so declare. *McKay Jewelers, Inc., v. Bowron*, 19 Cal.2d 595, 600, 122 P.2d 543, 139 A.L.R. 1188. In this connection it is recognized that every intendment will be indulged in favor of the constitutionality of a legislative enactment. *Hart v. City of Beverly Hills*, 11 Cal.2d 343, 79 P.2d 1080, but the presumption of constitutionality is not conclusive.

[5] The question of the validity of a price fixing law as related to the general welfare was involved in the case of *In re Herrick*, 1938, 25 Cal.App.2d 751, 77 P.2d 262. There the court declared unconstitutional an ordinance which fixed a minimum price for the cleaning of a man's suit of clothes. The declared purpose of the ordinance was "the restoration and maintenance of the highest practical degree of public welfare." The court in that case relied on the decision in *In re Kazas*, 1937, 22 Cal.App.2d 161, 70 P.2d 962, which had declared unconstitutional an ordinance for fixing minimum prices for a hair cut and shave. In considering whether legislation aims to promote the public welfare as a component part of the police power, the court properly recognized that the concept of public welfare had undergone a process of development through the years. Traditionally the power to legislate for the public welfare was not much more comprehensive than the power to legislate for the public health, safety and morals. In *Munn v. Illinois*, 1876, 94 U.S. 113, 24 L. Ed. 77, it was considered that only where a person had entered the field of public service in the use of his property did he consent to its regulation for the public welfare. In this state and elsewhere it is established that at least where a business is "affected with a public interest" or "clothed with a public use" it may be regulated under the general welfare concept. *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 516, 78 L.Ed. 940; *Agricultural Prorate Commissioner v. Superior Court*, 5 Cal.2d 550, 582, 55 P.2d 495. In the *Nebbia* case a New York statute establishing a minimum price for the milk industry of that state was upheld on the ground that the end sought was within the scope of the legislative power of the state to insure an

adequate supply of wholesome milk for public consumption.

It is argued that the "affected with a public interest" doctrine was abandoned in the *Nebbia* case. On the contrary that case may be cited merely for an interpretation of that doctrine. At page 536 of 291 U.S., at page 516 of 54 S.Ct. the court stated that the phrase can mean "no more than that an industry, for adequate reason, is subject to control for the public good." See also *Olsen v. Nebraska*, 313 U.S. 236, 245-246, 61 S.Ct. 862, 85 L.Ed. 1305. If the phrase means only what the Supreme Court has said it means, then it remains an adequate test. It does not imply that some particular industries are and others are not subject to control. It means that where the control is for the public good any industry may be regulated, provided there is "adequate reason" for it. That "adequate reason" can only be to achieve a purpose within the police power of the state. The test emphasizes that the control must be for the "public good." When the "affected with a public interest" doctrine is applied in this sense it is an adequate and proper test. As it was traditionally applied to confine regulation to only those industries in the nature of public utilities it is admittedly no longer so limited.

[6] Regardless of the legal terminology used in defining the test employed, any legislation to be justified and supported by the concept of "general welfare" must aim to promote the welfare of a properly classified segment of the general public as contrasted with that of a small percentage or a special class of the body politic where no such classification can be justified. In the *Kazas* case [22 Cal.App.2d 161, 70 P.2d 968] the court held that the ordinance legislated for the benefit of barbers alone, who made up two per cent of the community, and that the "ordinance does not purport to consider the welfare of the other 98 per cent. of the population of the city nor the effect on them of fixing the minimum prices to be charged for cutting their hair or shaving their masculine faces." It was also held "that on the face of the ordinance it affirmatively appears that the legislation was not intended to promote the general welfare of

the people * * * but only a small group composing a very small proportion of the population * * *." As further evidence that the ordinance did not consider the interests of the general public, the court noted that the ordinance "attempted to pour all barbers and barber shops into a common mold, turning them out exactly alike regardless of skill or efficiency of operation, excellence and completeness of equipment, desirability of location, or expense of conducting business."

The statute before us is not dissimilar to that considered in the *Kazas* case. It seeks to establish but a single grade of work in the dry cleaning industry and to eliminate the economical cleaning job. It does not take into consideration the "skill or efficiency of operation, excellence and completeness of equipment, desirability of location, or expense of conducting business." It does not consider that a substantial group of the public may choose to purchase a cheaper grade of cleaning for particular garments, knowing that they are not obtaining the quality of service offered by more expensive establishments. The statute does not purport to prevent the imposition of fraud upon the public, nor to eliminate destructive and unfair competition, which practices are adequately legislated against in the Unfair Practices Act, Div. 7, Pt. II, Chap. IV, Business & Professions Code. As in the *Kazas* case, this statute would seemingly have the effect of enhancing the economic status of the industry and enlarging the profits of each operator. The record shows that an advance in prices will benefit less than one percent of those persons who comprise the dry cleaning operators in Los Angeles County. On principle the standards here involved are indistinguishable from the standards considered in that case. Indeed it is argued that the circumstances in that case presented an even greater reason for upholding the enactment; that it was decided upon a declared state of emergency in unemployment affecting the peace and welfare of the city, and affecting an industry more personal in nature and therefore more subject to regulation. But the court concluded that "the private advantage

of a small group, not a class, composing a small percentage of the population * * * does not make a price fixing ordinance for that group alone legislation for the general welfare * * *."

The plaintiff seeks a reversal on the ground that since the decision in the Kazas case in 1937 the judicial treatment of legislation dealing with an exercise of the police power has advanced to a point where the principles of that decision should not be controlling. It is particularly asserted that the "error in the Kazas case is the holding that in order to regulate the prices in an industry that industry must be 'clothed with a public use' in the old and traditional sense of that term." However the use of the phrase was in reference only to the fact that the barbering business is not so "clothed with a public interest" that the welfare of the industry itself is directly related to the welfare of the public. The use the court made of the phrase "affected with a public interest" in the Kazas case was in the same sense that the Olsen and the Nebbia cases, *Olsen v. Nebraska*, supra, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; *Nebbia v. New York*, supra, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, had used it, namely, as an aid to determine when a statute provides for the general welfare. This was indicated in the Kazas case by a citation of the following excerpt from *State ex rel. Fulton v. Ives*, 123 Fla. 401, 167 So. 394:

"Such a regulation could be justified only upon the fact that the barber trade is a paramount industry of the state intimately connected with its welfare, so that the state may, through an agency such as the board of barber examiners, prescribe prices for the services to be rendered by each barber.
* * *

"Reduced to its last analysis, the thought underlying the act seems to be not that the barber trade is a paramount industry affecting the general welfare, but that the prosperity of the barber class sufficient to maintain the average barber and his family 'properly' is a sufficient reason for the exercise by the state of the power of direc-

tion, control, and management of the barber business * * *."

Although the Florida Supreme Court in a later decision, *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 1938, 134 Fla. 1, 183 So. 759, 763, 119 A. L.R. 956, upheld the validity of a statute regulating prices in the dry cleaning industry, it reiterated its position in regard to the use of the "affected with a public interest" phrase as employed in its modern sense. The court said: "There is no magic in the phrase, 'clothed with or affected with a public interest.' 'Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public * * *.'" This statement of the doctrine is in accord with its application in the Kazas case. If it may be said that the Florida court in the *Miami Laundry Co.* case abandoned its position in the *Ives* case it apparently did so on the theory that the Supreme Court of the United States had, in the *Nebbia* case, thrown open to price regulation all lines of business legislatively declared to be affected with the public interest and therefore subject to price control. The able dissenting opinions in the *Miami Laundry Co.* case would seem to be clearly in accordance with the weight of authority.

Returning to the Kazas case it must be said that it correctly employed the "affected with a public interest" phrase in the same manner as that phrase was employed in the *Nebbia* case three years earlier. Because of the closeness of the milk industry to the public health the Supreme Court saw fit to classify it as "affected with a public interest", or subject to price regulation for the public good. But it does not follow that all other businesses in which the public is served should fall within the same classification. If they do there is no limit which the legislature is bound to respect and all businesses are subject to its uncontrolled power to fix prices.

The doctrine of the Kazas case has been followed in other jurisdictions. *Kent Stores v. Wilentz*, D.C., 14 F.Supp. 1; *Becker v. State*, 7 W.W.Harr., Del., 454, 185 A. 92,

City of Mobile v. Rouse, 233 Ala. 622, 173 So. 266, 111 A.L.R. 349. The most recent decision declaring unconstitutional a minimum price statute similar to the present case was announced by the Supreme Court of Oregon on April 2, 1952. In *Christian v. LaForge*, Or., 242 P.2d 797, 808, that court declared that "perhaps the best discussion of the subject is to be found in *In re Kazas*, supra." The Oregon court quoted at great length from that opinion and declared invalid the statute before it on the same reasoning. Additional decisions in other states which have expressly followed the *Kazas* case are the following: *Edwards v. State Board of Barber Examiners*, 1951, 72 Ariz. 108, 231 P.2d 450; *Reyne v. Trade Commission*, 1948, 113 Utah 155, 192 P.2d 563, 3 A.L.R.2d 169; *State Board of Barber Examiners v. Cloud*, 1942, 220 Ind. 552, 44 N.E.2d 972. The case is recognized as a leading authority by the highest courts of sister states and receives the approval of this court. Seeking its disapproval the plaintiff states that the decision in the case of *In re Lasswell*, 1 Cal. App.2d 183, 36 P.2d 678, has been completely ignored. That case upheld the constitutionality of the California Industrial Recovery Act, St.1937, pp. 2635, 2637, and particularly held that provisions fixing minimum prices in the dry cleaning industry were valid. The decision in that case has been properly ignored. The California Industrial Recovery Act was legislation enacted to supplement the National Industrial Recovery Act of 1933, 48 Stat. 195, and in effect adopted the federal statute to extend its application to intrastate commerce. In effect the Supreme Court of the United States in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, overruled *In re Lasswell* and rendered inoperative the California price fixing statute. The *Lasswell* decision cannot therefore be relied upon as authority for the validity of the price fixing provisions of the present statute.

In *Wholesale Tobacco Dealers v. National Candy & Tobacco Co.*, 1938, 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486, this court sustained the Unfair Practices Act, St.1913, p. 508, as amended, St.1935, p. 1546. The

court there held that the purpose of the Act was the prevention of destructive competition and injury to competitors. That is a legitimate objective in the interest of the general welfare, and on this basis is distinguishable from the present statute.

In *Jersey Maid Milk Products Co. v. Brock*, 1939, 13 Cal.2d 620, 91 P.2d 577, this court upheld the constitutionality of the Milk Stabilization Act, Chapter 10, Div. IV, Agricultural Code, § 705 et seq., involving the regulations including the fixing of minimum prices in the sale of fluid milk. The statute there under consideration is clearly distinguishable from the present one on the same basis as is *Nebbia v. New York*, supra, 1934, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940. There as before stated it was held that there is a public need for a constant supply of pure, wholesome milk; that the milk industry concerns not only the economic welfare but the health of the public in general, and legislation which aims to protect that general welfare through an initial protection of an industry is within the scope of the police power. The effect of the statute here involved is to protect the industry only—a small segment of the general public. On this same ground, the decision in *Agricultural Prorate Commission v. Superior Court*, supra, 1936, 5 Cal. 2d 550, 55 P.2d 495 is not in point.

In *Max Factor & Company v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177, the validity of the Fair Trade Act, St.1931, p. 583, as amended, St.1933, p. 793, was upheld. That act does not involve alone the question of legislative authority in the field of price regulation. It is an act to enforce contracts, express or implied, between vendors and vendees in which they agree to maintain specified standards of prices upon trade-marked commodities. Although the retailer in that case had not expressly been a party to the agreement, nevertheless a majority of the court held that an agreement to sell at the fixed price was implied when that retailer ordered goods which he knew or should have known were fair trade items. The court stated in 5 Cal.2d at page 464, 55 P.2d at page 185: "The Statute * * * is aimed at protecting these valuable property and contract rights of the

manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price cutting in order to regulate prices, but prohibits price cutting in an attempt to protect the validly acquired rights of others." The Max Factor case affords no support for the plaintiff's position.

[7] It must be concluded that the price fixing provision of the statute here involved is invalid because it is not, by any recognized or recognizable standard, an enactment providing for the public health, safety, morals, or general welfare.

[8,9] The defendant points to another ground upon which the invalidity of the statute may well be based. Section 9564 of the Code requires that the "board shall investigate and ascertain those minimum prices which will enable cleaners, dyers, or pressers in that * * * area to furnish modern, proper, healthful and sanitary services, using such appliances and equipment as will minimize the danger to public health and safety incident to such services." The only other reference to an established standard is in Section 9566 as follows: "At the conclusion of an investigation therefor, the board may establish a reasonable and just minimum price schedule conforming to the requirements of this article." While the delegation of governmental authority to an administrative body is proper in some instances, the delegation of absolute legislative discretion is not. To avoid such a result it is necessary that a delegating statute establish an ascertainable standard to guide the administrative body. Here the statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule and its penal provisions with no guide for the exercise of the delegated authority. The board is made up of six active members of the industry, and one member of the public at large. The initiation of the proposed control is at the insistence of 75%

of the cleaners in the area. In declaring invalid the Bituminous Coal Conservation Act of 1935, 49 Stat. 991, the United States Supreme Court stated: "* * * one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S.Ct. 855, 873, 80 L.Ed. 1160.

In *Becker v. State*, supra, 7 W.W.Harr., Del., 454, 185 A. 92, 100, the Supreme Court of Delaware set aside the Delaware Dry Cleaning Law, 40 Del.Laws, c. 120. It stated that "vast authority is centered in a governing board, a majority of which are directly interested in the industry, but who, nevertheless, are empowered to act in a judicial capacity, and to sit in judgment over fellow members of the trade. Too great a strain is imposed upon human frailty. The practical tendency of the legislation is to create and foster monopoly, to prevent, not to encourage competition, to maintain maximum, not minimum prices, all of which is against, not in aid of, the interest of the consuming public."

Where the legislature attempts to delegate its powers to an administrative board made up of interested members of the industry, the majority of which can initiate regulatory action by the board in that industry, that delegation may well be brought into question.

From the foregoing it follows that the price fixing provisions of the statute under attack must fall on the constitutional grounds stated, and that the demurrer was properly sustained.

The judgment is affirmed.

EDMONDS, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

In my opinion the minimum price provisions of the Dry Cleaners' Act of 1945 do not violate the due process clause of either the United States Constitution or the California Constitution.

The Legislature has power to determine the rights of persons, subject only to the limitations of the United States Constitution and the California Constitution. *Modern Barber Colleges v. California Employment Stab. Comm.*, 31 Cal.2d 720, 726, 192 P.2d 916; *Delaney v. Lowery*, 25 Cal.2d 561, 568, 154 P.2d 674; *Collins v. Riley*, 24 Cal.2d 912, 916, 152 P.2d 169. A statute regulating commercial transactions does not violate the due process clause of either constitution unless it is proved so unreasonable as to dispel the presumption that it rests upon some rational basis within the knowledge and experience of the legislators. *Olsen v. Nebraska*, 313 U.S. 236, 246, 61 S.Ct. 862, 85 L.Ed. 1305; *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234; *Serve Yourself Gasoline Stations Ass'n v. Brock*, 39 Cal.2d 813, 249 P.2d 545; *In re Fuller*, 15 Cal.2d 425, 428, 102 P.2d 321; *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 636, 91 P.2d 577; *Wholesale Tobacco Dealers v. National etc. Co.*, 11 Cal.2d 634, 643, 82 P.2d 3, 118 A.L.R. 486. Judicial inquiry "where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, supra, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234. The statute in the present case, like any other regulation of private enterprise, must be considered in this light.

Although early decisions held that prices could not be regulated unless the industry was clothed with a public interest, see *Ribnik v. McBride*, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913, the United States Supreme Court discarded that test in *Nebbia v. New York*, 291 U.S. 502, 531-539, 54 S.Ct. 505, 78 L.Ed. 940. See also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703. In *Olsen v. Nebraska*, 313 U.S. 236, 244, 61 S.Ct. 862, 85 L.Ed. 1305,

the Court in a unanimous opinion overruled the *Ribnik* case and refused to inquire into the wisdom of the challenged legislation. The *Olsen* decision reversed the decision of the state court, *State ex rel. Western Reference & Bond Ass'n v. Kinney*, 138 Neb. 574, 293 N.W. 393, holding the price-fixing statute in question unconstitutional. This court soon followed the lead of the United States Supreme Court. *Wholesale Tobacco Dealers v. National etc. Co.*, supra, 11 Cal.2d 634, 655, 82 P.2d 3, 118 A.L.R. 486. The Legislature, therefore, is clearly empowered to prevent destructive price cutting, which has demoralizing effects on business itself and on its service to the public.

The dry cleaning industry has an unhappy history of ruthless competition marked by destructive price cutting and retaliatory sabotage. Early attempts at voluntary price regulation by internal agreements were struck down by the courts. *Endicott v. Rosenthal*, 1932, 216 Cal. 721, 16 P.2d 673; see also *In re Herrick*, 1938, 25 Cal.App.2d 751, 77 P.2d 262. Thereafter, price cutting was fought by sabotage. The chaotic state of the industry was brought to light in *People v. Cowan*, 1940, 38 Cal. App.2d 231, 101 P.2d 125, a murder prosecution arising out of an attempt to sabotage a dry cleaner who cut his prices, and in *People v. Black*, 1941, 45 Cal.App.2d 87, 113 P.2d 746, a prosecution for conspiracy to commit sabotage by placing metallic potassium in garments sent to a price cutter. It was there revealed that a substantial number of industry members were guilty of unlawful attacks on retailers who cut prices. The industry thereafter, from 1941-1945, achieved stabilization under price regulation by the Office of Price Administration. After the cessation of O.P.A. regulation, the statute now held unconstitutional was passed by unanimous vote of both houses of the Legislature and signed by the Governor.

The dry cleaning business is highly vulnerable to price wars and their attendant evils. The industry represents millions of dollars in plants and equipment and requires the labor of thousands of skilled workers. It is subject to intense short-per-

iod fluctuations. The dry cleaner cannot hedge against these fluctuations by stockpiling inventory or by large-scale buying of raw materials. He cannot supply his market in advance, lay off help, and wait for demand to catch up with supply as a manufacturer ordinarily can. A dry cleaner is under constant pressure to cut his prices, increase his volume, and reduce his costs. Other cleaners follow suit and the price cuts inevitably result in downgrading of service. The cleaning industry is particularly susceptible to downgrading: its processes are highly specialized and it is difficult to police against slipshod performance or to detect it. Destructive price cutting quickly starts a vicious train of sabotage, violence, eventual bankruptcy for many cleaners, and disruption of a service industry essential to the public health.

The statute sets the minimum price schedule as low as is consistent with efficient and sanitary service. Bus. and Prof. Code, § 9564. Prices can be fixed only after a cost survey and due investigation by the board. Bus. & Prof. Code, §§ 9564-9566. If the board should abuse the discretion vested in it, its action is subject to judicial correction.¹ Government Code, § 11440. The statute thus limits the competitive struggle in the industry to the quality of service offered to the public.

The Legislature could reasonably conclude that the economic waste, the loss of property, the violation of law, the threat to health and public convenience, could be prevented by elimination of price warfare through establishment of minimum price schedules. It could reasonably conclude that a measure of economic security would encourage compliance with health and safety regulations and the maintenance of the industry's capacity to meet the fluctuating demand of the public at reasonable prices.

Disruption of business by destructive competition has long been recognized as an evil that may be controlled by the Legislature. Thus in *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177, affirmed,

299 U.S. 198, 57 S.Ct. 147, 81 L.Ed. 122, this court held constitutional a statute requiring retailers to sell products at a price fixed by the wholesaler. The court said: "In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the Legislature. We recognize that economic and juridical thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, pricecutting. * * * The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise." 5 Cal.2d at pages 454-455, 55 P.2d at page 181. The majority opinion would distinguish the *Max Factor* case on the ground that the only question there decided was the right to enforce "implied" contracts between vendors and vendees who "should have known" that certain goods were fair trade items. The distinction is untenable. The retailer in the *Max Factor* case had not at any time agreed to sell at the fixed price and was being compelled by the court to abide by the price determined by the wholesaler. A statute requiring a nonsigning retailer to sell at a fixed price under penalty of an injunction is as much a price fixing statute as is the statute in the present case. The *Max Factor* case is clear authority for the proposition that the Legislature may enact price fixing legislation, if it determines that price cutting will adversely affect a particular industry to the detriment of the public. In other cases also this court has approved price regulation. *Jersey Maid Milk Products Co. v. Brock*, supra; *Wholesale Tobacco Dealers v. National etc. Co.*, supra; see also *In re Willing*, 12 Cal.2d 591, 594, 86 P.2d 663. The majority opinion would distinguish the *Jersey Maid* case on the ground that low milk prices affect the general public, which needs a supply of pure milk, but that dry cleaning prices protect only the in-

1. Defendants contend only that the statute is unconstitutional as a whole. No claim is made that the particular price

schedules fixed by the board are unauthorized by the statute.

dustry. Unless this court intends to return to the "clothed with a public interest" test, I see no basis for the proposed distinction of the Jersey Maid case. The question of the need of the legislation in a particular industry is one for the Legislature; this court is not equipped to determine which industries should receive price protection in the public interest and which should not. The majority opinion would distinguish the Wholesale Tobacco case on the ground that the legislation in that case was designed to prevent destructive competition, a proper legislative objective. The same objective underlies the statute in the present case.

The majority opinion holds that this case is governed by *In re Kazas*, 1937, 22 Cal. App.2d 161, 70 P.2d 962, 970, rather than by the cases discussed in the preceding paragraph. The *Kazas* case, however, turned on the question whether the barber trade was "affected with a public interest", a standard long since discarded by the United States Supreme Court and by this court. *Olsen v. Nebraska*, supra; *Wholesale Tobacco Dealers v. National etc. Co.*, supra. Moreover, the *Kazas* case relied upon *State v. Ives*, 123 Fla. 401, a case subsequently abandoned by the court that decided it. *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 54, 183 So. 759, 119 A.L.R. 956. I would disapprove the *Kazas* case as clearly contrary to presently accepted principles of constitutional law.

It is contended that the Dry Cleaners' Act of 1945 could not have the objective of protecting the public health and safety because the Legislature could reach that objective by enforcement of provisions of the Health and Safety Code and of the Unfair Practices Act. This reasoning proceeds from a misconception of this court's function in passing upon the constitutionality of a legislative enactment. The only question before us is whether there is a rational basis for the statute. Questions regarding the wisdom of the legislation are irrelevant. *Olsen v. Nebraska*, supra, 313 U.S. at page 246, 61 S.Ct. 862, 85 L.Ed. 1305. It was for the Legislature to determine whether additional legislation was necessary to preclude conditions in the dry cleaning industry that

would adversely affect the public welfare. An attack on a statute cannot be justified by an assumption that there are wiser methods of reaching the desired objective. *Hunter v. Justice's Court*, 36 Cal.2d 315, 319, 223 P.2d 465.

A number of decisions from other states have held constitutional the regulation of prices in the dry cleaning and barber industries. *Miami Laundry v. Florida Dry Cleaning & Laundry Board*, supra; *People ex rel. Rogers v. Barksdale*, 104 Colo. 1, 87 P.2d 755; *State Dry Cleaners' Board v. Compton*, 201 Okl. 284, 205 P.2d 286; *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779; *Board of Barber Examiners v. Parker*, 190 La. 214, 266, 182 So. 485; *State v. McMasters*, 204 Minn. 438, 283 N.W. 767; 119 A.L.R. 1481; *City of Mobile v. Rouse*, 233 Ala. 622, 173 So. 266, 111 A.L.R. 353. The reasoning of the court in the *Arnold* case is typical of the foregoing decisions: "The record before us discloses the hazards to the health of that large portion of the public which patronizes barber shops, in the price cutting competition which prevails, absent regulation and fixing of the minimum to be charged. The sanitary requirements set up by earlier act of 1935 (Chap. 111, Laws 1935), appellant urges, are in themselves sufficient to insure health protection and sanitary working conditions. But the record before us offers support to appellees' contention that in price wars and where non-profitable charges are made for barbers' services, the sanitary safeguards are uniformly sacrificed. This was the situation which we have a right to assume the legislature intended to correct. * * * We recognize *Ex parte Kazas*, 22 Cal.App.2d 161, 70 P.2d 962, relied upon by appellant, as authority opposing the constitutionality of a statute similar to our own. It is clearly opposed to the authority relied upon by appellees and to much we have here said. It is quite obvious also that the California court took its position in that case notwithstanding the changed doctrine announced and followed in the *Nebbia* and *West Coast Hotel Company* cases, supra. We pass further consideration of this case, however, with the observation that in our opinion, it is

contrary to the weight of recent authority and the better reasoned decisions, as is also other authority relied upon by appellant." 109 P.2d at pages 785-786.

Most of the cases holding statutes regulating dry cleaning and barber prices unconstitutional were decided in 1937 or earlier, before the decision in *West Coast Hotel v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703. Thus, *State ex rel. Fulton v. Ives*, supra, 123 Fla. 401, 167 So. 394, quoted at length in the majority opinion, was decided upon authority of *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, expressly overruled in the *West Coast Hotel* case. As previously pointed out, the Florida Supreme Court has abandoned its position in *State ex rel. Fulton v. Ives*. Again, the majority opinion relies on *City of Mobile v. Rouse*, 1937, 27 Ala.App. 344, 173 So. 254. That decision was cited as controlling by the Louisiana Supreme Court in *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485. Before the decision in the *Parker* case became final, the United States Supreme Court filed its opinion in the *West Coast Hotel* case. The Louisiana court thereupon granted a rehearing, reversed its earlier decision relying on the *Rouse* case, and held the barber statute constitutional. 190 La. 266, 182 So. 485. Another case cited by the majority, *Becker v. State*, 1936, 7 W. W. Harr. 454, 37 Del. 454, 185 A. 92, was also decided before the recent United States Supreme Court cases.

It is true that several recent cases support the majority opinion. *Christian v. La Forge*, Or., 242 P.2d 797; *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189; *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253; *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E.2d 972; *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450. The *Greeson*, *Cloud*, and *Edwards* cases expressly relied upon *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. The United States Supreme Court, however, no longer adheres to the constitutional doctrine expressed in the *Lochner* and similar cases, such as *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436; *Allgeyer v. Louisiana*, 165

U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832; and *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441. "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia v. New York*, supra, 291 U.S. at pages 523, 524, 54 S.Ct.[505] at pages 509, 510, 78 L. Ed. 940, 89 A.L.R. 1469, and *West Coast Hotel Co. v. Parrish*, supra, 300 U.S. at pages 392-395, 57 S.Ct. [578] at pages 582, 583, 81 L.Ed. 703, 108 A.L.R. 1330, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." *Lincoln Federal Labor Union v. Northwestern Co.*, 335 U.S. 525, 536-537, 69 S.Ct. 251, 257, 93 L.Ed. 212. In view of the *Nebbia*, *West Coast Hotel*, and *Olsen* cases, and the decisions of this court in the *Jersey Maid* and *Max Factor* cases, I cannot regard as controlling the decisions from other states holding similar legislation unconstitutional.

As an alternative ground of decision, the majority opinion states that the Dry Cleaners' Act "may well be" unconstitutional because it "assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule and its penal provisions with no guide for the exercise of the delegated authority."

The members of the State Board of Dry Cleaners are appointed by the Governor and approved by the Senate. They are officials of the state, paid by the state for administering the law, and their acts are reviewed by the judiciary. The fact that six members of the board must be members of the cleaning industry has no constitu-

tional significance. See *Ex parte Gerino*, 143 Cal. 412, 414, 77 P. 166, 66 L.R.A. 249 [Board of Medical Examiners elected by members of regulated profession]; *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 13, 183 So. 759, 764, 119 A.L.R. 956; see also *Davis Administrative Law*, pp. 380-381. It may be debatable whether the manifest advantages of submitting highly technical problems to an informed tribunal are outweighed by the possible danger than an agency largely composed of members representing an interested economic group may be tempted to act for selfish ends. The Legislature is free to make its choice. See *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 144, 657, 61 S.Ct. 524, 85 L.Ed. 624.

The fact that price regulation is initiated at the insistence of 75% of the cleaners in the area does not present constitutional difficulties. Whatever their special interest in articulating the problem, it remains a general one, of the greatest concern to the public. Governmental processes are commonly set in motion by the petition, complaint, or other action by some individual or group. Thus, the Administrative Procedure Act provides that "Except where the right to petition for adoption of a regulation is restricted by statute to a designated group * * * any interested person may petition a state agency requesting the adoption or repeal of a regulation * * *. [A] state agency shall within thirty days deny the petition in writing or schedule the matter for public hearing". Government Code, §§ 11426-11427. In *Agricultural Prorate Comm. v. Superior Court*, 5 Cal.2d 550, 554, 586-587, 55 P.2d 495, this court upheld a statute providing that the details and area of a proration program be determined by the filing of a petition signed by two-thirds of the producers in the area. We rejected there a contention that apparently is accepted in the majority opinion: that the delegation of power to the industry to initiate action invalidated the statute. In *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 645, 91 P.2d 577, we upheld a requirement that 65% of the producers in the regulated industry decide that a stabilization plan should be

formulated. See also *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 [upholding the statute involved in *Agricultural Prorate Comm. v. Superior Court*, supra]; *Currin v. Wallace*, 306 U.S. 1, 15-16, 59 S.Ct. 379, 83 L.Ed. 441; *Ray v. Parker*, 15 Cal.2d 275, 286-287, 101 P.2d 665; *Davis, Administrative Law*, pp. 71-73.

Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160, is not applicable here. In that case, the prices were fixed by private persons in the industry. The present case is analogous to *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399, 60 S.Ct. 907, 84 L.Ed. 1263, where the United States Supreme Court held the *Carter* case not controlling and upheld a statutory plan for coal price fixing by which district boards of code members proposed minimum prices, which became effective upon approval by the agency. See also *United States v. Rock Royal Co-Op.*, 307 U.S. 533, 577-578, 59 S.Ct. 993, 83 L. Ed. 1446; *Jaffe, Law Making by Private Groups*, 51 Harv.L.Rev. 201.

In *Revne v. Trade Commission*, 113 Utah 155, 192 P.2d 563, 3 A.L.R.2d 169, it was held that the Utah Legislature had unlawfully delegated to the barber industry the power to fix minimum prices by agreement. That decision, however, is clearly distinguishable. The Utah court said: "We recognize, of course, that the legislature may properly delegate to some administrative body the duty of ascertaining the facts upon which the provisions of a law are to function, and also, that one of the methods of initiating activity on the part of that administrative body may be by petition of the citizens concerned. Such procedure is not in and of itself defective as an improper delegation of legislative authority. The question of an improper delegation of legislative authority lies embedded in the extent of the power granted to the administrative body." 192 P.2d at page 567. The court held the Utah statute invalid on the ground that price schedules were initiated by the members of the regulated industry. The board could not fix prices upon its own initiative; it could only accept or reject the prices suggested by the industry. In contrast, under the Dry Cleaners' Act

the board fixes the prices under the standards set forth in sections 9564 to 9566, and the industry has to accept the prices so fixed. 75% of the industry petitions the board to fix a price; the industry does not fix the price.

The provision in the present statute does no more than relieve the board from making an expensive survey at the instance of a few cleaners, and allows it to act only when the need for regulation is apparent to a substantial number of those who would be affected. Far from unlawfully delegating authority, the Legislature has merely restricted its regulations by withholding their operation from a given area until 75% of the cleaners favor it. See *Currin v. Wallace*, supra, 306 U.S. 1, 15-16, 59 S.Ct. 379, 83 L.Ed. 441.

The majority opinion states that the standards of the statute are an inadequate guide for exercise of the delegated authority. The challenged provision provides that the board "shall investigate and ascertain those minimum prices which will enable cleaners, dyers, or pressers in that * * * area to furnish modern, proper, healthful and sanitary services, using such appliances and equipment as will minimize the danger to public health and safety incident to such services. * * * At the conclusion of an investigation therefor, the board may establish a reasonable and just minimum price schedule conforming to the requirements of this article." Sections 9564, 9566. Standards similar to those set forth in foregoing sections of the Dry Cleaners' Act have been repeatedly upheld by this court, *Ray v. Parker*, supra, 15 Cal.2d 275, 286-287, 101 P.2d 665; *Jersey Maid Milk Products Co. v. Brock*, supra, 13 Cal.2d 620, 645, 91 P.2d 577; *Agricultural Prorate Comm. v. Superior Court*, supra, 5 Cal.2d 550, 586-587, 55 P.2d 495; *Nelson v. Dean*, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467, and by the United States Supreme Court. *American Power & Light Co. v. S. E. C.*, 329 U.S. 90, 104-106, 67 S.Ct. 133, 91 L.Ed. 103; *Avent v. United States*, 266 U.S. 127, 130, 45 S.Ct. 34, 69 L.Ed. 202; *Federal Radio Comm. v. Nelson Bros. Co.*, 289 U.S. 266, 285, 53 S.Ct. 627, 77 L.Ed. 1166. Minutely defined standards are not required when,

as here, flexibility is desirable. The Legislature cannot and need not anticipate every situation that might arise and supply a rule for each situation. See *Hampton Jr., & Co. v. United States*, 276 U.S. 394, 407-408, 48 S.Ct. 348, 72 L.Ed. 624. In the present case, the Legislature has plainly stated the legislative objective and has established standards adequate to guide the administrative determination of the particular prices that should be fixed to carry out that objective. See *American Power & Light Co. v. S. E. C.*, supra.

The real basis for the result reached by the majority opinion is an adherence to an economic view that minimum price legislation is not in the best interests of the general public. But as Mr. Justice Holmes long admonished, the economic and moral beliefs of the judiciary are not embedded in the Constitution. There is no reason to suppose that judges are better qualified than legislators to determine what social and economic programs should be adopted by the State of California.

I would reverse the judgment on the ground that plaintiff has stated a cause of action under a valid statute.

GIBSON, C. J., and CARTER, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



40 Cal.2d 459

**FRENCH ART CLEANERS et al. v.
STATE BOARD OF DRY
CLEANERS.**

**BEST SERVICE CLEANERS et al. v.
STATE BOARD OF DRY
CLEANERS et al.
S. F. 18570.**

**Supreme Court of California, in Bank.
March 10, 1953.**

Rehearing Denied April 2, 1953.

Consolidated actions to enjoin enforcement of price fixing portions of the Dry Cleaners Act, wherein defendants filed cross-complaint to enjoin the plaintiff dry cleaners from violating the Unfair Practices Act by advertising and selling, as a standard cleaning

service, work which was in fact but a partial service, and thereby misleading members of the public. The Superior Court, San Francisco County, Edward Molkenbuhr, J., rendered judgments adverse to defendants and defendants appealed. The Supreme Court, Shenk, J., held that evidence sustained finding that it was untrue that advertising of such economical grade of service tended to, or did deceive, defraud or mislead members of public.

Judgments affirmed.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

Trade-Marks and Trade-Names and Unfair Competition §93(3)

On cross-complaints to enjoin dry cleaners from violating Unfair Labor Practices Act by advertising and selling, as a standard cleaning service, work which was in fact but a partial service, and thereby misleading public, evidence sustained finding that it was untrue that advertising of such economical grade of service had tendency to, or did deceive, defraud or mislead public. Business and Professions Code, § 16300 et seq.

Edmund G. Brown, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

George M. Naus, San Francisco, Nathan Kessler, Oakland, Harold B. Lerner, McFarland, Laumeister & Ferdon and Harry L. Kuchins, Jr., San Francisco, for respondents.

SHENK, Justice.

These are direct appeals from judgments of the Superior Court enjoining the defendants from enforcing the price fixing portions of the Dry Cleaners Act of 1945 embodied in Sections 9560 through 9567 of the Business and Professions Code, and declaring those sections to be unconstitutional under the due process clauses of the State and Federal Constitutions. The court also denied injunctive relief sought by the defendants under their cross-complaints. The issues set forth in the pleadings in the two cases are the same and the proceedings were consolidated for trial by stipulation and order. However, separate judgments were rendered and separate appeals have been taken.

The controversy in each case arose over an order adopted by the State Board of Dry Cleaners fixing minimum prices for various articles of apparel as provided for in the challenged sections of the code. The plaintiffs brought the actions to enjoin the enforcement of the orders on the ground that the price fixing provisions of that statute are invalid. The defendant Board sought injunctive relief in its cross-complaints to prevent the plaintiffs from violating the order and minimum price schedules fixed by the Board. The question is the constitutional validity of those sections of the statute providing for the fixing of prices by the Board. In this respect the issues are the same as those involved in the companion case of State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Cal.Sup., 254 P.2d 29.

In its pleadings the defendant Board also seeks injunctive relief to restrain plaintiffs from violations of the Unfair Practices Act, Div. 7, Pt. 2, Ch. 4, Bus. & Prof.Code, specifically charging that the plaintiffs were advertising and selling as a standard cleaning service, work which was in fact but a partial service, and thereby misleading members of the public. The trial court made specific findings of fact, based on evidence to support them, that "it is untrue that the advertising of said economical grade of service has a tendency to, or does deceive, defraud or mislead the members of the public." Having found no violation or threatened violation of the Unfair Practices Act the trial court properly withheld the requested relief.

The judgments are affirmed.

EDMONDS, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

I dissent for the reasons set forth in the dissenting opinion in State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Cal. Sup., 254 P.2d 29.

GIBSON, C. J., and CARTER, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

CARVER v. FERGUSON.

Civ. 8171.

District Court of Appeals
Third District, California.

Jan. 27, 1953.

Hearing Granted March 26, 1953.*

Action by wife against husband for damages for personal injuries arising out of automobile collision. The Superior Court, San Joaquin County, rendered judgment of dismissal, and wife appealed. The District Court of Appeals, Peek, J., held that wife's cause of action against husband for damages for personal injuries which occurred prior to their marriage was "separate property" within statute declaring that all property owned by wife before marriage is wife's separate property.

Reversed.

1. Property $\hookrightarrow$ 51/2

A cause of action for damages for personal injuries is a "chose in action" within statute defining chose in action. Civ.Code, § 953.

See publication Words and Phrases, for other judicial constructions and definitions of "Chose in Action".

2. Property $\hookrightarrow$ 4

Cause of action for tort, being a thing in action, is personal property. Code Civ. Proc. § 17, subds. 1, 3; Civ.Code, § 14, subds. 1, 3, §§ 654, 655, 953, 1427.

3. Husband and Wife $\hookrightarrow$ 260

A wife's cause of action for tort committed prior to wife's marriage is separate property of wife. Civ.Code, § 162.

4. Husband and Wife $\hookrightarrow$ 248 1/2

The character of property as separate or community is determined by its status as of time of acquisition, and hence any subsequent change in spouse's marital situation has no effect on separate nature of property which spouse owned prior to marriage and which followed spouse into marriage. Civ.Code, § 162.

5. Husband and Wife $\hookrightarrow$ 203

A wife cannot be prevented from dealing with her separate property as wife sees fit, nor can she be prevented from resorting to whatever legal process may be necessary to protect her interest in the property,

whether it be a chose in action stemming from tort or contract, or a parcel of real estate. Civ.Code, §§ 157, 162.

6. Husband and Wife $\hookrightarrow$ 205(4), 260

Plaintiff's cause of action for personal injuries sustained before her marriage to defendant while riding in automobile operated by defendant, being a chose in action and hence property, and being property owned prior to marriage, was plaintiff's separate property in which defendant had no interest, and so plaintiff was not deprived of her right to litigate because of the marriage. Civ.Code, § 14, subds. 1, 3, §§ 157, 162, 654, 655, 953, 1427; Code Civ. Proc. § 17, subds. 1, 3.

7. Husband and Wife $\hookrightarrow$ 205(4)

That husband carried automobile liability insurance did not deprive wife of her right, stemming from the nature of her cause of action as a property right acquired before marriage, to sue husband for personal injuries in automobile collision occurring before marriage. Civ.Code, § 162.

Miller, Kroloff & Brown, Stockton, for appellant.

Neumiller, Ditz, Beardslee & Sheppard and Joseph W. Diehl, Stockton, for respondent.

PEEK, Justice.

On May 2, 1950, Eleanor Carver was injured while riding in the automobile of William Ferguson, which he was then driving. She filed a complaint for damages on August 15, 1950, for personal injuries against Ferguson. On March 17, 1951, prior to the time set for trial of the matter, plaintiff and defendant intermarried, and ever since that date they have been husband and wife. On November 19, 1951, the trial court granted defendant's motion for dismissal of the action upon the ground of the marital status of the parties. From the judgment of dismissal, plaintiff appeals, presenting for determination the question of whether a wife may maintain, against her husband, an action for a tort which occurred prior to their marriage. The agreed statement of facts upon which the appeal

* Case dismissed June 4, 1953.

is taken shows that the defendant had public liability insurance at the time of the accident, although the materiality and relevance of this factor was and is expressly denied by the defendant.

Counsel have ably argued their opposing contentions, respondent relying upon the common law rule that the wife may not sue the husband in tort, and appellant contending that the aforesaid rule is neither applicable nor the true state of the law in California as indicated by the several statutory changes to Code of Civil Procedure, section 370, made after the decision in *Peters v. Peters*, 1909, 156 Cal. 32, 103 P. 219, 23 L.R.A.,N.S., 699. However, it is our view that the matter is governed by other principles.

[1,2] The cause of action sought to be asserted by plaintiff, being a right to recover payment for damages, is a chose in action, as defined by Civil Code, section 953, which provides that: "A thing in action is a right to recover money or other personal property by a judicial proceeding." Under this section, it was held in *Everts v. Will S. Fawcett Co.*, 1937, 24 Cal.App.2d 213, 74 P.2d 815, 816, that a cause of action for tort, like a cause of action arising from breach of contract, is a "thing in action". See, also, *Mortimer v. Young*, 1942, 53 Cal.App.2d 317, 127 P.2d 950, and *McFadden v. Santa Ana, Etc. Ry. Co.*, 1891, 87 Cal. 464, 25 P. 681, 11 L.R.A. 252. A thing in action is characterized by both Civil Code, section 14, subsection 3, and Code of Civil Procedure, section 17, subsection 3, as personal property. Section 1 of each of these code sections defines the general term "property" as including both real and personal property. Thus, in *Scott v. McPheeters*, 1939, 33 Cal.App.2d 629, at page 632, 92 P.2d 678, 680, 93 P.2d 562, this court said that property includes the "right to compensation for personal injuries wrongfully inflicted by the wilful or negligent acts of another person." Hence it is apparent that the cause of action which the wife was here attempting to pursue constitutes property. Such further proof of this conclusion as may be necessary appears from the following Civil Code sections:

654: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property."

655: "There may be ownership of * * * all obligations * * *."

1427: "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." (1458): "A right arising out of an obligation is the property of the person to whom it is due * * *."

[3] Since that property accrued to appellant at the moment of the commission of the wrong, it becomes equally clear that the cause of action was her separate property. Civil Code, section 162, provides, in part, that: "All property of the wife, owned by her before marriage, * * * is her separate property." The cause of action here pleaded is the alleged breach by respondent of a duty of care owing by him to appellant, which breach caused injury to appellant; these matters are all referable to a particular moment in time when that breach and injury occurred. Whatever obligation might be found to exist upon the respondent in favor of the appellant arose at the moment of breach and injury. Therefore, the cause of action, which constituted property arose and vested in appellant at the time of the accident, and was "owned" by her from that day forward. She thus owned it prior to her marriage to respondent and it constitutes her separate property.

[4,5] The character of property as separate or community is determined by its status as of the time of acquisition, hence any subsequent change in appellant's marital situation could have no effect upon the separate nature of property which she owned prior to marriage, and which followed her into the marriage. *Finley v. Winkler*, 99 Cal.App.2d Supp. 887, 222 P.2d 345; 3 Cal.Jur. 10-Yr.Supp. 505. No further authority than Civil Code, section 157, providing that "Neither husband nor wife has any interest in the property of the other * * *", need be cited to sustain the proposition that the wife cannot be prevented from dealing with her separate

property as she sees fit, nor can she be prevented from resorting to whatever legal process may be necessary to protect her interest in that property, whether it be a chose in action stemming from tort or contract, or a parcel of real estate. No justification can be found for a contrary rule which would operate to divest her of that property. In *Zaragosa v. Craven*, 1949, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461, it was expressly held that the recovery on a cause of action for personal injuries bears the same character as the cause of action itself; the result in that case, that the property was community because the cause of action accrued during marriage, alters neither the substance nor applicability of the rule. See, also, *Huber v. Huber*, 1946, 27 Cal.2d 784, 167 P.2d 708, and authorities cited therein to the effect that property received in exchange for separate property is separate property.

[6] Because of the separate nature of any recovery appellant might receive upon her cause of action, the entire transaction must be regarded as one by the wife concerning her separate property, as to which no disability to litigate can be asserted according to the fortuitous circumstance of whether the defendant happens to be her husband instead of a third party. Nothing in Code of Civil Procedure, section 370, providing that a married woman may sue or be sued in her name alone in all actions, can provide comfort to respondent in his attempt to deny appellant the right to pursue her separate property interests. The fundamental feature in this case is the fact that the right accrued to the wife prior to marriage. This conclusion must follow because had the matter been first pursued to judgment, the subsequent intermarriage of the parties could have no more effect upon the legal collectibility of such a judgment than upon a judgment obtained against a third person prior to marriage. Such a judgment would constitute the wife's separate property. In the same manner, "The right to recover damages for a personal injury, as well as the money recovered as damages, is property * * *." *McFad-*

den v. Santa Ana, Etc. Ry. Co., 1891, supra, 87 Cal. at page 467, 25 P. 682, and the circumstance of the litigants' intermarriage prior to the rendition of judgment cannot operate to deprive the wife of property which is rightfully hers.

[7] While it is true that in a few jurisdictions the existence of liability insurance has been considered, nevertheless under the conclusion we have reached we do not see the materiality of such fact in the present case. Appellant's rights stem from the nature of her cause of action as a property right acquired before marriage. This concept has already been enunciated in *Morrissey v. Kinkelie*, 1935, 5 Cal.App.2d 183, 42 P.2d 361, in which an engaged couple, while returning from the courthouse where they had filed their notice of intention to marry, were involved in an automobile collision. In disposing of the contention that the negligence of the driver should be imputed to plaintiff because they had intermarried and were husband and wife at the time of the trial, the court stated, 5 Cal. App.2d at page 184, 42 P.2d at page 362: "Plaintiff's recovery is not community property, since her rights thereto accrued before marriage. The rule that the negligence of a husband is imputable to his wife does not apply here", and affirmed the judgment in favor of plaintiff wife. Hearing in that case was refused by the Supreme Court.

Nor is anything herein stated in conflict with *Watson v. Watson*, 1952, 39 Cal.2d 305, 246 P.2d 19, where it was held that the rule that one lawful spouse may not sue the other for damages in tort applies to prevent an action for a tort occurring after entry of an interlocutory divorce decree but before entry of the final decree. In that case, the plaintiff was estopped to deny the existence of the marriage at the time the tort was committed; there was no marital relationship between appellant and respondent herein at the time the tort was committed.

The judgment of dismissal is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concurred.

GAVEL v. JAMISON et al.
Civ. 19213.

District Court of Appeal, Second District,
Division 2, California.
March 11, 1953.

Rehearing Denied March 26, 1953.

Hearing Denied May 7, 1953.

Action to recover for death of employee on construction project as result of being struck by boom of crane which fell when excavation collapsed. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment granting motion of certain defendants for nonsuit, and plaintiff appealed. The District Court of Appeal, McComb, J., held that record was devoid of evidence from which jury might infer that either of such defendants had any right to control the crane which caused the accident, or the premises where the accident occurred, and that judgment of nonsuit was proper.

Affirmed.

1. Master and Servant ⇨286(3, 9)

In action to impose liability on defendants for death of employee at construction project as result of being struck by boom of crane which fell when excavation collapsed, record was devoid of evidence from which jury might have inferred that either of the defendants had any right to control crane which caused accident, or the premises where accident occurred, at time accident occurred, and granting of defendants' motion for nonsuit was proper.

2. Master and Servant ⇨301(4)

A general employer is not freed from responsibility for the negligent acts of an employee merely because the employee, together with an instrument, has been hired out by the employer to a third person to be used by the latter in the performance of his work, and the negligence of the employee must be held to be that of the owner and not that of the hirer of the instrumentality.

3. Master and Servant ⇨301(1)

The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or

wrong at very time and in respect to the very thing out of which the injury arose.

Thomas W. LeSage and Harry M. Bowman, Pasadena, for appellant.

Parker, Stanbury, Reese & McGee, by Harry D. Parker, Los Angeles, for respondent Jamison.

C. F. Jorz and John G. Zelezny, Los Angeles, for respondent Montez.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of their motion for nonsuit in an action to recover damages for wrongful death, plaintiff appeals.

Viewing the evidence, as we must on the granting of a motion for nonsuit, in the light most favorable to plaintiff, we accept plaintiff's statement of the facts which is as follows:

"The plaintiff, Sadie Gavel, is the surviving widow and sole heir of the deceased Arthur Gavel who was killed on June 30, 1947 while engaged in the course of his employment as carpenter foreman for the Wm. C. Crowell Co. Plaintiff had married the deceased in 1938.

"The Wm. C. Crowell Co. * * * had the prime contract with the California Hardware Co. for the construction of a multiple story warehouse located at 121 Rose Street, Los Angeles, California.

"Crowell entered into a written subcontract with Jamison for the doing of certain work stated in the subcontract which fell generally into the classifications of excavation, concrete cutting, back fill and removal of debris.

"Hesse was the owner of the crane which fell when an excavation collapsed, killing the deceased Arthur Gavel. Harmon Willingham was the 'operator' of the crane and Randall Griffin was the 'oiler' or 'swamper' of the crane. Willingham and Griffin were on the payroll of Hesse. * * *

"At the time of the accident all of the excavations had been completed except one * * * or possibly two. The crane was

being maneuvered near the excavation in which it fell in order to get it into position to complete the last excavation and then to back off the job into the street. Because of the numerous excavations that had been completed and the other construction work in process, the crane was being 'spotted' at the only possible location preliminary to completing the final excavation.

"The excavation in which the crane fell had been freshly dug, having been completed only 2 hours before the accident. The crane, weighing 25 tons with a forty-foot boom and ten wheels with truck tires, was moving back and forth within less than 2 feet of the edge of the excavation.

"The soil was sandy loam 'pretty' damp and excavations for some of the footings were required to go a greater depth than specified because the soil did not meet 'load bearing requirements.'

"* * * When the banks of the excavation collapsed, the body of the crane slipped into the excavation and the 40-foot boom fell in a northerly direction, striking the deceased with the very end of the boom. He was apparently killed instantly."

[1] This is the only question presented so far as defendants are concerned: *Is there any evidence from which the jury might have inferred that either one or both of them had any right to control the crane which caused the accident or the premises where the accident occurred at the time it happened?*

This question must be answered in the negative. The record is devoid of any evidence that either or both defendants were doing the excavating work; had engaged Mr. Hesse, who was the owner and operator of the crane which fell into the excavation; or were in any other way responsible for the operation of the crane at the time of the accident. Nor is there any evidence which directly proves or from which an inference could be drawn that either defendant had or exercised any control, or had the right to exercise control, over the opera-

tions of the crane, or over the manner in which the premises were maintained.

There is no evidence that defendant Montez was in any way connected with the operation of the crane. The only evidence that defendant Jamison had any connection with the crane was that possibly she had requested it to be sent to the site of operations, and had paid for its rental as well as the salary of the two employees of its owner out of money which she received herself under her subcontract.

The case is on all fours with that of *Billig v. Southern Pacific Co.*, 189 Cal. 477, 209 P. 241, which promulgated these applicable rules:

[2] (1) A general employer (in this case, Mr. Hesse) is not freed from responsibility for the negligent acts of an employee merely because the employee together with an instrument has been hired out by the employer to a third person to be used by the latter in the performance of his work, and the negligence of the employee must be held to be that of the owner and not that of the hirer of the instrumentality. (*Billig v. Southern Pacific Co.*, supra, 189 Cal. 477, 484[4] ff., 209 P. 241.)

[3] (2) The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the very time and in respect to the very thing out of which the injury arose. (*Billig v. Southern Pacific Co.*, supra, 189 Cal. 477, 483[3] ff., 209 P. 241.)

In view of the fact that the record is devoid of any testimony that would connect either defendant or give either one of them the right of control over the persons in charge of the instrumentality which caused the accident, the motion for a nonsuit as to such defendants was properly granted.

Affirmed.

FOX, J., concurs.

MOORE, P. J., concurs in the judgment.

ELBERT, Limited, v. SEMERAD et al.**ELBERT, Limited, v. DAREMES et al.**

Civ. Nos. 4565, 4566.

District Court of Appeal, Fourth District,
California.

March 11, 1953.

Rehearing Denied April 9, 1953.

Hearing Denied May 7, 1953.

Actions for partition of realty to which plaintiff claimed title through foreclosure of street improvement bonds and defendants by tax deeds to the State and from the State to defendants. The Superior Court of San Diego County, L. N. Turrentine, J., entered judgments in favor of defendants, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that the evidence sustained finding that plaintiff had no equitable or other lien upon the realty in absence of proof of assignment of commissioner's certificates of sale or transfer of title to plaintiff's predecessor in interest.

Judgment affirmed.

I. Appeal and Error ⇨970(2)**Evidence** ⇨187

Whether evidence as to loss or destruction of commissioner's certificates of sale of realty on foreclosure of delinquent street improvement bonds and purchaser's assignments of certificates was sufficient to permit proof of transfer of title to purchaser's assignee by secondary evidence was a question for trial court, and its determination that secondary evidence was inadmissible was conclusive, in absence of abuse of discretion.

2. Municipal Corporations ⇨579

Deeds from alleged assignee of commissioner's certificates of sale of realty on foreclosure of delinquent street improvement bonds did not convey realty to grantee, where chain of title did not disclose transfer of title to grantor.

3. Taxation ⇨816

Judgment quieting title in State's grantee to realty conveyed to State for delinquent taxes eliminated from the title purchaser at previous commissioner's sale on foreclosure of delinquent street improvement bonds, and quitclaim deed subsequently executed by purchaser to alleged assignee

of commissioner's certificates of sale conveyed nothing to such grantee.

4. Partition ⇨63(3)

In action for partition of realty, evidence sustained findings that defendant was the owner in fee entitled to possession of realty conveyed by tax deed to the State and by State to defendant and that plaintiff, claiming through prior foreclosure of street improvement bonds, had no equitable or other lien upon the realty, in absence of proof of assignment of commissioner's certificate of sale and transfer of title to plaintiff's predecessor in interest. Code Civ. Proc. § 752.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for appellant.

Solon S. Kipp and W. E. Starke, San Diego, for respondents.

MUSSELL, Justice.

These actions are for partition of real property in San Diego county and were brought pursuant to Section 752 of the Code of Civil Procedure. The plaintiff claims title through the foreclosure of street improvement bonds and defendants claim the property by tax deeds to the State of California and from the State of California to the defendants.

It was stipulated at the trial that the court could render the same decision in each of said cases as the evidence would be identical except for the amount of the equitable liens owned by each of said parties in the event the court ordered judgment of partition.

The trial court found that plaintiff is not the owner of an equitable lien, or other lien, affecting the property involved; that plaintiff's predecessor in interest, M. Blakesley, now known as Mrs. Mary Jones, lost all interest in the property by her disclaimer and the subsequent judgment against her in case No. 148180, entitled *Semerad v. McKee*, in said court, and that defendant Netta Semerad is the owner in fee and entitled to the possession of the property. Plaintiff appeals from the judgment entered against it in accordance with these findings.

Plaintiff contends that it has title to the property involved by foreclosure of delinquent street improvement bonds, commissioner's sales thereof to one M. Blakesley, assignments of said commissioner's certificates of sale to Pacific States Savings and Loan Company, and deeds from said Pacific States Savings and Loan Company to Western Housing Company and from Western Housing Company to plaintiff.

On June 24, 1931, a decree of foreclosure and sale was rendered by the Superior Court of San Diego county and a commissioner was appointed to sell the property involved. The returns of the commissioner show that M. Blakesley purchased the property at the sales. However, no certificates of such sales were recorded and the original certificates were not produced or introduced in evidence at the trial of the instant action. Mrs. Mary Jones, formerly M. Blakesley, testified that the commissioner in said foreclosure action executed and delivered to her commissioner's certificates of sale, all as recited in the returns of sale and that when she received the same, which was in the latter part of 1930, she made and executed written assignments thereof, attached the same to the certificates and delivered them to the Pacific States Savings and Loan Company and that she had not seen the certificates or assignments since 1930.

In an effort to prove the assignments and a transfer of title to Pacific States Savings and Loan Company, Gizella Allen and John F. Bender, attorneys for plaintiff, testified as to a search made by them for the necessary certificates and assignments. The former testified that she examined the files in the foreclosure action in the Recorder's office and that she was unable to find recordation of the certificates or commissioner's deeds to Pacific States Savings and Loan Company. She also testified as to conversations had by her with an officer of Pacific States Savings and Loan Company and with an officer of Western Housing Company. This evidence was stricken out by the court on motion for counsel for defendants. Mr. Bender testified that he had checked all of the insolvency proceedings of

the Pacific States Savings and Loan Company and all of the commissioner's records in respect thereto and was unable to locate any reference whatsoever as to any commissioner's certificates or deeds involving the property.

[1] This evidence was sufficient to support the trial court's implied findings that secondary evidence was not admissible to prove a transfer of title to Pacific States Savings and Loan Company. *Anthony v. Janssen*, 183 Cal. 329, 332, 191 P. 538; *Taylor v. Clark*, 49 Cal. 671, 672. It was for the trial court to determine whether the evidence in this connection was or was not sufficient and its determination is conclusive in the absence of an abuse of discretion. *Brown v. Gow*, 128 Cal.App. 671, 673, 18 P.2d 377. Here, no abuse of such discretion is apparent.

[2, 3] Plaintiff introduced in evidence a quitclaim deed, dated November 29, 1938, from Pacific States Savings and Loan Company to Western Housing Company and a deed dated December 8, 1947, from Western Housing Company to plaintiff. These deeds did not convey the property to plaintiff because of the break in the chain of title to Pacific States Savings and Loan Company. Plaintiff introduced in evidence a quitclaim deed, dated October 9, 1950, from Mary Jones, formerly M. Blakesley, to Pacific States Savings and Loan Company. However, on August 12, 1948, the defendants herein filed an action to quiet title affecting all of the property here involved. In that action Mrs. Mary Jones, on February 14, 1949, filed a disclaimer, and judgment was obtained by defendants quieting their title as against her. This judgment eliminated M. Blakesley from the title and she conveyed nothing by her quitclaim deed to Pacific States Savings and Loan Company dated October 9, 1950.

[4] Under the evidence presented, the trial court was correct in finding that plaintiff is not the owner of an equitable or other lien upon the property. The evidence was sufficient to support the trial court's judgment that defendant Netta Semerad is the

owner in fee and entitled to the possession of the property involved

Judgments affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



116 Cal.App.2d 419

MENZIES et al. v. GEOPHYSICAL SERVICE, Inc. et al.

Civ. 4390.

District Court of Appeal, Fourth District,
California.

March 2, 1953.

Action for damages to water well and to realty from subsurface explosions which defendants allegedly set off wilfully, wantonly and with intent to damage plaintiffs and their realty. The Superior Court of Kern County, on its own motion, struck allegations pertaining to damage to realty and to exemplary damages and, upon plaintiffs' refusal to file complaint as modified, entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that plaintiffs were entitled to plead separately the damages to well and to realty, and that the allegation with respect to exemplary damages was sufficient as against general demurrer.

Judgment reversed with directions.

1. Appeal and Error ⇨151(1)

Where trial court, on its own motion, struck main portion of a cause of action, plaintiffs were not obligated to go to trial on remaining portion of complaint, and were entitled to appeal from a judgment for defendants, even though such judgment was entered upon plaintiffs' request in order that they might test ruling. Code Civ.Proc. § 956.

2. Appeal and Error ⇨870(5)

On an appeal from a judgment entered against plaintiffs, the ruling of trial court

striking portion of plaintiffs' complaint may be reviewed. Code Civ.Proc. § 956.

3. Pleading ⇨362(3)

In action arising from damage to water well from subsurface explosions set off by defendants, allegations in original complaint for damage to and depreciation of realty which allegedly resulted from damages to well and in amended complaints for general damages to realty and specific damages to well, did not reveal an inconsistency or change of position, or disclose a defect not curable by amendment or the introduction of a wholly different cause of action, and would not be struck as being frivolous and sham.

4. Damages ⇨108

One whose realty is injured by another's wrongful and negligent act is entitled to such damage as will compensate him for the injury or loss sustained.

5. Damages ⇨110

Permanent damages to freehold is ordinarily required to be shown by proof of value of property before and after commission of acts complained of, in order that jury may determine, by subtracting one valuation from other, what amount of actual damages may be.

6. Damages ⇨110

If a thing destroyed, although part of realty, has value which can be accurately ascertained without reference to soil on which it stands or out of which it grows, recovery may be for value of thing thus destroyed or for the cost of its repair. Civ. Code, § 3333.

7. Damages ⇨146

Plaintiffs, whose water well was allegedly damaged by subsurface explosions set off by defendants, were entitled to plead separately the damages to the well and the damages to the realty. Civ.Code, § 3333.

8. Mines and Minerals ⇨125

In action for damage to water well and to realty from subsurface explosions set off by defendants, allegations that defendants acted wilfully, unlawfully and maliciously in doing the acts charged, with deliberate intention to injure and damage plaintiffs'

property, were, with respect to demand for exemplary damages, sufficient. Civ.Code, § 3294.

Thomas P. Menzies, Harold L. Watt and James O. White, Jr., Los Angeles, for appellants.

Johnston, Baker & Palmer, Bakersfield, for respondents.

GRIFFIN, Justice.

In a third amended complaint plaintiffs and appellants Thomas P. Menzies and wife allege that they own a certain parcel of property in Kern County improved with a water well and pump which then produced approximately 2,250 gallons of water a minute; that in March, 1949, defendants and respondents wilfully, wantonly and without authority, and with intent to damage plaintiffs and their property, entered upon it and drilled holes in various places and placed explosive substances therein and caused them to detonate and explode; that violent concussions and vibrations of the earth and air shook the land and well of plaintiffs, causing great injury to the strata of the soil; that as a direct result, plaintiffs' well was shattered and the production of water therefrom was reduced and diminished from 2,250 gallons to approximately 1,750 gallons per minute, damaging plaintiffs' real estate so improved with the well, in the sum of \$50,000, being the difference in the value of plaintiffs' property so improved by the water well before and immediately after the acts of said defendants; that as a further direct result of said acts plaintiffs' well, which was reasonably worth the sum of \$13,000 immediately prior thereto, was wrecked, damaged and depreciated by the acts of defendants, in the sum of \$2,755.87, in that the well became clogged and obstructed with sand and gravel, and plaintiffs spent \$1,271.25 in removing said sand and gravel and in installing new equipment; that the water level of the well was permanently reduced from approximately 85 feet below the surface to approximately 136 feet, and plaintiffs' pump was thereafter unable to lift water to the surface; that they spent \$1,484.62 for a new pump and new tubing capable of lifting the water

from the lower level resulting from said acts of the defendants, and for gravel to repair damage to the well resulting therefrom; that in doing the things alleged defendants acted maliciously and with wanton disregard of the rights of plaintiffs. Exemplary and punitive damages are also claimed in the sum of \$1,000.

As a second cause of action, plaintiff and appellant Jamie H. Smith realleges these same acts pertaining to a parcel of property owned by him; that the property was improved with a well producing 2,000 gallons of water per minute and that after the detonation it was reduced to 1,500 gallons per minute; that the value of the real estate so improved before the acts complained of was \$75,000, and afterwards was \$25,000. \$50,000 is claimed for such damage. Additional damage for \$33,590.91 is claimed for the difference in value of the well prior to and after the claimed acts of defendant. Exemplary and punitive damages for \$1,000 are sought.

A general and special demurrer to the third amended complaint was sustained. Twenty days to amend were allowed plaintiffs if they so moved the court. On August 20, 1951, plaintiffs filed a motion for permission to file a proposed fourth amended complaint, and served a copy thereof on defendants. This proposed complaint set forth similar allegations as to the claimed damage, with an enlarged description of the property, the usages to which it was put, and the nature of the damage suffered, i. e., that it was fenced and used for the production of crops and as shooting grounds for migratory game birds; that by reason of the lowering of the subterranean water level there was an increase in the cost of production of water by extending tubing to the lower level. The court, after hearing, struck out, on its own motion, all allegations pertaining to damage to the realty and allegations pertaining to exemplary damages and granted plaintiffs leave to file the fourth amended complaint as modified. Counsel for plaintiffs refused and advised the court to enter judgment accordingly so he could test the correctness of the court's ruling. Judgment for defendants was entered.

Plaintiffs appealed and argue that both the third and fourth amended complaints contain sufficient allegations to state a cause of action for injury and damage to the realty as well as to the well and pump.

[1,2] Defendants first argue that plaintiffs were obligated to file that portion of the fourth amended complaint allowed by the court and go to trial upon it; that the judgment entered was not one entered *against* them but that this is an appeal from a judgment *requested* by plaintiffs. We see little merit to this argument. The trial court, on its own motion, struck and emasculated the main portion of plaintiffs' cause of action pertaining to the realty. Plaintiffs were not obligated to go to trial on the remaining portion of the complaint if the court was in error as to its ruling. On an appeal from a judgment entered against plaintiffs the ruling of the trial court striking a portion of plaintiffs' complaint may be reviewed. *Ross v. Flynn*, 46 Cal.App. 401, 189 P. 293; section 956 Code Civ.Proc.

In *Neal v. Bank of America*, 93 Cal.App. 2d 678, 209 P.2d 825, the court sustained an order of the trial court striking the complaint and proposed amendment to the complaint on the ground that they were frivolous and sham, and stated that the proper judgment to be entered was a judgment of dismissal, from which plaintiff could appeal and test the question.

In *Metzenbaum v. Metzenbaum*, 86 Cal. App.2d 750, 752, 195 P.2d 492, the defendant demurred generally to the complaint. After sustaining the demurrer with leave to amend, plaintiff declined to do so. The court said plaintiffs must, then, stand upon the pleading as against all grounds, and if the complaint is objectionable on any ground, the judgment of dismissal must be affirmed.

[3] It is defendants' contention, in support of the trial court's ruling, that, from plaintiffs' allegations in the several complaints, it affirmatively appears that the damage attempted to be alleged by plaintiffs was damage to their wells and well water produced by existing wells; that the allegations as to damage to plaintiffs' land is frivolous and sham and the court was

therefore authorized to strike these allegations from the complaint; that the allegation of \$50,000 damages to the realty of each plaintiff, which is additional to the only damage specifically pleaded, i. e., well damage, is not only inconsistent with former verified pleadings, but is a conclusion of law inconsistent with particular allegations of well damage, and that, under the circumstances, the special allegations must control, citing *Denman v. City of Pasadena*, 101 Cal.App. 769, 776, 282 P. 820. We have examined the original complaint and the various amended complaints. Even in the first complaint it refers to damage and depreciation in value of plaintiffs' property. The other amended complaints refer to damage to the water well, for reduction in water production, for reduction in the value of the real property, and for costs of attempted repairs to the well. Although, at defendants' insistence, plaintiffs amended their complaint several times to elaborate more fully on the nature of the damage, there appears to be no inconsistency between the several pleadings or change of position as was indicated in *Lee v. Hensley*, 103 Cal.App.2d 697, 230 P.2d 159, or that the original complaint discloses a defect not curable by amendment, or that a wholly different cause of action is introduced, as in *Klopstock v. Superior Court*, 17 Cal.2d 13, 108 P.2d 906, 135 A.L.R. 318; *Reardon v. Balaklala Consol. Copper Co.*, 9 Cir., 193 F. 189.

[4,5] It has been definitely held that one whose real property is injured by another's wrongful and negligent act is entitled to such damage as will compensate him for the injury or loss sustained. *Givens v. Markall*, 51 Cal.App.2d 374, 379, 124 P.2d 839; 15 Am.Jur. p. 514, sec. 106; *O'Leary v. Herbert*, 5 Cal.2d 416, 55 P.2d 834. In a proper suit for permanent damages to a freehold, the reason for the rule which ordinarily requires the measure of damages to be shown by proof of the value of the property before and after the commission of the acts complained of, is that the jury may determine, by subtracting one valuation from the other, what the amount of actual damages may be. *Givens*

v. Markall, *supra*; General Geophysical Co. v. Brown, 205 Miss. 189, 38 So.2d 703.

[6, 7] If a thing destroyed, although it is a part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be the value of the thing thus destroyed or the cost of its repair. Vol. 4 Sutherland on Damages, Fourth Ed. p. 3751, sec. 1015; *Greenebaum v. Taylor*, 102 Cal. 624, 36 P. 957; section 3333, Civ.Code. These claimed damages, in the instant pleadings, have been separately stated, and are separate and distinct from the claimed permanent injury to the underground strata. Whether plaintiffs will be able to prove the allegations of their amended complaint is not the question before us. They were entitled to plead it, and we conclude that the court erred in sustaining defendants' demurrer to the third amended complaint, and in striking from plaintiffs' proposed fourth amended complaint the allegations pertaining to damage to the realty. *Norton v. Bassett*, 158 Cal. 425, 111 P. 253; 21 Cal.Jur. p. 182, sec. 126; *Bacon v. Wahrhaftig*, 97 Cal.App.2d 599, 218 P.2d 144.

The other contention of defendants is that the allegations pertaining to exemplary and punitive damages are frivolous and sham and should have been stricken.

[8] In *Smpardos v. Piombo Construction Co.*, 111 Cal.App.2d 415, 244 P.2d 435, the question of exemplary damages was presented where there was a trespass on property held by plaintiff as a mining claim. Defendants entered, without his permission, maintained a powder magazine within 200 feet of his cabin and injured his personal property. The court sustained an award for such damages where it appeared that defendants were both oppressive and malicious in their trespass. Under section 3294 of the Civil Code exemplary damages may be awarded where a defendant has been guilty of "oppression, fraud, or malice, express or implied * * *." The allegations here are that defendants acted wilfully, unlawfully and maliciously in doing the acts charged, with deliberate intention to injure and damage plaintiffs' property. This is a sufficient allegation as against

a general demurrer. *Davis v. Hearst*, 160 Cal. 143, 116 P. 530; *Morgan v. French*, 70 Cal.App.2d 785, 161 P.2d 800.

Judgment reversed with directions to the trial court to allow plaintiffs to file their fourth amended complaint, as proposed.

BARNARD, P. J., and MUSSELL, J., concur.



LORENSEN et al. v. CITY OF LOS ANGELES.*
Civ. 19218.

District Court of Appeal, Second District,
Division 3, California.

March 9, 1953.

Rehearing Denied March 25, 1953.

Hearing Granted May 7, 1953.

Action against city for balance of salary due one of the plaintiffs as police officer. The Superior Court, Los Angeles County, William S. Baird, J., rendered judgment for plaintiffs and the city appealed. The District Court of Appeal, Shinn, P. J., held that claim of police officer, filed about a month after his restoration to duty, for his semi-monthly salary from time of his relief from duty under void order until his automatic restoration to duty was timely under city charter, as against contention that under charter the officer should have filed claim for salary within six months after each semi-monthly installment fell due.

Affirmed.

1. Municipal Corporations ⇐186(4)

A police officer who is temporarily relieved from duty pending charges against him is entitled to receive his salary while charges are pending if order so relieving him is void.

2. Municipal Corporations ⇐185(1)

The mere fact that police officer had been indicted for conspiracy to commit assault, robbery and to obstruct justice would not furnish legal grounds for officer's suspension, dismissal, or other disciplinary

* Subsequent opinion 260 P.2d 49.

action, but such indictment would justify an order on the conditions stated in city charter, temporarily relieving officer from duty. Pen.Code, §§ 182, subd. 5, 211, 245.

3. Municipal Corporations ⇐185(7), 186(4, 6)

Under city charter, order relieving police officer from duty, not followed within five days by complaint stating charges against officer, was void, and hence officer was entitled to his salary as it accrued semimonthly from date of order, and his automatic reinstatement as of date of order rendered it unnecessary for him to demand reinstatement before suing for compensation.

4. Municipal Corporations ⇐1005

An account or claim is "itemized", as respects provision in city charter requiring claims or demands to be presented within six months after last item of account or claim had accrued, when account or claim sets forth separate sums which add up to total amount of account or claim, and the separate amounts are the "items" of the account or claim.

See publication Words and Phrases, for other judicial constructions and definitions of "Itemized" and "Items".

5. Municipal Corporations ⇐1005

The provision in city charter requiring claims to be presented within six months after last item of account or claim has accrued means that if claim is on account consisting of several items or is based on contract or obligation under which payments fall due from time to time, but not indefinitely as in life pension cases, the six month period for filing a claim does not commence to run until last charge was made or last payment accrued.

6. Municipal Corporations ⇐1005

Claim of police officer, filed on April 19, 1950, for semimonthly salary from time of his relief from duty under void order of April 13, 1949, until his automatic restoration to duty in March, 1950, was sufficient as to all his salary during such period, as against contention that provision in city charter requiring claims or demands to be presented within six months after last item of account of claim has accrued required officer to file claim for salary within

six months after each semimonthly installment fell due.

Ray L. Chesebro, City Atty., Bourke Jones and Alan G. Campbell, Asst. City Attys., George William Adams, Deputy City Atty., Los Angeles, for appellant.

Thomas D. Kelly, Los Angeles, for respondents.

SHINN, Presiding Justice.

The City of Los Angeles appeals from a judgment in favor of plaintiffs for a balance of salary due Harry M. Lorensen as a captain in the city police force.

On April 12, 1949, plaintiff Harry M. Lorensen of the Los Angeles Police Department was indicted for conspiracy to commit assault, robbery and to obstruct justice. See *Lorensen v. Superior Court*, 35 Cal.2d 49, 216 P.2d 859. On the same day, Chief of Police Horrall filed charges against Lorensen, asking his removal upon grounds stated as follows: "Cause 1. Conduct unbecoming an officer. Count 1. In that on or about April 12, 1949, he was indicted by the Los Angeles County Grand Jury on a charge of conspiracy to violate Sections 245, 211, and 182, subd. (5) of the Penal Code, such action causing embarrassment to the Department." On the following day the Chief of Police temporarily relieved Lorensen from duty under § 202 (2) of the City Charter, which authorizes the Chief of Police to: "(a) Temporarily relieve from duty any officer or employee of the Police Department pending a hearing before and decision by the Board of Rights of any charge or charges pending against such officer or employee;" or "(b) Suspend such officer or employee for a total period not to exceed thirty (30) days with loss of pay and with or without reprimand, subject, however, to the right of such officer or employee to a hearing before a Board of Rights." A Board of Rights was duly organized and set the matter for hearing at various times but did not dispose of it until March, 1950, at which time, without a trial, the board ordered the charges dismissed and restoration of Lorensen to duty

without loss of pay. This action was taken immediately after the dismissal of the criminal charges in the superior court for insufficiency of evidence. After restoration to duty Lorenson retired. He had not received any pay since April 13, 1949. On April 19, 1950, he filed a claim for \$5,652.74. It was allowed for the six months' period immediately preceding the filing of the claim, but was disallowed for the balance of \$3,110.97. The ground for disallowance was the fact that Lorenson had not filed claims for salary within six months after each semimonthly instalment fell due. As authority for this position the city at that time contended, and it now contends, that the claim, insofar as it related to instalments falling due more than six months prior to the filing of the claim was barred by § 376 of the charter.¹ This, as we shall see, is the only question to be decided on the appeal.

[1] A preliminary question is whether the order relieving Lorenson from duty

was valid and sufficient to temporarily deprive him of his salary as it accrued. If it was a void order he was entitled to receive his salary semimonthly while the charges were pending. The city contends, and we agree, that the attempted relief from duty was ineffective for failure to comply with charter provisions. We quote from § 202(1) as set out below,² and also from § 202(3).³

[2] The mere fact that Lorenson had been indicted would not have furnished legal ground for his suspension, dismissal, or other disciplinary action. It would have justified an order temporarily relieving him from duty, but such an order would have been upon conditions stated in the charter.

[3] The only charges filed were those we have quoted, and since no complaint was filed containing "a statement in clear and concise language of all the facts constituting the charge made," the failure to file the same rendered applicable the lan-

1. "Sec. 376. No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damages arose, and all other claims or demands shall be presented within six (6) months after the last item of the account or claim accrued."

2. "Sec. 202. (1) * * * No officer or employee of the Police Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Police Department (other than by resignation), except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of Rights (except as otherwise specifically provided in paragraphs two (2) and seven (7) of this section). Such charges must be based upon some act committed or omitted by such officer or employee within one (1) year prior to the filing of the complaint referred to herein. No case of suspen-

sion with loss of pay shall be for a period exceeding six (6) months."

3. "Sec. 202. (3) In the event any order of relief from duty or order of suspension is made under either subparagraphs (a) or (b) of paragraph two (2), such order must contain a statement of the charges assigned as causes therefor, and the Chief of Police must (within five (5) days after such order of relief from duty or order of suspension is served as in this section prescribed) file with the Board of Police Commissioners a copy of a verified written complaint upon which such order of relief from duty or order of suspension is based, with a statement that a copy of such order of relief from duty or order of suspension and copy of verified complaint was served upon the accused. Such complaint must contain a statement in clear and concise language of all the facts constituting the charge made. In the event that the Chief of Police fails to file the aforesaid statement and complaint within the five (5) day period heretofore prescribed, the aforesaid order of temporary relief from duty or order of suspension shall thereupon become void and of no effect and shall be automatically revoked, and the accused officer or employee restored to duty with the department without loss of pay and without prejudice, the same as if no order of relief from duty or order of suspension had been made."

guage of § 202(3): "[t]he aforesaid order of temporary relief from duty or order of suspension shall thereupon become void and of no effect and shall be automatically revoked, and the accused officer or employee restored to duty with the department without loss of pay and without prejudice, the same as if no order of relief from duty or order of suspension had been made." (Emphasis added.) It follows that in the absence of the filing of a sufficient complaint within five days after the order of relief from duty the order became void and of no effect. Lorensen was to be deemed a member of the department at all times and was entitled to his salary as it accrued semi-monthly from and after April 13, 1949. The fact that he was automatically restored, as of the date of the attempted lay-off, rendered it unnecessary for him to make a demand for reinstatement under § 112½ of the charter before suing for his compensation. See *Varela v. Board of Police Commissioners*, 107 Cal.App.2d 816, 238 P.2d 62.

In contending that Lorensen should have filed a separate claim for each instalment of salary, the city relies upon the case of *Dryden v. Board of Pension Com'rs*, 6 Cal. 2d 575, 59 P.2d 104. That was a case where the widow of a police officer sued for a pension under the Los Angeles City Charter. She first filed a claim for a pension some ten months after the death of her husband. Her claim was denied by the Board of Pension Commissioners "on the sole ground that section 376 of the city charter required all such claims or demands to be presented within six months, and that, since more than six months had elapsed since the death of petitioner's husband, the said claim was barred and petitioner entitled to no relief under the pension provisions of the city charter of the city of Los Angeles." 6 Cal.2d 577, 59 P.2d 105. In the opinion of Mr. Justice Pro Tempore Roth of the District Court of Appeal, adopted by the Supreme Court, it was said: "The sole point presented on petitioner's appeal (Civ. No. 9912) [*Dryden v. Board of Pension Com'rs*, Cal.App., 51 P.2d 177] is the correctness of the trial court's rul-

ing in this respect." The court held that the widow was entitled to present and future payments but that those which had accrued more than six months prior to the filing of the claim were barred. Inferentially, the court held that the final phrase of the provision of § 376 that the claim must be filed "within six (6) months after the last item of the account or claim accrued" does not apply in the case of a life pension. A reference to the briefs discloses that the petitioner was contending that the claim was timely filed because "the last item would not accrue until petitioner dies or remarries." It will be noticed that the section relates to the time the *last* item accrued. This use of the past tense renders the language inapplicable to instalments of a life pension.

In commenting upon the *Dryden* case the court in *Dillon v. Board of Pension Com'rs*, 18 Cal.2d 427, at page 431, 116 P. 2d 37, at page 40, 136 A.L.R. 800, said: "Thus, a claimant can assert his right to a pension before the board at any time after the event giving rise to the claim has occurred so long as the claim is made within six months after any payment would have accrued. If the pension is granted he is entitled to receive payments in the future but can recover only those past payments which would have accrued within a period six months prior to the time of the making of the claim. This result is compelled by the peculiar wording of this charter provision, which establishes as the point of reference for the running of the six months' period, *not the time when the right to the pension first accrues, but the time at which the last item of the claim accrues. In the case of pensions, items accrue indefinitely.*" (Emphasis added.)

It is settled that the provision of § 376 that the six months' period runs from the time the *last item of the claim accrued*, does not apply in the case of life pensions, and that the time therefore runs from the date each periodic payment accrued prior to the filing of a claim. It is clear, however, that the rule has but limited application. It cannot be extended to all accounts and claims without completely disregarding the

provision that the time commences to run when the last item accrued. If this provision is inapplicable in the present case, it would be inapplicable in any case of an open account with the city under which goods were being sold or services rendered, and to all instalment or periodic payments that might become due to a creditor of the city under a single contract or obligation.

[4] In order to sustain the contention of the city it would be necessary to hold that Lorenson was not presenting a single claim but a multiplicity of claims, each consisting of a half month's salary. This would be the equivalent of saying that each item of the claim is a claim in itself. The very purpose of the wording of § 376 was to avoid the necessity of filing separate claims for each of the items or amounts of indebtedness having origin in a common source which, when combined, would make up a single claim. An "item" is defined in Webster's New International Dictionary, 2nd Ed., as "a separate particular in an enumeration, account or total; a detail; as, the items in a bill." An account or claim is itemized when it sets forth separate sums which add up to the total amount of the account or claim. The separate amounts are the items of the account or claim.

[5] The clear meaning of § 376 is that if the claim is on an account consisting of several charges, or is based upon a contract or obligation under which payments fall due from time to time (but not indefinitely, as in life pension cases), the six months' period for filing a claim does not commence to run until the last charge was made or the last payment accrued.

[6] The demand of Lorenson was made up of the semimonthly accruals of salary for the period April 13, 1949 to March 16, 1950. The last item was the sum which accrued on the latest pay day during that period. The entire sum for which demand was made had accrued. The claim filed was sufficient as to all the salary that had accrued.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

FALL v. COASTWISE LINES.
Civ. 19155.

District Court of Appeal, Second District,
Division 3, California.

Feb. 27, 1953.

Action under the Jones Act for personal injuries sustained by a seaman who was struck by falling cargo when loading winch ran wild. The Superior Court, Los Angeles, David Coleman, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Vallee, J., held, *inter alia*, that the amount of damages awarded was not so obviously disproportionate to the injuries as to justify the conclusion that the verdict was not the result of the cool and dispassionate discretion of the jury.

Affirmed.

1. Jury ⇨115

A challenge to the panel does not lie in a civil case.

2. Appeal and Error ⇨232

A challenge to the panel as a whole, and to each prospective juror on panel, on ground that method of impaneling jury was illegal and unlawful and not in accordance with statute because names of jurors were not kept in locked box and because names of jurors were on white pieces of unfolded paper was, in effect, an objection to service of jury on grounds stated; and therefore overruling of such challenge was properly before appellate court on appeal in civil case. Code Civ.Proc. §§ 204-211.

3. Jury ⇨65

The statutory provisions for selecting and returning trial jurors in Superior Court differentiate between the "trial jury box" used prior to time jurors are sent to trial department and the "trial jury box" from which names of jurors are drawn when jury to try action is formed in trial department, and it is not required that when "regular jurors" are sent to trial department, slips or ballots of paper on which their names are written shall be folded or that box in which they are sent shall be kept locked until ordered by court to be opened. Code Civ.Proc. §§ 246-248, 600-604.

4. Appeal and Error ⇨971(2)**Evidence** ⇨546

Qualifications of witness to testify as expert is matter within sound discretion of trial court, and where there is no showing of clear abuse of that discretion, ruling will not be disturbed on appeal.

5. Evidence ⇨537

In action under Jones Act for personal injuries sustained by seaman, it was not error to refuse to permit witness who had followed sea to answer hypothetical question as to whether in his opinion a man in plaintiff's condition would be qualified physically to perform duties of able-bodied seaman, where witness was not shown to have ever known any seaman who, after injury similar to that sustained by plaintiff, was able to go to sea and do actual work.

6. Appeal and Error ⇨1057(1)

Exclusion of evidence was harmless, where fact sought to be proved thereby was amply established by other evidence.

7. Trial ⇨260(1)

It is not error to refuse to give requested instruction if subject matter is incorporated in instructions given.

8. Negligence ⇨65

Contributory negligence may arise from an omission as well as from an act.

9. Seamen ⇨29(5.17)

In action under Jones Act for injuries sustained by seaman when winch "ran wild", wherein defendant claimed plaintiff was negligent and that his negligence was sole proximate cause of injury, and plaintiff denied any negligence but asserted that if the jury could infer negligence on his part it was not a proximate cause of his injury because the negligence of the winch driver was an intervening cause, it was not error to give proximate cause instruction including phrase "unbroken by any efficient intervening cause", notwithstanding defendant's claim that there was no evidence of any intervening cause and that effect of instruction was to confuse the jury.

10. Damages ⇨127

Where there is no showing of passion or prejudice on part of jury in arriving at amount of verdict, it cannot be said that amount is excessive as a matter of law.

11. Damages ⇨132(6)

Award of \$50,000 to seaman whose left foot and ankle were crushed with resulting total loss of function of leg muscles, and who consequently suffered permanent traumatic arthritis and constant pain, was not excessive.

Lasher B. Gallagher, Los Angeles, for appellant.

Tanner & Thornton, Dee B. Tanner, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment for plaintiff entered on a verdict in an action for damages for personal injuries brought under the statute of the United States known as the Jones Act, 46 U.S.C.A. § 668.

The accident occurred on June 28, 1950. Plaintiff was employed at the time by defendant as an able-bodied seaman aboard the S. S. Joel Chandler Harris. The ship was moored at Long Beach with its starboard side to the dock. The crew was engaged in the discharge of a deck cargo of steel rails from the portside onto railroad flatcars on the dock by means of the ship's steam winches. The rails lay fore and aft, were of uneven lengths, and were being discharged in lots of five to eight rails.

The loads were made up by seamen from the pile on the deck by placing a sling at each end and hooking the slings onto the cargo hook. The winch driver had sole control of the movement of the loads. When a sling had been placed at each end of a load and the slings had been hooked to the cargo hook, it was the duty of the winch driver to test the load by lifting it off the deck to determine whether it balanced evenly in the slings. If a sling slipped, he put the load down on the deck and the seamen readjusted it. If the load

hung evenly, the winch driver, by operation of the port winch, lifted the load vertically high enough to clear the hatch coaming. The seamen then turned the load so that it went out athwartship and the winch driver pulled it horizontally to starboard and onto the dock by operation of the starboard winch.

On the day of the accident, plaintiff and three other seamen hooked slings to a load of seven or eight rails weighing between one and two tons. Plaintiff and a partner were at the forward end and the other two were at the after end. Plaintiff was on the inboard side nearest the portside of the No. 3 hatch; his partner on the outboard side of the port gunwhale. Plaintiff and his partner placed a sling around the forward end of the load. The slings were hooked to the cargo hook; the winch driver tightened them and tested to see if the load hung evenly. The forward sling slipped toward the center of the load; plaintiff adjusted it; it was secure; the load was in position to go up; and the winch driver then lifted it vertically several feet off the deck. Because there was no room for it on the dock he left it hanging. Plaintiff, with his back to the winch driver, stood watching the load, prepared to guide it athwartship. Suddenly the winches ran wild: the winch driver had left his post at the controls without shutting off the winches. The load jerked forward toward plaintiff and to starboard with the rails hitting the deck and bouncing. Two seamen jumped for the winch controls and shut off the steam. Plaintiff attempted to escape from the careening rails, but he was hit by one or more of them, and was knocked to the deck against a masthouse. His left foot and ankle were crushed against a steam pipe guard, virtually severing the foot from the leg at the ankle.

Defendant, at the trial, conceded it was negligent and that its negligence was a proximate cause of the injury. It pleaded contributory negligence. It does not contend here that plaintiff was guilty of contributory negligence as a matter of law. Its assignments of error are: 1.) The statutory requirements covering the impanelment of a jury were violated; 2.) The court

erred in excluding evidence offered by defendant; 3.) The court erred in refusing to give instructions requested by defendant and in giving instructions on its own motion and at the request of plaintiff; and 4.) The verdict is excessive and not sufficiently supported by the evidence.

1. When the cause was called for trial, and after all the prospective jurors in the courtroom had been sworn and twelve were in the box, and before they were questioned, defendant challenged and objected "to the panel as a whole, and to each prospective juror on the panel, on the ground that the method of impaneling the jury is illegal and unlawful, and not in accordance with the provisions of the statute set forth in the Code of Civil Procedure in the following respects: 1. The names of the jurors are not kept in any locked box, nor was such box ordered to be opened by the court. 2. The names of the jurors are on flat pieces of paper, not folded, and are contained in a tin box which is unlocked, and was unlocked and brought into this courtroom by one of the prospective jurors, which one the record does not show." The challenge and objection were forthwith denied. After a number of jurors had been examined for cause and several had been challenged peremptorily, the court stated it wished to augment the record by showing the manner in which the jurors "are handled" when they arrived in the department in which the cause was on trial. The clerk of the department then was sworn and testified: When the jurors come into the courtroom, one of them bears a metal box; the juror carrying the box hands it to the bailiff who hands it to me; in the box there is a small sealed paper envelope and on the envelope, the number of the department; the envelope is left sealed in the box; when the court called this case, I opened the envelope and dumped the slips in the metal box which was then sitting on top of my desk; the slips were flat pieces of paper sent over by the jury commissioner; in filling the jury box I drew one slip at a time from the box; I did not look at the slips before I drew them; the metal box was not locked; I did not receive any directions or order

from the court before opening the box and taking the envelope out; the slips of paper were about four inches long and one and a quarter inches wide; they remained flat at all times. Defendant then again challenged "each juror now sitting in the box for cause, and also challenged the panel as a whole for cause" on the grounds previously stated and on the further grounds that defendant "has been and will be deprived of due process of law as guaranteed by the Thirteenth [Fourteenth] Amendment to the Constitution of the United States; and also that it has been and will be deprived of equal protection and/or the equal application of the laws of the State of California."

[1-3] Plaintiff objects to our consideration of the point on the ground a challenge to the panel does not lie in a civil case and that defendant did not challenge any individual juror for cause. A challenge to the panel does not lie in a civil case. *Livesey v. Stock*, 208 Cal. 315, 321, 281 P. 70. We think, however, that the challenge was in effect an objection to the service of the jury on the ground stated and that the point is properly before us.

Sections 204 to 211 of the Code of Civil Procedure provide the method of selecting and returning the trial jurors in the superior court. In Los Angeles County the judges semiannually select persons to serve from lists of qualified individuals furnished by the jury commissioner. Certified lists of the persons selected by the judges are filed with the clerk of the court. On receiving the lists, it is the duty of the clerk to write down the names contained on the lists "on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon," and to deposit such pieces of paper in a box called the "trial-jury box." The persons whose names are so returned are known as "regular jurors." They serve during the ensuing year or until a new list is required. The names are to be drawn from this "trial-jury box" as jurors are need for trial service.

Sections 214 to 227 provide for the drawing and summoning of trial jurors to attend before the court. When trial jurors are needed the court makes an order directing a specific number to be drawn and summoned. The clerk, in the presence of the court, draws the slips from the "trial-jury box." After the drawing is completed, the clerk makes a list of the names drawn, certifies it, and delivers it to the sheriff for service. The sheriff is required to summon the persons on the list. The provisions to which we have referred are in Part I of the Code of Civil Procedure treating of "Courts of Justice" in general.

Sections 246 to 248, also in Part I, relate to the manner of selecting trial jurors from those summoned. Section 246 provides that "the clerk shall call the names of those summoned, and the court may then hear the excuses of jurors summoned; * * *. The clerk shall then write the names of the jurors present and not excused upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and there, in the presence of the court deposit the slips or ballots in a box, which must be kept sealed or locked until ordered by the court to be opened." Section 248 provides that in a county having two or more judges, one panel may be drawn, summoned, and impaneled by any one of the judges for use in the trial of cases before any two or more judges as occasion may require, and the whole or any number of jurors from such panel may be required to attend and serve in the trial of cases or to complete a panel or jury before any of the other judges.¹ Section 247 provides: "Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impaneling the trial jury as are prescribed in part two of this code."

Part II of the Code of Civil Procedure treats of "Civil Actions." Chapter IV of Title VIII Part II treats of "Trial by Jury". Article I thereof, §§ 600-604, prescribes the manner of formation of a trial

1. Section 248 was amended in 1951. Stat.1951 ch. 1495 § 9.

jury in a civil action. Section 600 reads: "When the action is called for trial by jury, the clerk, or the justice where there is no clerk must draw from the trial jury box of the court the ballots containing the names of the jurors, until the jury is completed, or the ballots are exhausted."

It does not appear that the method prescribed for selecting, summoning, and returning the trial jurors prior to the time they were sent to the trial department in the present case, was not followed. We must presume it was followed. Code Civ. Proc. § 1963(15). We think that when analyzed the statutory provisions differentiate between the "trial jury box" used prior to the time jurors are sent to a trial department and the "trial jury box" referred to in section 600 from which the names of the jurors are drawn when the jury to try an action is formed in a trial department. See 15 Cal.Jur. 401, § 72, note 11. This would seem obvious as only one "trial jury box" is required to summon and return trial jurors for service while many boxes may be necessary to send jurors to trial departments. The "trial jury box" in which the clerk must place the folded separate slips of paper is the one used when trial jurors are needed for service in the court as distinguished from a separate department of the court. The sections in Part I, to which we have referred, relate exclusively to the setting apart of a sufficient number of persons eligible for jury duty from whom may be drawn and brought into court from time to time, as many jurors as are required to render actual service. *Halsey v. Superior Court*, 152 Cal. 71, 77, 91 P. 987. Those persons are known as "regular jurors." They serve for one year and until other persons are selected and returned. They are available for service in all departments of the court. We understand it is the practice in Los Angeles County to assemble the "regular jurors" in one department and to send the required number to trial departments as needed. The names of those so sent on slips of paper of similar size and appearance are placed in an envelope, the envelope is sealed and placed in a metal box, and the unlocked box,

with the sealed envelope in it, is then taken by one of the jurors to the clerk of the trial department. This we think is the "trial jury box" referred to in section 600. The clerk, on receipt of the box, proceeds in the fashion described in the testimony to which we have referred. We find nothing in this procedure contrary to the statutory provisions. The statutes do not provide that when "regular jurors" are sent to a trial department the slips or ballots of paper on which their names are written shall be folded nor that the box in which they are sent shall be kept locked until ordered by the court to be opened.

[4,5] 2. A witness called by defendant who had been a seaman for many years and a master of a lumber schooner since November, 1950, was asked a hypothetical question as to whether in his opinion a man in plaintiff's condition would be qualified physically to perform the duties of an able-bodied seaman. Plaintiff's objection was sustained. Defendant assigns error. The objection was apparently sustained on the ground the witness was not qualified to express an opinion on the subject. The qualifications of a witness to testify as an expert is a matter within the sound discretion of the trial court; and where there is no showing of a clear abuse of that discretion, the ruling will not be disturbed on appeal. Cases collected—21 West's California Digest, Evidence, ¶546, page 605. No such showing is made. The question merely assumed the present condition of plaintiff's foot and ankle as testified to by some of the medical experts. The witness was not shown to have ever known any seaman, who, after an injury similar to that sustained by plaintiff, was able to go to sea and do actual work. There was no error.

[6] 3. One Marie Allison was called as a witness by defendant. Defendant sought to show that her husband had worked steadily as an able-bodied seaman for about 25 years; that during all of that time he had an "absolutely stiff knee"; and that he is now over sixty years of age and is still working in spite of the stiff knee. On objection of plaintiff, the witness was not permitted to give the testimony.

Defendant assigns error. There was no error. The witness did testify that her husband is a boatswain on ships; she had been married 25 years; her husband was working in the merchant marine at that time; "he is a cripple; he has a stiff knee." Assuming the admissibility of the proffered evidence, without so deciding, its exclusion was harmless. The facts defendant sought to establish by the witness were fully testified to by other witnesses. It is trite to say that the exclusion of evidence is harmless where the facts sought to be proved were amply proved by other evidence. Further, counsel for defendant argued the facts fully to the jury.²

[7] 4. Defendant requested the court to give the following instructions to the jury: (a) "While the defendant is under the burden of proving contributory negligence on the part of the plaintiff by a preponderance of the evidence, you are instructed that if contributory negligence appears from or is shown by the evidence which the plaintiff has introduced in support of his own case, there is no necessity that the defendant offer any evidence whatever upon that subject." (b) "In determining whether contributory negligence has been proved by a preponderance of evidence, you must consider all the evidence bearing either way upon that question, regardless of which of the parties produced it. The defendant is entitled to the same benefit from evidence that favors its contention that the plaintiff was guilty of contributory negligence when produced by the plaintiff as when produced by the defendant. Thus, if the evidence presented by the plaintiff himself supports a finding that he was guilty of contributory negligence, that finding would be adequately supported even if the defendant produced no additional evidence to the same effect."

2. Defendant's counsel argued: "We have the testimony showing the condition of Ben Allison, a totally stiff knee for years, but nevertheless, to Captain Barry's personal knowledge, for fourteen years he has been able not only to do his job as an able seaman but to do it well, and Captain Barry said that he was a good man. Who can dispute the fact that Ben Allison is a good man? He is over

The court modified instruction (a) and gave it as follows: "The defendant is under the burden of proving contributory negligence on the part of the plaintiff by a preponderance of the evidence. All of the evidence on this point is to be considered by you, whether produced by the defendant or the plaintiff." Instruction (b) was refused. Defendant assigns error. The argument is that since defendant conceded actionable negligence on the part of the winch driver, the question of contributory negligence was the vital issue in this case; therefore defendant was entitled to have the jury specifically instructed with respect to contributory negligence and the burden of proof in that respect, and that the instruction given was not specific. Conceding the premise, the conclusion does not follow. The instruction as modified and given contains virtually the same language as the instruction proffered, and it plainly stated that in determining the question of contributory negligence the jury should consider all the evidence on the point, including that of plaintiff. It is not error to refuse to give a requested instruction if the subject matter is incorporated in the instructions given. 24 Cal. Jur. 806, § 79. See also *McNulty v. Southern Pacific Co.*, 96 Cal.App.2d 841, 856, 216 P.2d 534; *Richmond v. Moore*, 103 Cal.App. 173, 180, 284 P. 681.

[8] 5. Defendant proffered and the court refused to give the following instruction: "In the event the plaintiff did any act which such ordinarily prudent able seaman would not have done under the circumstances or if the plaintiff failed to perform some act which such ordinarily prudent able seaman would have performed under the circumstances, then you must find that the plaintiff was guilty of negligence. If the plaintiff was guilty of negli-

60 years of age, the testimony shows, married 25 years to this lady who took the stand, and she testified that he has been crippled since World War I, but nevertheless he gets up and down ladders, he does clipping and painting, he climbs up and down to these loads of lumber, and he makes \$100 a week take-home pay."

gence and such negligence was a proximate cause of his injury then the law requires that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff." At the request of plaintiff, the court gave this instruction: "Contributory negligence is the doing of some act by a plaintiff employee amounting to a want of ordinary care for his own safety, that is, the care which a reasonably prudent seaman would exercise under like circumstances." Defendant assigns error. It cannot be gainsaid that the instruction given, standing alone, is inadequate. Contributory negligence may arise from an omission as well as from an act. However, other instructions given cured the defect.³ When the instructions are read as a whole no error appears.

6. Counsel for plaintiff stipulated during the trial that a sling would be unsafe if it was not properly hooked to the load. Defendant proffered an instruction which was refused to the effect that the jury must accept stipulated facts as conclusively true. It was not error to refuse the instruction. The subject matter was amply

covered by an instruction which read: "You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts." Further, counsel for defendant stated the effect of the requested instruction to the jury in argument.⁴

[9] 7. The court, on its own motion, gave the standard instruction defining "the proximate cause of an injury."⁵ Defendant assigns error because of the inclusion in the instruction of the phrase "unbroken by any efficient intervening cause," arguing that there was no evidence of any intervening cause and that the effect of the instruction was to confuse the jury. There was no error in giving the instruction. Defendant claimed plaintiff was negligent and that his negligence was the sole proximate cause of the injury. Plaintiff denied any negligence on his part, but asserted that if the jury could infer such negligence, it was not a proximate cause of the injury because the negligence of the winch driver was an intervening cause. These were questions of fact

3. The court gave the following instructions: "You must consider whether or not the plaintiff was negligent, proximately contributing to the happening of the injury."

"The defendant has conceded that the winch driver was guilty of negligence and that such negligence on the part of the winch driver was a proximate cause of the injuries sustained by the plaintiff. Therefore, insofar as the question of negligence is concerned, the sole issue submitted to you for decision as a question of fact is whether the plaintiff was also guilty of negligence proximately contributing to his own injury."

"Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person."

"Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light

of all the surrounding circumstances, as shown by the evidence."

4. Counsel said to the jury: "Now, we have stipulated here, and this is important on the question of contributory negligence. A stipulation is an agreement, and conclusively establishes the truth of the fact stipulated to, and the fact cannot be disregarded or ignored by either the court or the jury or by the attorneys. You will recall during my cross examination of Mr. Fall, and I was going into the question of the sling, 'How do you put them on?' and Mr. Tanner volunteered this: 'I will stipulate with counsel, if that is what he wants to show by reason of these questions, that it would be unsafe if it wasn't properly hooked to the cargo.' And, 'Mr. Gallagher: I accept the stipulation.'"
5. "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury."

for the jury and the instruction was proper.⁶

[10, 11] 8. A unanimous jury awarded plaintiff \$65,000 damages. After the jury had been polled, the foreman stated that for the benefit of the attorneys he had a form which gave the conclusions of the jury on the various items of damage. The court at the request of defendant permitted him to read it as follows: "Loss of wages to date, \$7,000; For wages lost in the future, \$8,000; \$50,000 for all pain and suffering heretofore and in the future," and directed the foreman to sign it and ordered it filed. Defendant argues that the time which elapsed from the date of injury to that of rendition of the verdict was about 16 1/2 months; that plaintiff was allowed \$425.24 a month for lost wages for that period; that it is clear that the jury used the same formula for "wages lost in the future"; that it is obvious the jury rejected the evidence that plaintiff would not be able in the future to engage in his occupation as an able-bodied seaman, and predicated its verdict on the finding he would be able as soon as his medical treatment was concluded to resume his occupation on a basis of full duty; that therefore, the allowance of \$50,000 "for all pain and suffering heretofore and in the future" is so grossly excessive as to shock the conscience at first blush.

The presumptions and rule governing our consideration of the point have been iterated innumerable times and need not be repeated. 4 Cal.Jur.2d 494, § 613. The presumptions have added strength when the trial judge reviews the verdict on a motion for a new trial and declines to disturb it, as he did in the present case. 4 Cal.Jur.2d 451, § 577.

Plaintiff was twenty-four years of age at the time of the accident. He had a life expectancy of 42.12 years. He had been at sea since he was seventeen, except for one year in the army. Before the acci-

dent his earnings were almost \$600 a month, take-home-pay about \$5,200 a year, which would have continued but for the accident. Fifty-two hundred dollars a year for forty-two years is \$218,400 without considering ever-present opportunities for advancement, as shown by the evidence. The present worth of \$5,200 a year for forty-two years at 3% interest is \$123,247. Plaintiff's left foot was completely avulsed at the ankle joint. Both the tibia (larger of the two bones between knee and ankle) and the fibula (smaller of the two bones) were avulsed through the skin. The foot remained attached by the anterior group of tendons and the posterior tendo Achillis. There was a compound comminuted fracture of the medial and lateral malleolus. The malleolus is the rounded projection of each bone of the leg at the ankle. There were three major and one smaller bone fragments lying in the soft tissue. The leg bones were broken into many small fragments. There was a total dislocation of the foot from the bones of the leg. There was just enough soft tissue left for one large blood vessel to come down. At the time of the accident, the pain was so agonizing that plaintiff was caused to bite a longshoreman who pulled him away from the rails.

Plaintiff was taken to a hospital where he remained nearly three months. The result was complete nonunion. There he was kept under narcotics, opiates, and sedatives; he lost much blood and had numerous transfusions; the wound was granulated, raw, and draining. Six months after the accident a screw was driven into the medial malleolus. The fibula could not be repaired. Later the tibia was fused to the ankle bone destroying the ankle joint. Bone for the fusion was obtained from the hip. During the operation the spinal anesthetic wore off and plaintiff suffered excruciating pain. After the fusion, nonunion of the malleoli remained, resulting in grating of the bone tissue

6. The trial judge at the time the question arose correctly stated: "It could be a very logical assumption that if there were any negligence on the part of the plaintiff in attaching the sling, that the force of that negligence had ceased to

operate, and that nothing would have happened if the winch driver had been there, and if he had operated the winch properly. If the load had stayed on the deck, nothing would have happened."

between the ununited malleoli and the tibia and ankle bone. Two months later the conditions previously described persisted, except that there was a partial fusion of the tibia and the ankle bone.

Shortly before the trial plaintiff was fitted with an ankle and foot brace. He used crutches until he was fitted with the brace from which sores developed under his arms causing him trouble and pain. At the time of the trial he was still undergoing treatment. Plaintiff's foot has no eversion or inversion, nor dorsiflexion or plantar flexion. Because there is no motion in the foot he has to walk with his knee stiff so he can get his foot down flat to take the next step; if he bent his knee he would stub his foot; he cannot walk up steps normally, but must take one step at a time, lifting his foot to a step, then dragging the left one up to the same step and then repeating the process; he cannot rotate his foot in turning and he has lost the ability to balance himself requiring the use of a cane. The fractures of the medial and lateral malleoli remain ununited. As a result there is constant pain at these fracture sites. Plaintiff has permanent traumatic arthritis in the left foot and ankle and suffers a great deal of pain. If he walks

a block the pain increases to the point where he has to lean on some one. If his foot hits a rock or uneven ground he suffers great pain. There is no give in the foot at any time. He suffers from a constant bad burning sensation on the top of the foot through the scarring. He has suffered a permanent nerve injury (severing of the nerve) in the foot. The tendons leading to the toes are involved in adhesions. There is a total loss of function of the muscles of the leg, and no motor supply to the toes and forefoot. To what extent rehabilitation will enable plaintiff to earn a livelihood is left largely in the realm of speculation. There was evidence from which the jury could reasonably conclude that he will never work as a seaman again.

A number of cases in which the verdicts were comparable are set out in the margin.⁷ Where there is no showing of passion or prejudice on the part of the jury in arriving at the amount of the verdict, it cannot be said that the amount is excessive as a matter of law. *Werkman v. Howard Zinc Corp.*, 97 Cal.App.2d 418, 422, 218 P.2d 43. We cannot say that the amount of damages awarded is so obviously disproportionate to the injuries as to justify the conclusion that the verdict was

7. *Holder v. Key System*, 88 Cal.App.2d 925, 200 P.2d 98 (\$45,000 award to 51 year old widow and adult children for death of 56 year old husband earning \$180 a month with life expectancy of 16.7 years); *Correia v. Van Camp Sea Food Co.*, 113 Cal.App.2d 71, 248 P.2d 81 (\$42,500 award under Jones Act to mother of 18 year old seaman earning more than \$6,000 a year—parents and son joint life expectancy of 17 years with father gainfully employed); *Sullivan v. City & County of San Francisco*, 95 Cal.App.2d 745, 214 P.2d 82 (\$100,000—pelvic region crushed and one vertebra fractured); *Gluckstein v. Lipsett*, 93 Cal.App.2d 391, 209 P.2d 98 (\$115,000—malpractice for raising breasts resulting in disfigurement, constant pain and malignant growths); *Johnston v. Long*, 30 Cal.2d 54, 181 P.2d 645 (\$73,000—loss of end of nose and numerous operations); *Bisinger v. Sacramento Lodge No. 6*, 187 Cal. 578, 203 P. 768

(In 1921—\$28,191 for injuries similar to those in case at bar to a woman without earning capacity); *Whittington v. Pennsylvania R. Co.*, D.C., 55 F.Supp. 1022 (\$60,000—loss of earnings \$3,000 a year, life expectancy 30 years); *Denny v. Montour R. Co.*, D.C., 101 F.Supp. 735 (\$77,650—R. employee 40 years old earning \$200 a month painfully crippled and forced to walk in an ungainly fashion); *Southern Pac. Co. v. Guthrie*, 9 Cir., 186 F.2d 926, certiorari denied 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343 (\$100,000 to 58 year old man for loss of leg); *Louisville & N. R. Co. v. Jolly's Adm'x*, 232 Ky. 702, 23 S.W.2d 564 (In 1930—\$5,000 for four days pain and suffering); *Bimberg v. Northern Pac. Ry. Co.*, 217 Minn. 187, 14 N.W.2d 410, 419 (In 1944—\$2,060 for forty-one hours suffering); *Stone v. Sinclair Refining Co.*, 230 Mich. 472, 202 N.W. 1004 (In 1925—\$4,000 for four hours pain and suffering.)

not the result of the cool and dispassionate discretion of the jury.

Affirmed.

SHINN, P. J., and PARKER WOOD,
J, concur.



116 Cal.App.2d 604

JONES v. JONES.

Civ. 19287.

District Court of Appeal, Second District,
Division 1, California.

March 11, 1953.

Proceeding on motions by wife for order to show cause why husband should not be held in contempt for violation of separate maintenance decree and for order requiring husband to pay for charges incurred by wife for eye examinations and glasses for herself and minor son wherein husband moved for order to show cause why he should not be relieved from obligation of making further payments for support of his minor son or for any medical or dental bills incurred in his behalf. The Superior Court, Los Angeles County, entered an order relieving husband from all payments of future doctor bills and from obligation to pay for the examinations and glasses, and dismissing the contempt matter, and the wife appealed. The District Court of Appeal, Patrosso, J. pro tem., held, inter alia, that the obligation of the husband to pay for the necessary medical and dental expenses of the wife was not in issue.

Affirmed in part and reversed in part and matter remanded for further hearing.

1. Husband and Wife ⇨299(3, 4)

In proceedings on motions by wife for order to show cause why husband should not be held in contempt of separate maintenance decree and to require husband to pay for eye examinations and optical glasses required by wife and minor child, and on husband's motion for order to show cause why decree should not be modified so as

to relieve husband from obligation of making further payments for support of minor son or for any medical or dental bills incurred in his behalf, question of whether husband should be required to pay for necessary medical and dental expenses of wife was not before court.

2. Divorce ⇨245(1, 3), 309

Husband and Wife ⇨299(3)

The court which has rendered divorce or separate maintenance decree retains jurisdiction to modify provisions thereof insofar as they relate to support and maintenance of wife and minor children, but it may not do so ex parte.

3. Husband and Wife ⇨299(4)

Only questions presented by wife's application to court which had issued separate maintenance decree for order requiring husband to pay for cost of dental services alleged to be necessarily required by wife were whether dental services were necessary, whether amount to be incurred therefor was reasonable, and whether husband was financially able to pay therefor.

4. Husband and Wife ⇨299(3)

Court which had issued separate maintenance decree did not possess power to so modify decree upon its own motion as to relieve husband of obligation of making payments for medical or dental bills incurred by wife.

5. Husband and Wife ⇨299(1)

Expense incurred by wife for examination of her eyes and those of her minor son and cost incurred in procuring glasses prescribed as result thereof was included within description of "medical expenses" contained in separate maintenance decree.

See publication Words and Phrases, for other judicial constructions and definitions of "Medical Expenses".

6. Evidence ⇨43(1)

It is common knowledge that separate maintenance decrees frequently provide for payment of stated sum monthly for support and maintenance of wife and children and in addition for payment by husband of cost of necessary medical and dental care which may be required by wife and children.

7. Husband and Wife Ⓒ299(3)

In proceeding on husband's motion for modification of separate maintenance decree so as to relieve him of obligation of making further payments for support of minor son or for medical or dental bills incurred in his behalf, evidence supports trial court's determination that husband should be relieved from such obligation.

John E. Glover, Los Angeles, for appellant.

Max E. Gilmore, Hollywood, for respondent.

PATROSSO, Justice pro tem.

In the year 1945, plaintiff obtained a decree of separate maintenance which, among other things, provided that the defendant pay all necessary medical and dental bills and expenses of the plaintiff and the minor children of the parties. In September, 1951, plaintiff filed an affidavit wherein she set forth the provisions of the decree in this regard; that it had become necessary for her and the minor child, Laurence, to have eye examinations and procure optical glasses for which she had incurred an expenditure of \$81.95; that plaintiff had requested defendant to pay the same but that he had refused to do so. The affidavit further stated that plaintiff was urgently in need of dental work and had consulted a dentist by whom she had been advised that the estimated cost thereof was the sum of \$385; that she had demanded of defendant that he make the requisite financial arrangements with said dentist or one of his own choosing in order that the necessary dental work might be performed, but that the defendant had refused so to do; that defendant had notice of the provisions of the decree and was financially able to comply therewith. Upon the filing of this affidavit there was issued an order to show cause why defendant should not be found in contempt for his failure and refusal to provide the necessary dental care for plaintiff and to pay for the charges incurred by her for eye examinations and glasses for herself and minor son. At the same time plaintiff filed a notice of motion for an

order directing defendant to pay for the last mentioned charges. Thereafter, defendant filed an affidavit in support of his request for and obtained an order directed to plaintiff to show cause why the decree of separate maintenance should not be modified so as to relieve defendant from the obligation of making any further payments for the support of his minor son, Laurence, or for any medical or dental bills incurred in his behalf.

All of these matters came on for hearing at the same time, following which the trial court made an order which in its entirety reads as follows:

"Plaintiff's order to show cause re contempt, plaintiff's motion for attorney fees and costs, Plaintiff's motion to require Defendant to pay medical bills and dental expenses, and Defendant's order to show cause re modification of order of October 3, 1945 having been heretofore submitted on November 7, 1951, the Court now renders its decision and order as follows: All orders for payment of future doctor bills by the Defendant are vacated. Bills for eyeglasses are held to be not included in prior orders for payment of medical bills. The Defendant is ordered to pay \$150.00 attorney fees direct to Plaintiff's attorney, payable forthwith. The contempt matter is dismissed."

Plaintiff appeals from this order insofar, (1) as it vacates the provision of the decree of separate maintenance whereby defendant is required to pay for all necessary medical and dental bills and expenses of the plaintiff, and (2) determines that the expense previously incurred for eye examinations and eye glasses is not comprehended within the phrase medical bills and expenses contained in the separate maintenance decree.

[1] Appellant contends, in effect, that the court was without jurisdiction to modify the prior decree or vacate so much thereof as required the defendant to pay for necessary medical and dental expenses of plaintiff because no issue with respect thereto was before the court. With this contention we are constrained to agree.

The only matters before the court at the hearing resulting in the order appealed from were: (1) the application of plaintiff for an order directing defendant to pay for the expense already incurred for examinations of the eyes of herself and minor son and in procuring the eye glasses prescribed as a result thereof, and for dental work alleged to be necessarily required by the plaintiff, and (2) the application of defendant for a modification of the decree insofar as it required him to pay for the *support and medical and dental care of his minor son*. There is nothing in the moving papers of the defendant to suggest that he was seeking any modification of the prior decree insofar as it provided that he pay for the medical and dental bills and expenses of the *plaintiff* herself as distinguished from those incurred for their minor son. Nor was any such issue presented by the evidence upon the hearing. Indeed, during the early stages of the hearing counsel for respondent stated to the court: "As far as the dental bill is concerned, I would like to state that the defendant's position with respect to that is his inability to pay. His financial position is such that he cannot afford to pay it". Again after appellant had rested, counsel for respondent said: "If your Honor please, I will now examine this witness (defendant) to attempt to how his inability to pay for this dental expense at this time and further I will go into the—I will examine him *with respect to the defendant's motion to be relieved of paying \$75.00 or any other sum, for the support of the child* as long as this trust fund is in existence and Mrs. Jones is getting substantial sums in connection with that".

[2] While the court which has rendered a decree of divorce or separate maintenance retains jurisdiction to modify the provisions thereof insofar as they relate to the support and maintenance of the wife and minor children, it may not do so *ex parte*, but only after notice and hearing. *Moore v. Superior Court*, 203 Cal. 238, 242, 263 P. 1009. In this respect we see no difference between the situation here and that presented where upon the trial of a divorce action the court undertakes to award prop-

erty to one of the spouses upon a finding that the same is his separate property when no issue is tendered and no evidence introduced with respect thereto, wherein it is held that it is error for the court to do so. *Mergendoller v. Mergendoller*, 13 Cal.App. 2d 310, 311, 56 P.2d 972. Likewise, it has been held that an order modifying the provisions of a divorce decree with reference to the custody of children is void when made without notice. *In re Saunders*, 76 Cal. App.2d 635, 637, 173 P.2d 818.

[3] Nor is there any merit in respondent's contention that, by requesting an order directing the payment by defendant of the cost of dental services alleged to be necessarily required by the plaintiff, the court was thereby empowered to modify the terms of the prior decree with respect thereto. The only questions presented by appellant's application were whether the dental services were necessary; whether the amount to be incurred therefor was reasonable and whether defendant was financially able to pay therefor. There was nothing, however, which would serve to advise the appellant or her counsel that in determining these questions the court would undertake, in the absence of any request therefor by the defendant, to modify the terms of the decree in other particulars.

[4] Likewise without merit is the further contention of respondent that the court possessed the power upon its own motion to so modify the decree. The case of *Simmons v. Simmons*, 45 Cal.App.2d 695, 114 P.2d 659, cited by counsel in this connection does not support his contention. There, upon the hearing of an order to show cause in a divorce action, the trial court had made an order awarding plaintiff, pending a trial, \$100 per month for his support and a further sum for attorney's fees. On the day of the hearing, by leave of court, the defendant was permitted to file a supplemental answer in which she set up a Nevada divorce and sought to have it determined that plaintiff and defendant were not then husband and wife. "On the following morning the trial judge, on his own motion, reopened the hearing on the order to show cause. Both parties were represented by counsel. No objection was made

by either counsel to the order nor to the further hearing. The question of lack of notice was not raised." 45 Cal.App.2d at page 696, 114 P.2d at page 660. It was following this further hearing that the order setting aside the previous order was made. There, all parties were advised that the further hearing was being had upon plaintiff's application for support and attorney's fees, and counsel for the respective parties participated therein without objection or protest. Here, on the contrary, neither appellant nor her counsel had any notice when the hearing was concluded and the court took the matter under submission that it would undertake to modify the decree in a particular which was not mentioned in the moving papers of the respondent or during the course of the hearing.

[5, 6] We also find ourselves unable to agree with the determination of the trial court that the expense incurred by plaintiff for the examination of her eyes and those of her minor son and the cost incurred in procuring the glasses prescribed as a result thereof is not included within the description of medical bills and expenses as that term is used in the decree of separate maintenance. While in a strict technical sense this may be true, the expression "medical expense" as commonly understood, we believe, is sufficiently broad and comprehensive to include that incurred for the examination of eyes and the cost of procuring the glasses prescribed for the correction of any defects of vision ascertained as a result of the examination. Particularly would this appear to be true when the expression is found in a decree of separate maintenance. It is common knowledge that such decrees frequently provide, as here, for the payment of a stated sum monthly for the support and maintenance of the wife and children and in addition for the payment by the defendant husband of the cost of necessary medical and dental care which may be required by them. The evident thought being that, while the stated amount is considered adequate to provide for the everyday necessities

of the family such as rent, clothing and food, it is recognized as being insufficient to meet the extraordinary contingencies which may arise as a result of illness or other physical disability. Defective vision may be no less disabling than a physical injury or illness, and the cost of remedying the former would appear to be within the scope of such a provision no less than that incurred in curing or relieving the latter. In this respect we perceive no material distinction, except perhaps in degree, between the cost of a tonsillectomy and the expense necessarily incurred for the examination of eyes and the cost of optical lenses required to correct defective vision. Nothing herein said is intended to suggest that we are necessarily of the view that appellant is entitled to the relief which she seeks. Upon a further hearing of the matter the trial court will be free to determine whether or not the glasses obtained by the plaintiff for herself and her son were necessary and the cost thereof reasonable; whether there is a present necessity for the dental work appellant claims to require, the reasonableness of the estimated cost thereof and the present ability of the defendant to pay therefor, and to make such order in the premises as in its judgment is warranted by the evidence.

[7] Appellant makes no complaint insofar as the order appealed from modifies the prior decree so as to relieve respondent from the requirement of paying future medical and dental expense incurred for the minor son, and the evidence is sufficient to support the court's determination in this respect.

Insofar as the order appealed from relieves the respondent from the necessity of paying future medical and dental expense of the minor son of the parties it is affirmed. In other particulars it is reversed and the matter remanded for further hearing in accordance with the views herein expressed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

**WELLS FARGO BANK & UNION
TRUST CO. v. BRADY.**

Civ. 15169.

District Court of Appeal, First District,
Division 2, California.

March 2, 1953.

Hearing Denied April 30, 1953.

Action by administrator of decedent's estate to recover amounts of bank accounts transferred to defendants as joint tenants with decedents at time when decedent was allegedly of unsound mind, and as result of undue influence and fraud on part of defendants. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment from which the defendants appealed. The District Court of Appeal, Goodell, J., held that evidence sustained findings of fraud and undue influence.

Judgment affirmed.

1. Appeal and Error ⇨930(1), 989

In reviewing the evidence, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict, if possible, and when verdict is attacked as being unsupported, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

2. Joint Tenancy ⇨3

In action by administrator of decedent's estate to recover amount of certain bank accounts transferred by decedent to herself and defendants as joint tenants, on ground that decedent had been of unsound mind at time of transfers, and that undue influence and fraud had been exerted on decedent by defendants, evidence sustained finding that decedent had at time of transfers been aged and infirm in mind, and that transfers had been procured by the undue influence of the defendants. Civ. Code, § 1575.

3. Joint Tenancy ⇨3

In action by administrator of decedent's estate to recover amount of bank accounts transferred by decedent to herself and to defendants as joint tenants, wherein evidence clearly established infirmness of

mind, undue influence and fraud on part of defendants who were a niece of decedent and niece's daughter respectively, proof that a confidential relationship existed between decedent and her niece was not essential to recovery by administrator. Civ.Code, § 1575.

4. Appeal and Error ⇨843(2), 1071(5)

If a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not a ground for reversal that such other findings are unsupported by evidence, or are uncertain or otherwise defective.

5. Joint Tenancy ⇨3

In action by administrator of decedent's estate to recover amount of bank accounts transferred by decedent to herself and defendants as joint tenants, wherein it was contended that decedent was of unsound mind and that undue influence and fraud had been exerted upon her, evidence sustained finding of fraud in that decedent had understood from language and conduct of defendants that she was to spend remainder of her life in home of one of the defendants in consideration of the transfer, but that promise was made without any present intention of performing it. Civ. Code, § 1572, subd. 4.

6. Contracts ⇨96

In order for advice given to one against whom undue influence has been exerted to be "independent", the advice should have been given in private by someone of the personal selection of person advised, and at time when such person is not surrounded with dominating influences favoring the transfer. Civ.Code, § 1575.

7. Appeal and Error ⇨1071(5)**Gifts** ⇨38

Independent advice given to a grantor is but a circumstance, and not necessarily a determining factor as to whether gift was procured by undue influence of grantee, and consequently, when finding of undue influence and fraud was supported by evidence, question whether finding of no independent advice was supported by evidence was immaterial. Civ.Code, §§ 1572, subd. 4, 1575.

8. Appeal and Error ⇨843(2)

If a finding of undue influence exerted on donor is based on weakness of mind and is supported by the evidence, it is not necessary that appellate court pass upon whether findings of unsoundness of mind and incompetency are supported by the evidence. Probate Code, § 1460.

9. Appeal and Error ⇨1065

Where court trying action by administrator to recover amount of bank accounts transferred by decedent to herself and defendants as joint tenants had informed counsel that jury's verdict on issues of unsoundness of mind, fraud and undue influence would be treated merely as advisory, and record disclosed no controversy with respect thereto, error, if any, in instructions to the jury would not constitute grounds for reversal, but the question on appeal was correctness of the decision of the court.

Tobin & Tobin, Charles R. Collins, Frank J. Fontes, San Francisco, for appellant.

Joseph F. Leonard, Appel, Liebermann & Leonard, Haskell Titchell, San Francisco, for respondent.

GOODELL, Justice.

Catherine L. Doran, a widow, died intestate on March 18, 1949 at the age of 83 years and 11 months. Her next of kin are Emily Wilson, a niece, appellant Marie L. Brady, a niece, (daughters of a deceased sister of decedent) Byron Fowzer, Leroy Fowzer and Elinor Fowzer Morris, children of a deceased niece of decedent, and Cecil Chesworth, the only child of a deceased nephew of decedent.

Shortly before her death decedent had on deposit in four San Francisco banks \$81,069.81 distributed as follows: in The San Francisco Bank \$14,927.58; in The Hibernia Savings & Loan Society \$22,505.26; in The Anglo California National Bank \$22,222.69, and in The American Trust Company \$21,414.28.

On February 11, 1949 decedent, accompanied by appellant and defendant Georgette Irwin (appellant's daughter) called at all four banks and effected the transfer therein of the accounts from her individual

name into the names of Catherine L. Doran, Marie L. Brady and Georgette Irwin, as joint tenants.

Respondent bank was appointed administrator of decedent's estate and promptly commenced this action to recover for the estate the \$81,069.81 so transferred, alleging the unsoundness of mind of decedent at the time of the transfers, and undue influence and fraud exerted on decedent by appellant and defendant Georgette Irwin.

The trial took 14 days and the record is voluminous. A jury heard the evidence and rendered four special verdicts all adverse to the defense. After the jury had retired to deliberate the judge announced his purpose to treat the verdicts, whatever they might be, as merely advisory, and his intention to make findings. This was done and a judgment was entered for \$81,459.13 against both defendants. A new trial was denied, and this appeal was taken by defendant Marie L. Brady but not by defendant Georgette Irwin.

The four banks were joined as defendants and filed answers, and the judgment runs against each of them for the respective amounts on deposit, but it is conceded of course that the banks are merely stakeholders.

Appellant's answer shows that on March 21, 1949 she caused to be transferred by all four banks "the balances standing to the credit of the aforesaid joint bank accounts to new accounts opened in the name of" appellant alone. The evidence shows without contradiction that this was done without the knowledge or consent of the other surviving joint tenant, defendant Georgette Irwin, and without disclosing to any of the banks the fact that Catherine L. Doran, the other joint tenant, had died three days before.

Appellant filed a cross-complaint against her co-defendant daughter wherein she alleged that on February 11, 1949 decedent advised appellant that she desired to go to the banks and arrange to have her accounts put in appellant's name and that if anything happened to decedent she desired appellant to have her property, and requested appellant to accompany her to the banks for that purpose; that in April, 1948 appellant had

been seriously ill and since then had been in extremely poor health and, in addition, was not familiar with business transactions of the character requested of her by decedent and did, therefore, call her daughter, Georgette Irwin, requesting that she take decedent and appellant to the banks for the purpose of making the transfers; that Mrs. Irwin on said day came to appellant's home and at once and prior to the making of any transfers represented to both decedent and appellant that her own name should be placed on the bank accounts as a joint owner, inasmuch as appellant was in poor health, and that should anything happen to appellant, she could then take care of the moneys in the bank accounts for the family of appellant, and at said time Mrs. Irwin represented and held out to decedent and appellant that the name of Georgette Irwin should be placed on said bank accounts for the sole purpose of taking care of the moneys in said bank accounts for the family of appellant should appellant predecease decedent; that Mrs. Irwin is a woman of business experience and advised and importuned decedent and appellant to have her name placed on the new bank accounts as a joint owner for the purposes aforesaid and for no other purpose.

Appellant alleged further in her cross-complaint against her daughter that both decedent and appellant relied on such representations and, believing them to be true, agreed to the placing of her name on the bank accounts as a joint owner, but solely for the purpose so represented to them by her; that neither decedent nor appellant would have permitted Mrs. Irwin's name to be placed on the bank accounts as a joint owner if said representations were not made by her as alleged and relied upon by decedent and appellant.

She alleged further that immediately after decedent's death Mrs. Irwin made claim to the moneys standing to the credit of the joint bank accounts, demanded of appellant the pass books therefor, and, in fact, forcibly took the same from the home of appellant but shortly thereafter returned them; that appellant upon the return of the pass books, and because of the asserted claims of her daughter to the moneys standing to

the credit thereof, contrary to the latter's representations made at the time the joint accounts were opened, immediately went to the various banks and transferred the balances standing to the credit of the joint bank accounts to new accounts opened in the name of appellant alone; that the total amount of moneys standing to the credit of said joint accounts, and so transferred to the name of appellant alone was \$80,869.-81. She then alleged that her daughter claims to be the owner of the moneys now standing in the various bank accounts in the name of appellant, or claims some right, title or interest therein or thereto, but such claims are wholly without right and that appellant is the sole owner of all funds standing to the credit of said bank accounts.

The prayer of appellant's cross-complaint is for a judgment that she is the owner of all the money and that her daughter "has no right, title or interest in or claim to all or any portion of the moneys * * * and that said cross-defendant be forever enjoined and debarred from asserting any claim whatever thereto."

In answering her mother's cross-complaint defendant Georgette Irwin denied certain of its allegations, and alleged that on March 21, 1949, appellant, without the knowledge or consent of herself, had caused the \$80,869.81 remaining in the four joint tenancy accounts to be transferred from those accounts into four bank accounts in appellant's sole and individual name, but that such funds so transferred nevertheless "remained the joint tenancy property of cross-plaintiff and cross-defendant." She asserted her right, title and interest as a joint tenant with her mother in all four accounts.

Georgette Irwin filed a cross-complaint against her mother, wherein she made substantially the same claims and assertions of title as those just stated, with the prayer that her right, title and interest as a surviving joint tenant (with her mother) be adjudged as against her mother's assertion of individual and total ownership of all four accounts.

A separate set of findings was made by the court on the issues raised on both cross-complaints and the answers thereto, where-

in, *as between the appellant and her daughter*, the court found in favor of the mother and against the daughter.

Appellant's principal contention is that the findings of unsoundness of mind, undue influence and fraud are not supported by substantial evidence.

Before discussing the occurrences of February 11, 1949 and the situation just before and just after that day, there are certain antecedent matters which should be stated.

Decedent carried at least one of her bank accounts in the name of Katie L. McCarthy. She carried her accounts in The San Francisco Bank in the name of Katie Longmoore (a fictitious name which she adopted for some reason of her own) and she seems to have been known in that bank by that name and not Doran.

On her husband's death in 1907 she went to live with her sister, Mary Chesworth, and for over 20 years, until the latter's death in December 1928, lived with her. Thereafter she lived by herself except for brief intervals when she lived either with her niece Emily Wilson, or with her niece, appellant Marie L. Brady.

Decedent had an account in The San Francisco Bank in the name of Katie Longmoore, and on November 18, 1935 she withdrew \$15,000 therefrom and with it opened in the same bank five separate accounts of \$3,000 each in the names of Katie Longmoore, Trustee, for each of five collateral relatives, namely, said niece Marie L. Brady, said niece Emily Wilson, George Chesworth, a nephew (since deceased), Robert Brady, a grand-nephew, and Georgette Boye (now defendant Georgette Irwin) a grand-niece. The materiality and bearing of this transaction is that on December 13, 1944 decedent withdrew appellant's \$3,000 from her trustee account and turned it over to her outright. This was at the time when appellant was purchasing the property at 2566 California Street which became the Brady home, and it is the theory of the respondent, stressed throughout its brief, that from that time until decedent's death she was possessed of the fixed idea that her contribution or gift to appellant of this \$3,000 toward the purchase of her home entitled decedent to some kind of right

therein. Declarations and conduct of decedent herself lend support to this theory and other evidence in the record does likewise, including a declaration decedent made to a city physician just two days before her death. These matters are discussed later.

Among the other preliminaries, and somewhat remote from the immediate period surrounding the opening of the joint tenancy accounts, is the incident when appellant filed in the Superior Court a petition for the commitment of decedent as a mentally ill person. That was on December 31, 1945 a little over three years before the transfers in question. Decedent was taken to the San Francisco Hospital, subjected to the usual examinations there by the two physicians on the board of examiners, and returned within a few days without any commitment or parole or any official action other than the court's determination that she was not mentally ill and its dismissal of the proceeding. A few days thereafter decedent closed out the two trustee accounts (of \$3,000 each) which since 1935 had stood in the names of appellant's son and daughter.

This brings us to the period immediately preceding the transfers in question.

About February 8, 1949 decedent moved to the home of appellant from the place where she had been living at 2546 Pine Street. Her living quarters at the latter place had been in a basement apartment which was extremely untidy and in disarray, not to say squalid, the condition of which supplied much evidence of the occupant's eccentricity, to say the least.

On October 28, 1948, while living on Pine Street decedent sustained injuries the cause of which is not shown by the record and probably is not known to any one connected with this case. She was found on the floor of her quarters lying in a pool of blood and with a black eye. A thud or fall was heard by one of the tenants living on the floor above and one of them discovered her and called the police, and she was taken to the emergency hospital in an ambulance but returned within a couple of hours in a police car. There was speculation as to whether she had been robbed and beaten or had accidentally fallen. That

was a little over three months before she made the transfers in question.

About February 8, 1949 decedent moved from her basement apartment at 2546 Pine Street to appellant's home at 2566 California Street.

On February 11 appellant telephoned to her daughter Georgette who lived in Lafayette and she, at her mother's request, drove over to the Brady home where the decedent, appellant and Mrs. Irwin conferred respecting the proposed transfers. The creation of the joint tenancy bank accounts was the suggestion of defendant Georgette Irwin, who as already appears, was a business woman. (She conducted a large real estate office in Contra Costa County and had been in business for about ten years.) The daughter then drove her mother and decedent to the Fillmore Branch of The San Francisco Bank where the first transfers were made. When it appeared that their mission was to open a joint tenancy account they were turned over to Irving E. Redmond, an assistant cashier and the assistant manager of the branch, who had known decedent for several years, and he explained the modus operandi to the three women. His testimony is given elsewhere in some detail under a separate head (dealing with independent advice). He testified, however, that at this meeting "Mrs. Brady was the one that took the lead in the matter"; it was she who talked to him first and told him that decedent wanted to set up the joint account. They were there about three-quarters of an hour because at that bank there were 3 or 4 accounts to merge. He fixed his conversation with decedent as lasting about 5 minutes. He testified that "Mrs. Irwin happened to be at that particular day in very much of a hurry. She was very nervous at the time, wanted to get out of there as quickly as possible * * *." On cross-examination he testified:

"Q. And it appeared to you that Mrs. Irwin was in a hurry? But you weren't hurried, were you? A. Well, it didn't make it very convenient for us, I can assure you of that.

"Q. I mean you took what time you deemed necessary to explain this transac-

tion to Mrs. Doran? A. Oh, yes, yes, we took time. At the same time we had to rush because of Mrs. Irwin."

He also testified:

"Q. Did Mrs. Longmoore say to you, Mr. Redmond, 'These are my people, and they are going to care for me, and my money is going to them on my death'? A. I can't remember whether that conversation took place in that substance.

"Q. Well, perhaps it wasn't in those words, but was it in that substance? A. That is correct."

And further:

"Q. Now, you stated in your direct examination that Mrs. Doran told you that her object was to have these people pay her bills, because she might become incapacitated, that is correct, is it not? A. That is correct.

"Q. And that was the object Mrs. Doran expressed to you in setting up this account? A. Mrs. Longmoore.

"Q. Mrs. Longmoore? A. Yes.

"Q. Now, didn't Mrs. Longmoore also say to you at that time, when she said that these people were going to take care of her and pay for her bills, that she was willing to rely on them? A. Yes, sir, that is correct, that's right.

"Q. And in explaining this to you * * * she said she might become incapacitated, and that these people were to handle the account for her, and she was willing to rely on them, that is the substance of her conversation, was it not? A. That is correct."

It appears without dispute that in the process of filling out the bank's record cards appellant did the writing, since decedent was unable to do so.

After leaving the Fillmore Branch the three women visited the Anglo Bank, the Hibernia Bank, and The American Trust Co. where, in each instance, decedent's individual account was transferred into a joint tenancy account in the three names. Appellant testified that at each of these three banks her daughter took the initiative. She used the expression that her daughter "engineered all the transactions" while appellant sat with decedent, at each bank. It seems to be agreed that at none of the

three banks was there any such lengthy explanation as that given by the witness Redmond.

Adolph L. Pierotti, assistant vice-president of the Anglo Bank and manager of its Market and Jones branch, attended to the transfer there. He knew the decedent, and testified that when she entered the bank "she was kind of assisted"; that when he went over to talk to her she told him she was "Not so good, that she had been sick, she wasn't able to get around very well" and that "she had been fine until just recently" and that "She said she couldn't take care of her business very well at that time, and that is why she wanted it transferred". She sat at a desk and the papers were brought over for her to sign. When asked if she spoke coherently he answered "No. Kind of slowly * * *. That is all, just as a feeble person would speak, sort of a feeble voice, and spoke weakly", but intelligently. He "thought she was of sound mind." He did not explain to decedent the method of making the transfer and there was no talk or comment at all about the joint tenancy account itself.

After visiting the four banks the three women returned to appellant's home. Mrs. Irwin testified that on getting back decedent said: "Thank goodness, I will never have to leave this house again until I am carried out, thank goodness somebody else is tending to my affairs." Respondent argues that this statement is proof that appellant had insisted upon the transfers if decedent was to stay in her home and that decedent harbored the belief that she would have the right to remain in the Brady home the rest of her life. And in connection with the same argument respondent points to Mrs. Irwin's testimony that decedent knew that "no one would take care of her unless she * * * paid for it one way or another, and she stated that * * * whoever would take care of her would be the recipient of her funds."

With respect to the new joint tenancy bank books Mrs. Irwin testified that on arriving from the banks at the Brady home she "automatically, as a dutiful daughter, gave them to my mother". Appellant put them in a drawer in an upstairs room.

The next day, the 12th, Mrs. Irwin came to the Brady home and told her mother that she was going to take the books, and her mother "objected quite strenuously"; her father also objected; but she ran upstairs, followed by her mother, and took the books, put them in her pocket and left the house with them several hours later. She did not tell decedent that she was taking the books. That same evening she came back to San Francisco and her husband returned the books to appellant while she remained outside in their car. While she had possession of the books she made notes from them for her own information.

Emily Wilson, a sister of appellant and a niece of decedent, testified that on February 12 appellant telephoned her that decedent was staying with her and if she wanted to see her, she was welcome to come over, and on the 16th she called at the Brady home. After lunch, while appellant was out, a representative of the Laguna Honda Home called and asked for Mrs. Doran. He questioned her with respect to money matters and then told her that she needed a rest, but that "Nobody can put you in the Laguna Honda Home unless you want to move in." The witness said decedent was very upset and excited and said she didn't want to go into a home. The result was an argument between decedent and Mrs. Wilson and the former told the latter to get out.

On February 25 George Chesworth, the brother of appellant and of Mrs. Wilson, died, and appellant notified Mrs. Wilson by telephone. Mrs. Wilson knew that decedent had set up a \$3,000 trust fund for him (as for herself and the others) some years before and she asked appellant "'Ree, do you think you could get Kitty to send the money to Ida, she probably needs it, maybe she will bring George's body up here and be buried in Holy Cross Cemetery with the rest of the folks.' And she replied: 'That cold blooded object wouldn't give anybody anything.'" The trustee account in favor of George Chesworth (\$3,398.11) had been closed out two weeks before on February 11, 1949 and merged in the three-name joint account in The San Francisco Bank.

Mrs. Wilson was asked whether appellant had, prior to decedent's death, mentioned

anything to her about the joint tenancy transfers, and answered in the negative.

Mrs. Wilson next saw decedent on February 27, when decedent called at the Wilson home. She testified that decedent had said that she wanted Mrs. Wilson and her husband to have her money and wanted Mrs. Wilson to buy a home and take her in "And she told me how she had to hide her money" and to put chairs against the door-knobs and quoted certain other statements susceptible of the interpretation that she was suffering from hallucinations of a paranoid nature with respect to the Brady family. She told Mrs. Wilson of an argument she had had with appellant that same day. Mrs. Wilson telephoned appellant who confirmed this, detailing certain occurrences which could have been interpreted as extremely eccentric conduct, to say the least, on decedent's part. Mrs. Wilson testified that the decedent's physical condition was very weak on this occasion and her conversation rambling and all in the past. On the way home she repeated that "she wanted to give my husband and I her money, she didn't want the Bradys to get any part of it." Mrs. Wilson testified that she had no idea what decedent's bank accounts amounted to.

Mrs. Wilson next saw decedent at the Brady home on March 13. She testified that "when we were sitting there there was a lull in the conversation, and my aunt pointed to Mrs. Brady and she said, 'That thing is mad at me.' I said, 'Why?' * * * and my aunt said, 'Because I wouldn't give her daughter some money for a development project.'

"I turned to my sister and said, 'What on earth is she talking about?' And she said, 'Georgette wanted to borrow some money from her, and * * * she refused to give it to her.'

"Q. Did Mrs. Doran say anything about Georgette? * * * And I said, 'How is Georgette?' And my sister said, 'She is fine.' And my aunt says, 'Yes, how is Georgette?' She says 'I haven't seen her around here since I have been here.' And my sister said, 'Oh, she wouldn't come any place where you are.'"

And then the subject of Georgette was changed. Further:

"Well, my sister told me not to have anything to do with any of Kitty's money, if I did I would regret it. She said, that she had regretted taking the \$3,000.

"Q. Did she say anything about having anything more than the \$3,000? A. No.

"Q. Now, after you were there for a while did you and Kitty go any place together? * * * A. All that afternoon Mrs. Brady kept telling my aunt she was going to have her taken to the San Francisco Hospital for observation, that she was going to have the furniture man come and take her junk out of there, and that she would have to pay for it. * * * Kitty says, 'That thing wants to put me in the nut house again.' I said, 'Kitty, don't worry, nobody will put you in the nut house again, because', I says, 'this time I will be at court.'"

Mrs. Wilson then testified: "My aunt asked me if I would take a walk down to Foster's and have a cup of coffee with her. She turned her back on Mrs. Brady. She opened her handkerchief. She had a few dimes there and a comb, I believe. Mrs. Brady was on the other side of the room, and she came across the room hurriedly to see what my aunt had in the handkerchief * * * then Kitty couldn't remember where she had put her shoes. I had got her a pair of shoes, but the heel was a little higher than the shoes she was accustomed to, and she had a bad fall that morning, so I told her she better change her shoes and put on the ones she had been wearing that had newspapers in the sole. She couldn't remember where she put them. So we looked around for a while, and we found them * * *. Then Mrs. Brady said if my aunt went out the front door she wouldn't get back in again. So we left anyhow, and my aunt's ankle bothered her from the fall in the morning. So I said, 'Well, Kitty, maybe we better not walk to Foster's, maybe you better go on back to the house and rest. 'But,' I said, 'if you go back there and Ree doesn't let you in,' I said, 'get in touch with Miss Shea and have her phone me.' I said, 'If I am not home,

tell her to keep trying, and,' I said, 'no matter what time of night it is I will come over.'" Further: "She asked me if I would stick by her. I took her face in my hands and I said 'You know I will.' And she says, 'Don't leave me to the mercy of the Bradys.' And I said, 'I will go around tomorrow to the real estate offices and see what I can do, and I will phone you tomorrow night.'"

That was the last time Mrs. Wilson saw the decedent alive. However on the 18th, the morning of the day of the death, she had a telephone conversation with appellant as follows: "Mrs. Brady phoned me and * * * she said she had quite an argument with Kitty the day before, that Kitty cursed her. And I said, 'Well, that was very foolish.' She said that Kitty wanted to go to a Mrs. Miller, and I said, 'Well, if that is what she wants, why not let her go to Mrs. Miller?' And my sister said she didn't know where she lived. And I said, 'I am sure you can get the forwarding address from the people that was living in her flat.'"

On March 16 the Social Service Department of the City received a call from 2566 California Street which was relayed to one of the City Physicians, who promptly called that day at that address. When admitted at the Brady home he was told that "They wished to give me the information regarding the patient that was living with them." After some preliminaries he testified respecting the two persons with whom he talked, as follows:

"These two individuals instructed me that they could no longer take care of a certain patient, or a certain woman that was living with them a Mrs. or Miss Doran. And that her mental faculties had seemed to leave her, and she was incompetent mentally, and it was impossible for them to handle the situation any longer, and desired for me to recommend for her permanent care at the Laguna Honda Home * * * and I instructed them I couldn't do that without examining the patient, that was a necessity. * * *

"Q. * * * Will you explain to the Court and the jury what Laguna Honda

Home is? A. Well, it is established by the taxpayers of this City and County for the care of the old and aged people who are indigent and cannot afford a private nursing home. They have two departments there, one for the ambulatory who are apparently still able to take care of their natural wants, and they have another department for the incurably ill, bed fast cases. There are two departments.

"Q. And these people then said to you they wanted you to recommend Miss or Mrs. Doran be placed within this home, is that correct? A. Yes, sir.

"Q. Was there anything else said at that time in that connection? A. I told them that I would have to examine the patient before I could make any recommendation. And it was then and only then that they stepped out of the room and brought this patient into the living room for the purpose of having me look at her."

When they brought her in she seemed to the doctor "rather disturbed." He added:

"She wanted to know who I was, what I was doing there. So I took it for granted she didn't know why I was there. And when she found out, when I told her the reason, the purpose of my visit, she became extremely agitated. Not at me. * * She was very much annoyed, and she immediately flew into a rage and accused these two people who were in the room there with me, of being very unkind and unjust to her. She turned to me and said, 'Doctor, you don't know the circumstances, but I will tell you, I have given these people several thousand dollars to pay their mortgage, and this is the gratitude I am getting. They want to put me in the Old People's Home.' I assured her that nobody could do that without her permission, and it went on and on for ten or fifteen minutes, until I took my leave.

"Q. Now, you say she told you she gave these people several thousand dollars. Do you recall the figure she mentioned? A. Somewhere in the neighborhood of three or four thousand. I don't know exactly. In the neighborhood of three or four thousand.

"Q. What did these people say in reply to that statement? A. They assured me in her presence that she didn't know what she was talking about, that she was incompetent, and things along those lines. And the more they talked along those lines the angrier the old lady got, and assured me she knew just what she was talking about.

"Q. Did they say anything about this statement that the old lady had given them three or four thousand dollars to pay a mortgage off on a home? A. They denied that, in my presence * * *.

"Q. Which one of them said the old lady didn't know what she was saying? * * * A. They both said that, and assured me she was mentally incompetent * * *.

"Q. Did they then and thereafter urge you to go ahead with this proceeding, Doctor? A. No, I explained to them that a Social Service investigation would be absolutely necessary before anything could be done, and instructed them that I would notify the Social Service and recommend relief home ambulatory as they suggested, but before she would be taken, a complete investigation as to her financial status must be made by the Social Service. When I informed them of that fact I was told to forget about it, about the recommendation for relief home."

The doctor testified that his conversation with decedent was very brief, only "a few words. The conversation existed only between her relatives and herself—the old lady * * *. Just a dog fight."

The decedent died two days later.

There is considerable evidence (from lay witnesses it is true) that following her injury on October 28, 1948 decedent failed both mentally and physically. She told Mr. Pierotti at the bank at the time of the transfer that "she had been fine until just recently", and his observation was that she did not speak coherently, but feebly and weakly. The witness Ramirez, who lived on the floor above decedent on Pine Street, and who had habitually visited with her as she sat on the front steps, testified that "after the accident she was not herself at all, absolutely, she was a different type of

a person". She would accuse persons of whom she was very fond, of stealing things from her; she would ring the doorbell of his flat for the purpose of using the telephone in the middle of the night, and had to be dissuaded from telephoning. Her condition, he said, after December was "worse, absolutely. After the accident the lady was never the same." The same witness testified that when she moved from Pine Street to the Brady home "the lady disappeared, because nobody ever knew where she went. It was a week before we knew she moved to California, she never told it to anybody." Decedent's niece, Emily Wilson, testified that the last time she saw her aunt on Pine Street was on February 8, at which time she had said nothing about moving to the Bradys', and she first learned of it on the 12th, when appellant telephoned her.

The witness Cantrell also testified that after the October 28 injury decedent's mental faculties were impaired. He also testified that on the night of October 28 when decedent was injured, on her return from the emergency hospital about 11:30 he and his aunts (who owned the Pine Street house) were confronted with the problem of decedent's care since she was in shock. One of his aunts telephoned Mrs. Brady who replied that they had gone to bed. He took the phone from his aunt and asked appellant "if she realized her aunt might have been seriously injured, and if she expected my old aunt, just around 90, and myself to stay up all night long and take care of her. I stated, 'You have absolutely got to come over here now; we have been imposed upon long enough.' She says, 'All right, * * * I will be over.'" She came over in about an hour.

There was testimony respecting decedent's forgetfulness and instances of it were cited. There also was testimony respecting decedent's changing attitudes toward friends and relatives—at times showing fondness and affection toward them, and then showing bitterness, antipathy and distrust toward the same persons. Illustrative of these changing moods at a time very close to the day of the transfers is the incident of February 16 in the

Brady home when decedent ordered her niece Emily out, followed 11 days later by her visit to Mrs. Wilson's home when and where she told her that she wanted the Wilsons to have all her money and the Bradys to have no part of it—from which, incidentally, the inference could also have been drawn that the transfers made two weeks earlier had passed entirely from her memory. The same may be said respecting the doctor's visit on March 16 when decedent mentioned the \$3,000 transaction of four years before, but said nothing about the \$81,069.81 transaction only five weeks earlier.

The fixed idea held by decedent with respect to her right or interest in the property at 2566 California Street is touched on repeatedly throughout this record (of almost 1,000 pages). The subject was of importance in so far as it shed light on whether anything said or done by defendants respecting this property might have influenced decedent in creating the joint tenancy accounts.

A police officer who had been called by appellant on March 12, 1949 because decedent was in the street in her nightgown (and one of the officers who had responded to the Pine Street call on October 28) testified that on March 12 decedent told him that the Brady home "actually belonged to her, and that Mrs. Brady was just waiting to get the house away from her" whereupon Mrs. Brady "told me * * * not to pay much attention, that she was old and suffering from hallucinations." On the same occasion decedent told the officer that "she gave Mrs. Brady \$3000." The witness Cantrell testified that decedent had told him on several occasions that she had advanced \$3,000 to the Bradys to purchase some property, a residence, and that they had not fulfilled their obligation. Mrs. Wilson testified to an occasion when decedent was walking to the bus with her, decedent had said "'Let's go past the Bradys' * * * I like to go past there because * * * I have a \$3,000 interest in that house and it will be mine some day.' She meant hers." On Mrs. Wilson's visit on February 12 decedent told her that "she had \$3000 invested in that house." A 15-

year old boy who lived across the street from the Brady home testified that in 1948 on several occasions he saw decedent standing in front of the house—2566—just looking at it, "And a few times she wanted to try to get in." Defendant Georgette Irwin when asked who first mentioned the names that were to go on the joint accounts answered: "I don't believe that anyone came out and actually said that my mother's name was to be put on there, but I believe that it was more or less taken for granted, because Mrs. Doran just, more than anything in the world, wanted to live in that house."

She also testified: "Q. Did Mrs. Doran express a desire to move some place where she could be taken care of? A. Yes."

Also: "Q. Who suggested that your mother's name go on the books? A. She wanted to live at my mother's house, and if she wanted to live at my mother's house that was just the automatic conclusion."

Further: "Because Mrs. Doran stated that she wanted to stay at that house, that left my mother the logical one. I don't remember whether it was actually said in words, but—

"Q. What do you mean, 'the logical one'? A. The logical one to have her money if she wanted to live in that house. That would be the logical thing to do, wouldn't it?

"Q. And she did live there continuously thereafter until her death? A. Yes."

[1] The foregoing summary was made in the light of the familiar rule restated in *Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690, where the court said:

"In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be rea-

sonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict."

On the issues of undue influence and fraud the findings are as quoted in the footnote.¹

[2] There is no doubt that there is substantial evidence to support the findings on those two issues.

"Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or

apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." Civ. Code Sec. 1575.

[3] One of appellant's contentions is that respondent neither pleaded nor proved that a confidential relation existed between decedent and herself. The court found that decedent reposed trust and confidence in the defendants, and it is argued that such finding is not supported by substantial evidence. While in actions of this type the subject of confidential relations is often one of major importance, we do not so consider it in this case. In Buchmayer

1. "It is true that on the 11th day of February, 1949, Catherine L. Doran was old and feeble and * * * unable to protect herself against imposition by reason of her physical and mental weakness * * *. It is true that on February 11, 1949, defendants * * * knew that Catherine L. Doran was aged and infirm in mind and body * * *. The said defendants * * * also knew that Catherine L. Doran was unable to resist imposition * * *. It is true that on February 11, 1949, defendants * * * represented to decedent that she should transfer her funds to joint tenancy accounts with them so that said defendants * * * could look after the needs and wants of said decedent since she was no longer able to attend to her own affairs. The said defendants * * * further told and represented to said decedent that the transfer of her funds into the joint tenancy accounts would safeguard and protect her property and would be for the benefit of said decedent and that the funds therein deposited would remain the property of said decedent and her estate. It is true that said defendants * * * further represented and promised said decedent that if she would transfer her funds in the manner aforesaid, she could live in the home of defendant * * * Marie L. Brady for the rest of her natural life and that said defendants * * * would personally look out for the care and wants of said decedent. Each and all of the above representations were untrue and were known by said defendants * * * to be untrue at the time of making them. The defendants * * * did

not intend to permit said decedent to live in the home of defendant * * * Marie L. Brady for the remainder of her natural life, nor did they intend to look after the needs and wants of said decedent, but on the contrary * * * intended to remove said decedent from the home of said Marie L. Brady as soon after the transfers were effected as they could do so. The defendants * * * knew that the transfer of her funds * * * would purport to vest title to said funds in said defendants * * * as joint tenants with right of survivorship and enable said defendants * * * to withdraw and possess themselves of said funds. It is true that said representations and each of them were made by said defendants * * * for the purpose of gaining control of the funds of said decedent during her lifetime and of securing the whole thereof upon her death for themselves to the detriment of said decedent and of her estate and those interested therein. It is true that said representations were made by said defendants * * * with intent to deceive and defraud said decedent and her estate and those interested therein of said moneys and were made with the further intent that said decedent should rely thereon. At the time of making said representations said defendants * * * intended to secure and convert to their own use and benefit the moneys and property of said decedent. It is true that the decedent relied upon the said representations * * * and would not have allowed or permitted said transfers to take place if said representations had not been made * * *."

v. Buchmayer, 68 Cal.App.2d 462, 467, 157 P.2d 9, 11, the court in discussing subdivision 2 of § 1575, says: "In the second class of cases the existence of a confidential relationship is not a necessary element, although weakness of mind of the person imposed upon is such an element." There is ample evidence in this record to support the finding of undue influence based alone on decedent's weakness of mind on the day of the transfers although it may be largely circumstantial in character. "Direct evidence as to undue influence is rarely obtainable and hence a court or jury must determine the issue of undue influence by inferences drawn from all the facts and circumstances. Taken singly the facts or circumstances may be of little weight, but taken collectively they acquire their proper weight and may then be sufficient to raise a presumption of undue influence." Estate of Hannam, 106 Cal.App.2d 782, 786, 236 P.2d 208, 210. See, also, Fross v. Wotton, 3 Cal.2d 384, 393, 44 P.2d 350, and Taylor v. Osborne-Fitzpatrick Finance Co., 57 Cal.App.2d 656, 661, 135 P.2d 598.

That the trial judge had this rule in mind is shown by his apt comment: "No matter how you look at those things, it all boils down to three issues, doesn't it, since the question of incompetency is one, the question of undue influence, and the question of fraud. All those things can be proven or disproven by bits and items, however small or infinitesimal."

[4] If the evidence is sufficient to support the finding of weakness of mind it is not necessary to now determine whether the finding of a confidential relation is supported since it is definitely settled that "if a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by evidence or are uncertain or otherwise defective." 2 Cal. Jur. pp. 1028-9, quoted in Porter v. Miller, 201 Cal. 750, 754, 258 P. 595, 596.

[5] We are satisfied that the finding of fraud is likewise supported by substantial evidence.

One of the elements of actual fraud, subd. 4, § 1572, Civ.Code, is "A promise made without any intention of performing it." There is abundant evidence from which the trier of fact could have concluded that decedent understood from the language and conduct of both defendants that she was to spend the rest of her days ("until she was carried out") in the Brady home. It is true that she did live there during the five weeks elapsing from the time of the transfers until her death but the testimony respecting the visit at the Brady home of the representative of the Laguna Honda Home on February 16, five days after the transfers, and the doctor's call there on March 16, about five weeks after the transfers, with respect to entry into Laguna Honda Home plus Mrs. Wilson's testimony that during her visit on March 13 "All that afternoon Mrs. Brady kept telling my aunt she was going to have her taken to the San Francisco Hospital for observation" presented the question whether a promise had been "made without any intention of performing it." This case seems to belong to the class of cases mentioned in Estate of Newhall, 190 Cal. 709, at page 718, 214 P. 231, at page 234, 28 A.L.R. 778, where the court said: "Undue influence is not always the equivalent of fraud. One may exist without the presence of the other. The former, however, may at times be exerted and applied through the medium of fraud. Oftentimes the terms 'undue influence' and 'fraud' are used interchangeably. Thus it has been held that undue influence, even though exercised without the aid of actual fraud, or fraudulent representations, is a form of fraud. Estate of Ricks, supra [160 Cal. 467, 117 P. 539]. It has also been held that undue influence may be exerted no less by fraudulent misrepresentations than by means of duress or other pressure. Estate of Snowball, supra [157 Cal. 301, 107 P. 598]."

[6] The court found that "The decedent * * * did not have any independent or legal advice in connection with said transfers." This finding is strongly attacked by appellant as being wholly unsupported by the evidence. The witness

Redmond explained joint tenancy accounts to decedent for about five minutes. For the purpose of the present discussion it may be conceded that his testimony, summarized in the footnote² might have supported a finding that decedent had had independent advice (if the court had so found) since it was somewhat similar to the explanations of joint tenancies given by the three banker witnesses which this court had occasion to consider in *Pfingst v. Goetting*, 96 Cal.App.2d 293, 215 P.2d 93—with certain differences in the circumstances in which the statements were made, noted later. In the *Pfingst* case, however, the trial court found that the decedent was competent, and that there was no undue influence and that she had had independent advice. There the question presented was not so much whether she had such advice as whether the testimony of the bankers was admissible under the intimate acquaintance rule. This court

held, as the trial court had, that it was admissible, and that it supported the finding of independent advice. Unlike that case, here the court found that decedent was of unsound mind, that there was undue influence and fraud and that she had had no independent advice. It would seem that the basis for the court's finding must have been the fact that Mr. Redmond's explanation was made in the presence of both defendants and after they had come to the bank with the avowed purpose of opening the joint tenancy account as announced by appellant. It has been held that to be independent, "the advice should be given in private by some one of her own selection and when the grantor is not surrounded with dominant influences favoring the transfer." *Nobles v. Hutton*, 7 Cal.App. 14, 23, 93 P. 289, 293; *Piercy v. Piercy*, 18 Cal.App. 751, 756, 124 P. 561.

[7] Moreover, "independent advice is but a circumstance, and is not necessarily

2. "I told her that if she was to transfer this account into a joint account, that either one of the three would have control of the account. I further went on to state that if they wanted to withdraw, that Mrs. Brady or Mrs. Longmoore or Mrs. Irwin could come into the bank and withdraw the money."

"Q. Did you make any statement concerning what would happen in the event of the death of any one of the parties? A. Yes, I did."

"Q. Tell the jury what you said? A. I told her also, that is, Mrs. Longmoore, that in the event of her death that the survivors would be entitled to the balance of the account * * * [that] a joint tenancy receiving the money, entitled all the parties to be able to withdraw the money. That was the way she wanted it taken care of. In other words, I told her also that they would be able to come in here and withdraw money for her or for themselves. And she stipulated very clearly to me and to the people present that that was her object, to have them pay her bills, that she might become incapacitated."

"Q. Yes, and during this conversation did Mrs. Longmoore act rationally or irrationally? A. Rationally * * *."

"Mr. Fontes: Q. I will ask you this: Did she speak coherently or incoherently? A. Coherently."

"Q. Coherently. Was there any statement made by either Mrs. Brady or Mrs.

Irwin to Mrs. Longmoore, importuning her to make this—rather, to create this bank account, or any statement urging her to do so? A. Not to my knowledge, not to my memory * * *."

"Q. Explain to the jury just what steps are taken to consummate the transaction, do you know what I mean? A. Yes, I believe we had three accounts that we transferred, or four, into this joint tenancy account. That meant we had to have a signature of Mrs. Longmoore signed on each individual account, withdrawing it, or transferring it to the joint account. It also meant we had to have a signature card completed by the three parties on the new account, namely, Mrs. Irwin, Mrs. Brady and Mrs. Longmoore. And Mrs. Brady [a slip of the tongue; he meant decedent] was not able to write all of the detailed information which we required on the reverse side of a signature card, so * * * Mrs. Brady completed the reverse side of the card for her, namely, her name, address, her date of birth, where she was born, mother's maiden name, and so forth. That particular transaction, I would say, transferring the accounts into the new account, took approximately three-quarters of an hour."

"Q. And were each of these steps explained to Mrs. Longmoore as to the various steps as to why you were doing these things? A. Yes, sir, they were."

a determining factor". *Burnham v. Witt*, 217 Cal. 397, 398-399, 18 P.2d 949. See discussion in *Brown v. Canadian etc. Co.*, 209 Cal. 596, 599, 289 P. 613; see also *Stevens v. Hutton*, 71 Cal.App.2d 676, 683, 163 P. 2d 479; *Munfrey v. Cleary*, 75 Cal.App.2d 779, 785, 171 P.2d 750 and *Helbing v. Helbing*, 89 Cal.App.2d 224, 229, 200 P.2d 560. Since independent advice is only a circumstance and not a determining factor, and for the reasons given in discussing the finding on confidential relations, we see no necessity to pass upon the question whether the finding that there was no independent advice is supported by the evidence. 2 Cal. Jur. pp. 1028-9, supra.

[8] The court found that on February 11, 1949 decedent "was not of sound mind and memory". It also found that she "was unable, unassisted to manage and take care of herself and her property * * * and was likely to be deceived or imposed upon by artful or designing persons." See sec. 1460, Probate Code. Much attention is given in the briefs to these two findings and many cases are cited by both sides addressed to this question. For reasons already given in discussing the findings on confidential relations and independent advice, 2 Cal. Jur. pp. 1028-9, we find it unnecessary to decide whether these two findings are supported. To repeat: if the finding of undue influence based on weakness of mind (without total mental disqualification) is supported, as in our opinion it is, it is not necessary to go further and pass upon these findings on unsoundness of mind and incompetency.

[9] Appellant makes several attacks on the instructions, but there is no necessity to

examine them for the following reasons: After the jury had retired the court said to counsel: "We should agree now on the next step in this case, regardless of what the jury does, whether it brings in a verdict on any of the issues, all the issues, or none of the issues. The Court feels that the matter has to be concluded by preparation of findings and conclusions and the signing of a judgment."

This suggestion seems to have met with general acceptance since the record shows no controversy over it, and no point was made of it in appellant's opening brief.

At the conclusion of the trial appellant moved the court "to discharge the jury and to try the issues by the Court, on the grounds that this is an equitable proceeding, that the special issues would only be advisory, and that there is no evidence in any event to submit any issue to the jury". The Court then said: "I believe it was intimated off the record a few days ago, that it would be stipulated by the plaintiff that—not stipulated, but it would be noted that they had waived their right for a jury trial as a matter of right" to which counsel for plaintiff replied: "Yes, your Honor". In short the court determined to treat the four special verdicts (shown in the footnote³) as merely advisory. That being so, the language found in *Richardson v. City of Eureka*, 110 Cal. 441, 446, 42 P. 965, 966, is apposite: "The verdict of the jury was merely advisory to the court, and if the instructions given to the jury were erroneous in any particular, as appellant insists they were, such error is not ground for reversing the judgment. The correctness of the decision of the court, and not

3. "We, the jury in the above-entitled cause, find as follows:

"(1) Was the decedent, Catherine Doran, on February 11, 1949, incapable of understanding the nature and extent of her property and mentally incompetent to make a gift or transfer thereof? Yes or No [answered 'Yes'].

"(2) Was the decedent, Catherine Doran, on February 11, 1949, acting under the undue influence of Defendants Brady or Irwin, or either of them, in making the transfers herein sought to be set aside? Yes or No [answered 'Yes'].

"(3) Were the transfers of February 11, 1949, secured by fraud practiced upon the decedent by the Defendants Brady or Irwin, or either of them? Yes or No [answered 'Yes'].

"(4) Did Georgette Irwin secure the addition of her name as one of the joint tenants to the bank accounts created by Catherine Doran on February 11, 1949, by the exercise of fraud practiced upon decedent Catherine Doran? Yes or No [answered 'Yes']."

the propositions of law it laid down for the guidance of the jury, is the question for determination in such instances. [Citations.]” See, also, *Scheerer v. Goodwin*, 125 Cal. 154, 159, 57 P. 789 and *Fisher v. Zumwalt*, 128 Cal. 493, 500, 61 P. 82. For these reasons we are satisfied that appellant cannot at this late date press this point.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



116 Cal.App.2d 445

**COSTA v. REGENTS OF UNIVERSITY
OF CALIFORNIA et al.**

Civ. 14776.

District Court of Appeal, First District,
Division 2, California.

March 3, 1953.

Rehearing Denied April 2, 1953.

Hearing Denied April 30, 1953.

Malpractice action against hospital and certain doctors for alleged improper diagnosis and treatment of cancer which resulted in necrosis and osteomyelitis. The Superior Court, City and County of San Francisco, after jury had failed to arrive at verdict, entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, *Nourse, P. J.*, affirmed judgment, 247 P.2d 21, and, after granting a rehearing on question of application of doctrine of *res ipsa loquitur*, held that refusal to allow plaintiff to produce expert medical evidence in support of the doctrine of *res ipsa loquitur* would necessitate a reversal.

Judgment reversed.

1. Limitation of Actions ⇐31, 95(1)

Action by a patient against physician and surgeon for injuries sustained by reason of alleged negligent or unskillful treatment is action sounding in tort and not upon contract, and, therefore, one year statute of limitation is applicable, but such limitation does not start to run until date of discovery or date when, by exercise of reasonable

care, plaintiff should have discovered the wrongful injury. Code Civ.Proc. § 340, subd. 3.

2. Limitation of Actions ⇐199(1)

In malpractice action, issue concerning when plaintiff discovered his injury and its actionable origin, or should have done so by exercise of reasonable care, and thereby caused statute of limitations to start to run, is for trier of facts. Code Civ.Proc. § 340, subd. 3.

3. Limitation of Actions ⇐199(1)

In malpractice action for alleged improper diagnosis and treatment of radio necrosis and osteomyelitis, upon issue whether statute of limitations had run, evidence concerning delay in discovery of injury and its actionable origin was for jury. Code Civ.Proc. § 340, subd. 3.

4. Physicians and Surgeons ⇐15(1)

In fighting a dangerous cancerous condition, physicians may take serious risks in reliance on their own judgment, and therefore, to hold them responsible in cases where the bad chance unfortunately materializes would be unjust and most dangerous if physicians were thereby deterred from going to extent necessary to give patient best chance of survival.

5. Physicians and Surgeons ⇐18(9)

In malpractice action against doctor based on allegation that X-ray treatment of carcinoma was too drastic and extensive, and that there had been insufficient use of perfected devices and precautions, and that there had been faulty methods of application and failure to use available diagnostic procedures to determine whether extension of lesion necessitated such drastic treatment, evidence whether such treatment or procedures may have caused or contributed to development of osteomyelitis and osteo necrosis was not sufficient for jury.

6. Physicians and Surgeons ⇐14(1)

Fact that another physician or surgeon might have elected to treat case differently or use methods other than those employed by defendant physician does not of itself establish defendant's negligence.

7. Physicians and Surgeons ⇨18(9)

In malpractice action, evidence upon alleged improper diagnosis and treatment of radio necrosis and osteomyelitis was not sufficient for jury.

8. Hospitals ⇨7

University hospital did not have duty, contractual or otherwise, to hospitalize persons with whom they had contracted only for out-patient services, nor to have a bed available for him when needed by him, and, therefore, hospital's failure, because of lack of an available bed to hospitalize such out-patient when his condition required it did not constitute negligence.

9. Hospitals ⇨7

Recovery could not be had for alleged negligent handling of hospital records, which handling allegedly made the workers unreliable, where such handling was not proximate cause of injury.

10. Physicians and Surgeons ⇨18(9)

In malpractice action, where evidence of negligence concerning 15 separate specifications thereof was not sufficient for jury, combination thereof would not be either.

11. Physicians and Surgeons ⇨18(7)

In malpractice action for alleged improper treatment of cancer, which treatment allegedly caused condition of necrosis and secondary osteomyelitis, exclusion of expert testimony which was offered to give rise to *res ipsa loquitur* doctrine, and which pertained to whether such condition would ordinarily follow treatment for cancer, was proper.

12. Physicians and Surgeons ⇨15(1)

Fact that result of treatment of patient is less favorable or more prejudicial than usual does not necessarily indicate that treatment was negligently performed, but may have been caused by individual differences in reaction or other circumstances.

13. Appeal and Error ⇨1048(6)

In malpractice action for alleged improper treatment of cancer, which treatment allegedly caused condition of necrosis and secondary osteomyelitis, refusal to allow defendant physician to be cross-examined concerning whether he knew why

neck operation was not performed was not prejudicial to plaintiff since question was immaterial. Code Civ.Proc. § 2055.

14. Trial ⇨59(2)

The matter of order of proof is in a matter within sound discretion of the court. Code Civ.Proc. § 2042.

15. Appeal and Error ⇨232(2)

Even if question would have been material on ground other than that urged in trial court, point would not be reviewed on appeal, in view of fact that such ground was not stated in trial court. Code Civ. Proc. §§ 2042, 2055.

16. Appeal and Error ⇨1048(6)

In malpractice action for alleged improper diagnosis and treatment of cancer which allegedly resulted in necrosis and osteomyelitis where no objection was sustained or offer of proof made following court's definition of word "apparently" which appeared in hospital record, which stated that lesion did not "apparently" involve the gum margin, as meaning from appearance, and doctor then agreed with court and stated that statement meant that there was no evidence of bony involvement, plaintiff was not prejudiced by any restriction in eliciting from the doctor an unequivocal definition of the quoted word.

17. Appeal and Error ⇨1048(6)

In malpractice action for alleged improper diagnosis and treatment of cancer, which allegedly resulted in necrosis and osteomyelitis, refusal to allow defendant physician to be cross-examined concerning whether there were other statements in hospital record which gave more certainty to distance between lesion and gum line, as shown in small sketch in record, was not prejudicial in view of fact that plaintiff rebutted his own argument that jury needed expert explanation of medical language in record by plaintiff's own statement that he wished to establish that there were no such statements in the record.

18. Appeal and Error ⇨1048(6)

In malpractice action for alleged improper diagnosis and treatment of cancer, which allegedly resulted in necrosis and osteomyelitis, where, following objection

to plaintiff's attorney's commenting on parts of hospital records, the court invited attorney to state question based on record which witness had, and witness then answered questions, which were not based on record and asked only for definitions of osteomyelitis and osteoradio-necrosis, and then stated that whether patient who has symptoms of necrosis followed by osteomyelitis should be referred to orthopedic surgeon depended on location, prejudicial restriction of cross-examination did not exist.

19. Appeal and Error ⇨1048(6)

In malpractice action for alleged improper diagnosis and treatment of cancer which allegedly resulted in necrosis and osteomyelitis, refusal to allow defendant doctor to be questioned, upon cross-examination, whether, if there had been a red and swollen area, which symptom later occurred, there would have been occasion to make route checks, including taking of plaintiff's temperature, was not prejudicial in view of fact that physician had testified, prior to objection, that clinical signs of infection like redness or swelling would be occasion for such check.

20. Physicians and Surgeons ⇨18(7)

Witnesses ⇨211(1)

In malpractice action for alleged improper diagnosis and treatment of cancer, which resulted in necrosis and osteomyelitis, refusal to allow defendant physician to name another of his patients who had similar results was proper since name was immaterial, and such answer would violate confidence between physician and such patient. Code Civ.Proc. § 2055.

21. Appeal and Error ⇨1048(6)

In malpractice action for alleged improper diagnosis and treatment of cancer, which allegedly resulted in necrosis and osteomyelitis, refusal, upon court's own objection, to allow plaintiff to question medical expert, upon cross-examination, whether an ambulatory patient would be one who came with help of someone else in an automobile, although such patient should be in bed, did not result in such sufficiently substantial prejudice as would require a reversal. Code Civ.Proc. § 2055.

22. Witnesses ⇨275(6)

In malpractice action for alleged improper diagnosis and treatment of cancer, which allegedly resulted in necrosis and osteomyelitis, question whether defendant doctor knew whether textbooks were used in teaching doctors at defendant hospital in subjects mentioned in the cross-examination was prima facie immaterial, and sustaining of objection thereto on such ground was not error in view of fact that use of question as foundation for quotation of statement in the books was not explained at trial. Code Civ.Proc. § 2055.

23. Physicians and Surgeons ⇨18(8)

In malpractice action for alleged improper diagnosis and treatment of cancer, which allegedly resulted in necrosis and osteomyelitis, expert testimony was not sufficient to establish that the results which ensued were probably caused by negligence.

24. Appeal and Error ⇨205

In malpractice action for alleged improper diagnosis and treatment of cancer, which allegedly resulted in necrosis and osteomyelitis, where trial judge excluded all expert evidence in support of theory of res ipsa loquitur, plaintiff was not required to make offer of proof to preserve point for consideration on appeal.

25. Appeal and Error ⇨205

Where an entire class of evidence has been declared inadmissible or the trial court has clearly intimated that it will receive no evidence of a particular type or class, or upon a particular issue, offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of such exclusion.

26. Appeal and Error ⇨205

An offer of proof is not prerequisite to arguing on appeal prejudicial nature of exclusion of question asked on cross-examination since, cross-examination being exploratory, such requirement would be unreasonable.

27. Appeal and Error ⇨1056(1)

Physicians and Surgeons ⇨18(7)

In malpractice action for alleged improper diagnosis and treatment of cancer, which allegedly resulted in necrosis and osteomyelitis, refusal to allow plaintiff to

produce expert medical evidence in support of *res ipsa loquitur* theory would necessitate a reversal of judgment for defendants.

Ernest I. Spiegl, San Francisco, Belli, Ashe & Pinney, San Francisco, for appellant.

Dana, Bledsoe & Smith, San Francisco, for respondents.

NOURSE, Presiding Justice.

This cause was before us on a prior occasion in which we entered judgment of affirmance, 247 P.2d 21. Thereafter the Supreme Court filed its opinion in *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 247 P.2d 344, treating the subject of the *res ipsa loquitur* doctrine. For that reason this court granted a rehearing for the express purpose of having further argument on the question of the application of that doctrine to this case.

In a reexamination of the record in the light of the *Zentz* case we are satisfied that the judgment must be reversed on that ground. All the other points raised have been properly treated in the former opinion which we now quote omitting the matter therein relating to *res ipsa loquitur* doctrine.

"Appellant brought a malpractice suit against the Regents of the University of California in whose University of California Hospital in San Francisco, herein further called U. C. Hospital, he received treatment and also against five individual defendants. His action against three of the individual defendants was nonsuited; they are not parties to this appeal. The case against the Regents and against Bertram V. A. Low-Beer and Nathan Spishakoff, two of the physicians who treated him, was tried to a jury which failed to arrive at a verdict and was discharged. On the motion of said defendants, whose motion for a directed verdict had been denied, judgment was entered in their favor under section 630, Code Civ.Proc., and plaintiff appeals. The court held that said appeal was timely filed. *Costa v. Regents of*

University of Cal., 103 Cal.App.2d 491, 495, 229 P.2d 867.

"Plaintiff, a seasonal cannery worker living at Monterey, California, permanently partially disabled by a spinal injury received in the army, on July 16, 1945 consulted a local physician, Dr. Gorham, about a sore on his tongue which he said he had had for three or four months. On July 27 a biopsy was taken and on August 1, 1945 the report received that it was an epidermoid carcinoma. Dr. Gorham arranged for him to go to the outpatient department of the U. C. Hospital for treatment. Plaintiff was first seen at the hospital on August 22, 1945 and it was found that, over and above the primary lesion under the tongue, nodes or a nodular mass under the chin were involved either by metastasis or direct extension. X-ray treatment was decided upon to be followed by operation on the neck after the primary lesion would be controlled. Plaintiff received the X-ray treatment as an outpatient in the Department of Radiology of which defendant Dr. Low-Beer was the head and defendant Dr. Spishakoff was an assistant. After, on the request of said department, six lower front teeth of plaintiff had been extracted in the Department of Dental Surgery, the intra oral X-ray treatment started on August 27, 1945. From that date until September 21, 1945 plaintiff received 8 intra oral treatments followed by 12 submental treatments (treatments from the outside under the chin). The treatments caused burning of the skin of the neck and inflammation of the mucous membrane of the mouth, which healed during October, 1945. At the end of the X-ray treatment plaintiff, who had during the treatment taken temporary living quarters in San Francisco, returned to Monterey and came up from there to the U. C. Hospital from time to time in accordance with appointments made. On November 23, 1945 plaintiff was put on the waiting list for neck surgery but the transfer record in relation to it was misplaced for six months and plaintiff not notified that the operation could take place until May, 1946 at which time plaintiff declined in accordance with the advice of defendant

Low-Beer that the operation was no longer necessary. In the meantime the lesion, which had been regularly followed in the Radiology Department, had healed satisfactorily without signs of recurrence or metastasis. However in the middle of January, 1946 there had developed pain in plaintiff's teeth and a sinus in his gum which, after the taking of X-ray pictures which did not show appreciable bony involvement, was diagnosed as probably an early radiation necrosis, which had to be watched. For the moment only penicillin lozenges were prescribed. When plaintiff was seen on March 8, 1946 the necrotic area in the gum had increased. After consultation with a doctor of the Dental Department and the president of the Visible Tumor Clinic an attitude of further watching and waiting, with mouth hygiene to be given by the dental clinic, was decided upon. During April, May and June, 1946 plaintiff was well enough to resume his work as a cannery worker. In May he wrote a letter to defendant Dr. Spishakoff that he felt O. K. except for some sore teeth. He quit work again in June, 1946 and testified that he did so because of the deteriorating condition in his mouth. On June 16, 1946 plaintiff when seen by defendant Low-Beer believed that the area of necrosis on the lower alveolar ridge had become somewhat larger but on June 25 a slight improvement was found and on July 9 and August 26, 1946 little or no change in the necrotic areas was noted. In a letter to whom it may concern given by Dr. Hill, an assistant in the Department of Radiology to plaintiff on the last mentioned date, the statement was made that plaintiff at that time had areas of osteo-radio necrosis of the lower jaw. An appointment was made for plaintiff to return in 4 weeks for the taking of films of the jaw, but plaintiff returned on December 10, 1946 at which time the exposed areas of the mandible were found to have considerably extended. X-rays of the mandible were taken the same day to determine the extent of the involvement and an appointment made for plaintiff to come back in a month. The roentgenologist's report could not decide whether the lesion shown was caused by

osteo-radio necrosis or infiltration of carcinoma and advised further study. However in the beginning of January, 1947 painful swelling under the chin and pain in the lower jaw developed which new development was reported to Dr. Low-Beer by plaintiff's landlady, later his wife, in a letter dated January 3, 1947. When defendant Low-Beer saw plaintiff on January 8, 1947 he thought it looked like osteomyelitis. Further X-ray films were ordered and the patient presented in the Visible Tumor conference. It was decided that plaintiff, as treatment for acute osteomyelitis, required hospitalization, systemic penicillin treatment and mouth hygiene but no surgical intervention at that time. However plaintiff was told that no bed was available for him at the U. C. Hospital but that steps could be taken for his hospitalization in the City and County Hospital. Plaintiff preferred under those circumstances to be hospitalized nearer to his home and he stated his desire to be treated in the Peninsula Community Hospital at Carmel by Dr. Swengel. Accordingly defendant Low-Beer wrote under date of January 10, 1947 a letter to Dr. Swengel describing in detail diagnosis and treatment of the cancer in 1945, the appearance and treatment of breakdown of alveolar mucosa and laying free of the bone in the alveolar region in 1946 and the recent appearance of acute osteomyelitis with as advised treatment: 'Hospitalization of patient, systemic penicillin, and mouth hygiene, and no surgical intervention at the present time.' The letter was given to plaintiff sealed (his landlady had requested that plaintiff should be kept unaware of the malignant character of his illness, which attitude was expressly approved by plaintiff in these proceedings) and was handed over by him to Dr. Swengel without having been read by plaintiff. It was stipulated when the letter was received in evidence that the letter could not prove knowledge of its content by plaintiff. Before plaintiff left for Monterey an appointment was made for him to come back after the hospital treatment. He was hospitalized the same day (January 10, 1947) in the Peninsula Community Hospital at Carmel, treated by Dr. Swengel with systemic peni-

cillin, mouth hygiene and anodyns and discharged on January 22, 1947 as improved. He left the hospital on foot. His temperature was normal after having been somewhat too high the first two days of the hospitalization. Plaintiff did not return as a patient to the U. C. Hospital and defendants thereafter. He remained in Monterey under treatment of Dr. Swengel who discontinued the systemic penicillin treatment and also consulted once a Dr. Cleves, a general practitioner, who advised him to spray his mouth with penicillin. During the year 1947 plaintiff's condition deteriorated greatly. When on December 22 of that year he was admitted as a veteran to the U. S. Naval Hospital at Oak Knoll he had developed large collar-like submandibular masses with fistulas draining to the outside, a large exposed area of the mandible was necrotic, the mouth in a foul condition, his general condition emaciated from poor nutrition due to inability to eat because of the infection of the mandible. He was treated for radiation necrosis, osteomyelitis and the general condition described with systemic penicillin, sulfadiazine, opening of the draining areas under the mandible, mouth hygiene, vitamins intramuscular, calcium tablets and special diet. A splint in the mouth to cover the denuded bone was tried but plaintiff could not continue to wear it because of the tenderness of the gums. Plaintiff's general condition improved and in January, 1948 he was able again to be out of bed, but the osteomyelitis extended backward toward the throat, and the necrotic mandible fractured for which reasons on January 29, 1948 the diseased portion of the mandible was excised from the molar region on the left to the area between the first and second molars on the right. Further surgery was necessary because of recurrence of osteomyelitis. Although plaintiff was sent home sometimes for periods to gather strength he had to return for further treatment and closing of the fistulas until he was discharged on July 20, 1948.

"This action was instituted on November 5, 1948. The complaint is in two counts. The first count alleges in substance that defendants, who treated plaintiff as a paying

outpatient, had been so negligent in the diagnosis and treatment of the growth on his tongue as to cause destruction of fleshy and bony tissue of the mandible, not involved in the illness to be cured; that defendants assured plaintiff that such symptoms were a normal result of the treatment given and would clear up within a reasonable time; that when the symptoms grew worse on January 10, 1947 they refused to admit plaintiff as a paying bed patient and reiterated said assurances and told plaintiff that he should not permit surgical treatment of the mandible by other physicians. That until December, 1947 he received conservative treatment by other physicians who also assured plaintiff that the affected tissue would eventually heal without any permanent injury; that however his condition deteriorated until in December, 1947 he was accepted as a patient in the U. S. Naval Hospital, Oakland, where in January, 1948 he heard for the first time that during the treatment by defendants plaintiff's mandible had been severely burned, and that because of its vulnerable and denuded condition osteomyelitis in the mandible had set in; that over and above the negligence in the original treatment defendants were negligent in not earlier (in the middle of 1946) diagnosing and treating the osteomyelitis so as to prevent the serious consequences which now existed. The second count of the complaint adds to the above allegations the contention that defendants to conceal the true facts concerning their negligence knowingly and fraudulently misinformed plaintiff concerning the character and prospects of his later affliction and refused to plaintiff's later physicians and surgeons information concerning medical history and treatment of plaintiff's case. Defendants denied the material allegations of the complaint and as affirmative defenses pleaded contributory negligence of plaintiff and the bar of the statute of limitations. There is no contention that plaintiff's alleged contributory negligence would as a matter of law justify taking the case from the jury; however defendants urge that the bar of the statute had that effect and that moreover no substantial evidence of negligence had been adduced. They point out that written information given by defendants and other

assistants at U. C. Hospital concerning plaintiff's case history and treatment, to wit, the stated letters of January 10, 1947 to Dr. Swengel and of August 26, 1947 to whom it may concern negative any intent of fraudulent concealment, that there is no evidence whatever that defendants' representations to plaintiff, if any, were made fraudulently contrary to their better knowledge, for the purpose of concealment, that the statute started running according to the normal rule on January 10, 1947, the last day on which plaintiff presented himself for treatment by defendants and the action was therefore barred on January 10, 1948.

"Even if it be conceded that the relation of physician and patient between plaintiff and defendants ended when in January, 1947 notwithstanding an appointment made plaintiff did not present himself anymore for treatment after he had left the hospital at Carmel improved and ambulant, and that there was no substantial evidence of fraudulent concealment sufficient to go to a jury, since defendants before showing reluctance to give information to Lt. Commander Madden of Oak Knoll Hospital had given full information in writing concerning plaintiff's treatment and case history in the letters mentioned, nevertheless plaintiff's action was not barred as a matter of law.

[1,2] "It is the settled law in this state that an action by a patient against a physician and surgeon for injuries sustained by the former, by reason of the negligent or unskilled treatment of the latter, is an action sounding in tort and not upon a contract. Such an action is therefore barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure one year after the date of the injury.' Although this general statement was made in *Huysman v. Kirsch*, 6 Cal.2d 302, 306, 57 P.2d 908, 910, this same leading case modified and liberalized this rule among other means by applying to the malpractice case the principle of workmen's compensation law 'that the statute of limitations should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause.' 6 Cal.2d at

pages 312-313, 57 P.2d at page 913. Since that decision the rule is settled in this state that in malpractice cases the statute cited does not start to run until the date of discovery, or the date when, by the exercise of reasonable care plaintiff should have discovered the wrongful injury. *Greninger v. Fischer*, 81 Cal.App.2d 549, 553, 184 P.2d 694. Although *Huysman v. Kirsch* and some of the cases following it related to foreign substances negligently left by the defendant in the body of the patient, the rule is not restricted to such cases. See *Greninger v. Fischer*, supra, relating to negligence in diagnosis and treatment of an injury and *Agnew v. Larson*, 82 Cal.App.2d 176, 185 P.2d 851, applying the rule to negligence in prescribing dangerous medicine. In *Airola v. Gorham*, 56 Cal.App.2d 42, 46, 133 P.2d 78, this court quoted the rule of *Huysman v. Kirsch* even as an example of a broader principle applicable also outside the field of malpractice. As in compensation cases, *Pacific Indemnity Co. v. Industrial Accident Comm.*, 34 Cal.2d 726, 729, 214 P.2d 530, the issues when the plaintiff discovered his injury and its actionable origin, or should have discovered them by the exercise of reasonable care are questions for the trier of facts.

[3] "In this case the testimony of plaintiff, that he relied on statements of defendants and of Dr. Swengel and a dentist Hart that his symptoms were a normal result of the treatments, that they would clear up in course of time and that he should not permit surgical treatment of his jaw, that he did not know the exact meaning of the technical terms used by defendants concerning his illness and that only after the operation in Oak Knoll Hospital he learned the true character and cause of the injury to his chin, part of which testimony was corroborated by plaintiff's wife, was sufficiently substantial evidence as to the delay in discovery to make these issues questions for the jury.

* * * * *

[4,5] "Appellant next argues at great length that also without application of the *res ipsa loquitur* doctrine there was evidence of negligence that should have gone to the jury. He divides his contentions in

this respect into fifteen specifications. It will not be necessary to treat each specification separately. They form three distinct groups; the first six specifications relate to the X-ray treatment itself, its allegedly too drastic and extensive character, insufficient use of protective devices and precautions, faulty methods of application and failure to use available diagnostic procedures to obtain certainty whether the extension of the lesion necessitated such drastic treatment. We do not find any substantial expert evidence supporting any of this group of specifications. To the contrary there is much expert testimony that the treatment as given was in accordance with good standard procedure, and that decisions complained of were matters of choice and stayed within the limits of sound medical judgment. Appellant mainly relies on the testimony of Dr. Bell of the Department of Surgery of U. C. Hospital and Lt. Commander Madden, dentist and oral surgeon, who treated appellant at Oak Knoll Hospital. Dr. Bell, who saw the patient only after the X-ray treatment had been terminated, advised an operation to remove the lymph nodes of the neck, which were enlarged apparently in relation with the cancer. He testified that it was the ordinary procedure to treat the original lesion by radiation and to treat enlarged nodes surgically. Appellant seeks to conclude from this evidence that X-ray treatment of the submental nodes was unnecessary and that therefore the external X-ray treatment could have been avoided. Neither Dr. Bell nor any other expert so testified. To the contrary the testimony of defendant Dr. Low-Beer, supported by testimony of other experts not parties to the action, was that for the killing of the original lesion 'sandwich' treatment intra orally and externally from different directions was the best procedure. Dr. Bell did not express any opinion as to the desirability of the X-ray treatment given, but, as a surgeon, testified to the desirability of certain surgical treatment over and above the X-ray treatment. His testimony would have been important if the basis of the action had been recurrence of the cancer because of failure to remove the nodes surgically. However,

fortunately, there was no recurrence. As support of appellant's contention that the X-ray treatment was too extensive Dr. Bell's testimony is without value.

"Dr. Madden testified that it was the general practice to use a lead shield or mask to protect the mandibular area as much as possible during X-ray treatment of a cancer of the tongue, and that a mask could be built in an hypothetical situation taken from this case. However he also testified that he was not an expert on X-ray treatment and that he only made the masks which the X-ray operator desired. Several experts on X-ray treatment testified that in the case before us it was not advisable to mask the mandible because it would impede the irradiation of the parts where irradiation was necessary. The testimony of Dr. Madden does not cause a substantial conflict with said evidence because he evidently only intended to express an opinion about the desirability of the use of shields and masks in general and the technical possibility of making them in cases like the one here involved, but not on the question whether in this special case the use of such devices would have had an injurious effect on the treatment, a subject as to which he expressly denied expert knowledge. Neither his nor any other expert testimony in the case could be a basis for a jury to find negligence because of failure to shield or mask.

"There is much discussion of the evidence with respect to the exact location and extent of the cancer, because appellant argues that if the evidence pointing to the least dangerous location and the smallest size is believed a less drastic and extensive treatment would have sufficed. Although there may be some conflict in the evidence as to this point we need not go into detail. The expert evidence showed clearly that the exact extent of the cancer under the surface and the absence of hidden involvements cannot in a case like appellant's be decided with such certainty that it can be safely relied on for the purpose of restricting the treatment within narrow limits. There was no expert evidence whatever that on the data available to defendants they ought in good practice to have

restricted the X-ray treatment to a less drastic procedure or that the diagnostic methods now indicated by appellant if used would have yielded certainty and should have lead to restriction to less dangerous treatment. Several experts testified that said methods (X-ray pictures and biopsy) could not be relied on for the purpose. In fighting so dangerous a condition as here involved, physicians may take serious risks and in doing so must rely on their judgment in deciding how far to go. See *Callahan v. Hahnemann Hospital*, 1 Cal.2d 447, 35 P.2d 536. To hold them responsible in the cases where the bad chance unfortunately materializes would be evidently unjust and most dangerous if physicians were deterred from going to the extent which gives their patient the best chance of survival.

"We need not detail the further specifications of this group as there is with respect to them neither evidence that they constituted bad practice nor that the procedures specified may have caused or contributed to the development of osteo necrosis and osteomyelitis.

[6, 7] "The second group of seven specifications relates to the treatment of radio necrosis and osteomyelitis which developed during 1946-1947. Appellant assigns as negligence among other things that defendants did not use dentures and tube feeding to protect the necrotic areas and prevent osteomyelitis infection, that when osteomyelitis developed it was not timely diagnosed, that no diagnostic methods were used to find osteomyelitis although appellant's deteriorating condition and the presence of osteo necrosis required them and that the osteomyelitis was treated insufficiently and too late.

"With respect to this second group of specifications appellant favorably compares the treatment given in Oak Knoll Hospital with the treatment given by defendants. The comparison is without any value. In the first place 'the fact that another physician or surgeon might have elected to treat the case differently or use methods other than those employed by defendant does not of itself establish negligence', *Lawless v. Calaway*, 24 Cal.2d 81, 87, 147 P.2d 604,

607. But moreover in this case there was no resemblance whatever between the conditions during the period when defendants treated appellant's radio necrosis and when he was a patient at Oak Knoll Hospital. The treatment of defendants ended in the first part of January, 1947 just at the time when they themselves made the diagnosis of acute osteomyelitis and declared a more intensive treatment including systemic penicillin necessary. Said treatment given immediately in the Monterey Hospital proved effective for the moment. For the treatment after that time until appellant reached Oak Knoll Hospital in the unfortunate condition previously decribed, a treatment which covered nearly the whole year 1947, defendants are in no way responsible, as during that time appellant chose to be treated by others (general practitioners).

"This second group of specifications relates therefore only to the period from the middle of 1946, when according to the complaint defendants should have diagnosed the osteomyelitis, and the beginning of January, 1947. Although there were earlier symptoms of soft tissue necrosis the first mention of osteo radio necrosis which may be a danger sign for osteomyelitis is in the letter of Dr. Hill of August 26, 1946. There is no evidence of any knowledge of defendants prior to January, 1947 of complaints of a more generalized nature or of outside redness or swelling comparable to those existing at the end of 1947. No mention of such is made in the records of the U. C. Hospital and appellant who testified at length in his own behalf did not testify that he complained of such conditions to defendants. All his complaints relate locally to his mouth. His wife testified to his illness and keeping his bed in the fall of 1946 but not to reporting of these circumstances to defendants before her letter of January 3, 1947; that letter mentions swelling under the chin. There is no record or evidence of any visit of plaintiff to the U. C. Hospital between August 26, 1946 and December 10, 1946 or of any report sent to defendants during that period concerning plaintiff's condition. It is then evidently useless to compare appellant's treatment in the second half of 1946 when

he was treated by defendants as an irregularly reporting ambulant outpatient with a beginning osteo radio necrosis and his treatment at the end of 1947 when he was received in Oak Knoll Hospital as a bed patient with a far progressed acute osteomyelitis and a general condition exhausted by malnutrition and illness.

"Appellant relies on the testimony of Dr. Newell, called as an expert by defendants, to the effect that from the first appearance of radio necrosis of the mandible osteomyelitis should always be suspected. However said expert also testified that in common practice systemic penicillin is used when the patient develops a fever and increased white cells in his blood and becomes ill with a bad feeling indicating absorption of poison in the system and that it is good practice to take temperature and blood count when he begins feeling badly. Other expert witnesses also testified that it is only common practice to give systemic penicillin injections for osteomyelitis when the patient is febrile and toxic from a generalized infection or when at least there was redness and swelling in the area indicating infection; whether there are indications of an infection is mostly a matter of judgment for the physician who is treating the patient at the time. Lt. Commander Madden testified that in the condition in which appellant came to Oak Knoll accepted practice was to give penicillin and/or sulfa drugs and that also in a hypothetical case combining plaintiff's symptoms on December 10, 1946 and January 8, 1947 systemic use of penicillin or other antibiotic was standard practice, but he also testified that the treatment was a matter of judgment for the attending doctors. This evidence cannot prove any negligence of defendants. There is no evidence of any circumstances brought to their knowledge before January, 1947 which indicated a general toxic condition or other infection which required according to common practice treatment not given or the need of taking temperature or blood count. The testimony of Dr. Madden has no relevancy for this early period. On January 10, 1947 defendants gave the same advice as held good practice by him and at that time their function ended.

There is no expert evidence either that common practice required the taking of more X-ray pictures than were taken or that the taking of more pictures would have led to earlier diagnosis or other treatment. X-ray pictures would have been taken earlier if appellant had kept the appointment made for that purpose on August 26, 1946. The pictures taken on December 10, 1946 proved inconclusive according to a report made on them after plaintiff had again left for Monterey. There is no expert evidence that circumstances then existing showed that this further study could not wait until the new appointment made for a month later. When the letter of January 3, 1947 showed an exacerbation of the condition a new appointment was immediately given and more pictures made.

"The same applies to the complaints of insufficient protection against infection.

"Although Dr. Madden testified that in Oak Knoll Hospital he gave appellant a necrellic splint to cover the denuded bone and to keep food from going into the exposed area (the hospital record shows that appellant could not continue to wear it) there is no evidence that such was standard practice in the earlier stages of necrosis or at all or that it was negligence not to give it. The same applies to the tube feeding which Dr. Madden only prescribed for the initial stage in Oak Knoll Hospital (1947-48) when the inflammation made it hard for appellant to swallow. There is no evidence that in 1946 when defendants were treating him his condition was such that tube feeding was a procedure necessarily required by good practice.

"The other specifications in this group are wholly without merit. From the failure to hospitalize appellant between November, 1945 and May, 1946, when the hospitalization was planned for neck surgery, no detrimental results have appeared and there is no connection whatever with the treatment of the osteo necrosis. There is no evidence that it is common practice to have osteomyelitis of the jaw treated by orthopedists. Dr. Madden testified that such cases were sent to an oral surgeon; at U. C. Hospital the Dental Department was consulted and gave plaintiff mouth hygiene.

Neither is there evidence that in 1946 appellant needed the same diet as when he was hospitalized in Oak Knoll Hospital and that for his condition in 1946 the prescription of milk by defendants was not sufficient according to common practice.

[8,9] "In the last place appellant predicates negligence on two unrelated specifications equally without merit. The refusal to hospitalize appellant in January, 1947 because no bed was available although defendants declared that hospitalization was necessary cannot constitute negligence because there is no duty, contractual or otherwise for a University Hospital to hospitalize persons with whom they have only contracted for outpatient's services, and certainly no duty to have beds available for them whenever they may need them. The allegedly negligent handling of defendants' hospital records which according to appellant made them unreliable concededly had not been a proximate cause of the injury for which the action was brought.

[10] "Appellant contends that if each separate specification were insufficient as basis of a negligence verdict the combination of all fifteen would at any rate suffice. That is not so. When there is here no evidence of negligence as to any of the fifteen points, there is no evidence to go to the jury with respect to their combination either.

"Appellant's further designations of error relate to rulings of the court on the admission of evidence.

[11,12] "In the first place it is contended that the court erroneously sustained objections to questions of appellant directed to expert witnesses whether the condition of necrosis and secondary osteomyelitis which plaintiff suffered did not ordinarily follow treatment for cancer as here involved. An offer of proof to the effect that it does not was made and the relevancy argued on the ground that if this were established the doctrine of *res ipsa loquitur* would apply. The court correctly held that such, even if proved, would not make that doctrine applicable. The result of the same treatment is not always the same in all cases and on all patients. When the

result of a treatment is less favorable or more prejudicial than in the great majority of cases such need not indicate that the treatment was negligently performed, but may as well be the result of individual differences in reaction or the less favorable circumstances of the case. * * *

[13-15] "Next appellant contends that the court erred in limiting the examination of the defendant Dr. Bell in a manner held reversible error in *Lawless v. Calaway*, supra, 24 Cal.2d 81, 147 P.2d 604. In that case it was held, 24 Cal.2d at page 90 et seq., 147 P.2d 604, that the right to elicit testimony from an adversary under section 2055 should be liberally construed and that any relevant matter in issue in a case is within its scope. It also comprises the standard of skill and care ordinarily exercised under like circumstances and the question whether defendant's conduct conformed thereto, even though such examination calls for expert testimony. It is true that the court in discussing the manner of examination of Dr. Bell used expressions which might indicate that he was not fully aware of the above rule. However a careful examination of the parts of the transcript indicated by appellant shows that the court's interference did not actually cause an undue or prejudicial restriction. The first example given by appellant related to the question asked Dr. Bell whether he knew why the neck operation was not performed. An objection was sustained on the ground that the reason was immaterial. Appellant's attorney pointed out as only ground of materiality that he was going to an issue brought out by defense counsel in his opening statement. The court then ruled in substance that it was not the proper time for rebuttal of intended evidence, but that appellant could meet the evidence when it was put in. The order of proof is in the sound discretion of the court. Section 2042, C.C.P.; 24 Cal.Jur. 764 and cases there cited. If the question would have been material on another ground, as is argued now, but which was not stated in the court below, the point cannot be reviewed on appeal. *Valentin v. Valentin*, 93 Cal.App.2d 588, 593, 209 P.2d 654; *Estate of Parkinson*, 190 Cal. 475, 477, 213 P. 259. Moreover

in the light of all the evidence now received the question was immaterial and appellant in no way prejudiced.

[16] "Appellant next complains that he was restricted in eliciting from Dr. Bell an unequivocal definition of the medical significance of the word 'apparently' in the following phrase contained in the hospital record of the plaintiff's first examination in the surgical department: 'It (the lesion) does not apparently involve the gum margin.' The court stated: 'I don't think "apparently" is a medical term. "Apparently" means from appearance; is that what you construe it, Doctor? A. That's right.' No objection was sustained or offer of proof made, and the examination of Dr. Bell continued as to the standard procedure. if it were suspected that something was involved other than that which was apparent. Moreover immediately thereafter the answer was elicited that the writer meant that there was no evidence of bony involvement. In fact no restriction and therefore no prejudice appears.

[17] "The third example stated relates to questioning of Dr. Bell concerning the distance of the lesion from the gum line as shown in a small sketch made in the record. The witness gave answers indicating that he did not know it for this special case and could not say it with certainty. To the question whether there were other statements in the record which gave more certainty an objection was sustained informally on the ground that the record was the best evidence. Appellant's argument that the jury needed expert explanation of the medical language of the record is rebutted by his own statement that he wished to bring out that there were no such statements in the record. The matter seems without importance or prejudice.

[18] "At the next point cited appellant stated his intention to ask questions relating to parts of the record and began to point out a portion and to comment on it, to which commenting defendants objected. The court then invited appellant to state the question based on the record which the witness had in front of him. The questions which appellant then asked were not based

on the record at all but only asked for definitions of osteomyelitis and osteoradionecrosis which were given. The questions proved to be introductory to an inquiry whether when symptoms of necrosis followed by osteomyelitis were present the patient should properly be referred to an orthopedic surgeon. The answer elicited was that it depended on the location and that if it was in the mandible it should probably not be done. There is no indication whatever of any prejudice by any possible restriction of reference to the record.

[19] "When cross-examining the defendant Spishakoff who had testified for the defense after plaintiff had rested and had stated that he had not seen the plaintiff after March 8, 1946 and that up to that time he saw no occasion for taking temperature or making other routine checks appellant asked whether in his judgment, if there would have been moreover a red and swollen area outside, a symptom which occurred later, there would have been occasion to make such a check. Objection was sustained on the ground that it was not cross-examination. Although under the rule of *Lawless v. Calaway*, supra, the question would probably have been admissible under section 2055, C.C.P., as part of plaintiff's case or on rebuttal there may be doubt whether it ought to be injected into the cross-examination on defendants' case. However we need not decide the point. Just prior to the objection stated the witness had already answered without objection that clinical signs of infection like redness in the area or swelling would be the occasion for such check. The answer was what plaintiff wished to bring out and he cannot be prejudiced by the prevention of repetition.

[20] "An objection to the question put to defendant Low-Beer to name another of his patients that had a similar result was correctly sustained on the ground that the name was immaterial and would violate the confidence between the physician and said patient.

[21] "An assignment of error not relating to examination of a defendant follows. After the expert Dr. Shimkin had

testified that calcium, vitamins and so forth would do no particular good so long as the patient was ambulatory, was taking nourishment by mouth, and has maintained his weight, plaintiff inquired into the meaning of 'ambulatory.' The witness testified that it was determined by his ability to stay on his feet and to come to the clinic at intervals on his feet. To the question whether that would also be the case when he came with the help of somebody else, in an automobile, although needing to be in bed, the court objected on his own motion without stating a reason and took the noon recess. The court evidently objected to undue prolongation of the very extensive cross-examination by unimportant details. Appellant did not make any showing of materiality. Although we do not think that the question was actually objectionable no sufficiently substantial prejudice by the exclusion is shown or appears to us to justify reversal.

[22] "Next appellant assigns as error the sustaining of an objection of immateriality to the question asked defendant Dr. Bell, whether text books are used in teaching the doctors at U. C. Hospital in the subjects being mentioned in the examination of the witness. Appellant explains on appeal that the question was intended to lay the foundation for quotation of statements which counsel knew were in text books used by the defendants. The question which evidently is *prima facie* immaterial was not explained at the trial in this or any other manner. Thus the sustaining of the objection was no error. The point argued by appellant whether it would be objectionable to ask an expert witness who is a teacher which books he uses in teaching the subject involved in his testimony is not before us.

"Finally appellant assigns as prejudicial error miscellaneous rulings and remarks of the court too numerous to allow statement of each separately. We have checked all and concluded that each was either not erroneous or not prejudicial."

[23] In our former opinion it is stressed that the *res ipsa loquitur* doctrine is based on common knowledge and that it only

applies in malpractice cases "where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised", citing *Engelking v. Carlson*, 13 Cal.2d 216, 221, 88 P.2d 695, 698. However, in the *Zentz* case it is said that the doctrine is based on the probability that the injury is the result of negligence and continues: "In determining whether such a probability exists with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses." 39 Cal.2d at page 442, 247 P.2d at page 347, citing as authority, among others, *Cavero v. Franklin, etc., Benevolent Society*, 36 Cal.2d 301, 309, 223 P.2d 471, a malpractice case. And again on the same page: "* * * it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." Although there is here a clear difference in theory, the difference is without practical importance so far as the evidence in the record is concerned, as there is no substantial expert testimony that results such as here ensued are probably caused by negligence. However, appellant contends also, that he tried to elicit from the experts for defendants evidence to that effect but was prevented by the court. When plaintiff asked one of the medical witnesses whether he had seen such bad results of similar treatment in cases in which the witness had taken part and plaintiff explained that he was attempting to place the case within the *res ipsa* rule, the court sustained an objection saying that plaintiff could put the doctrine aside entirely, that he was not going to instruct upon it, that it was a case for experts not for ordinary people and that in that condition the doctrine did not apply.

[24-27] In view of the sweeping ruling of the trial judge excluding all expert evidence in support of the theory of *res ipsa loquitur* no offer of proof by appellant was necessary. "Where, however, an entire class of evidence has been declared inad-

missible or the trial court has clearly intimated that it will receive no evidence of a particular type or class, or upon a particular issue, an offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of the exclusion of such evidence." *Lawless v. Calaway*, 24 Cal.2d 81, 91, 147 P.2d 604, 609; *Tomaier v. Tomaier*, 23 Cal.2d 754, 760, 146 P.2d 905; *Caminetti v. Pacific Mutual Life Ins. Co.*, 23 Cal.2d 94, 100, 142 P.2d 741. As to the particular question asked on cross-examination no offer of proof was required for the further reason that cross-examination being exploratory it is unreasonable to require the cross-examiner to make an offer of proof. *Tossman v. Newman*, 37 Cal. 2d 522, 525-526, 233 P.2d 1; *Lawless v. Calaway*, supra, 24 Cal.2d page 91, 147 P.2d at page 609. This error of the trial court denying appellant the right to produce expert evidence in support of the *res ipsa* theory necessitates a reversal.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.



116 Cal.App.2d 660

ELBERT, Ltd. v. CITY OF SAN DIEGO
Civ. 4578.

District Court of Appeal, Fourth District,
California.

March 11, 1953.

Rehearing Denied April 9, 1953.

Hearing Denied May 7, 1953.

Action for partition of real property in which plaintiff's claims were based on street improvement bonds and foreclosure thereof, and defendant city's title was based on tax deed from state. The Superior Court of San Diego County, L. N. Turrentine, J., entered judgment for partition with respect to lien arising out of one bond, but determined that lien of other bond was conclusively presumed extinguished, and plaintiff and defendant each appealed from portions of judgment adverse to each. The District Court of Appeal,

Mussell, J., held that as to bond which plaintiff's predecessor in interest had preserved rights by action for foreclosure and certificate of sale, resulting in commissioner's deed, the right to maintain action of partition existed.

Judgment affirmed.

1. Taxation ⇨510

Lien arising out of commissioner's deed after valid foreclosure of street improvement bond was on a parity with lien of state for general taxes.

2. Partition ⇨13

Tenancy in Common ⇨3

Successor in interest of one who had procured commissioner's deed after foreclosure of street improvement bond within time permitted by statute had title as tenant in common with city as grantee from state as holder of tax title for general taxes, and was entitled to maintain partition against city. Civ.Code, § 2911; Code Civ.Proc. § 752.

3. Payment ⇨66(2)

Where street improvement bond issued in 1928 was delinquent when action to foreclose bond was filed in 1941, and action was assigned to plaintiff in 1943, but no further action was taken, determination in plaintiff's partition action instituted in 1951 that bond was conclusively presumed extinguished because of lapse of time was proper. Civ.Code, § 2911; Code Civ.Proc. § 581a.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for appellant and respondent Elbert, Ltd.

J. F. DuPaul, City Atty., Robert J. Sjogren, Deputy City Atty., and W. E. Starke, Associate Counsel, San Diego, for appellant and respondent City of San Diego.

MUSSELL, Justice.

This is an action, filed February 13, 1951, for partition of real property in San Diego county and was brought pursuant to the provisions of Section 752 of the Code of Civil Procedure. Plaintiff's claims are based on two street improvement bonds issued by the city treasurer of the city of San Diego, bond 219, series 1130 and

bond 360, series 903, both issued pursuant to the Improvement Act of 1911. Defendant's title is based on a tax deed obtained from the State of California on October 3, 1946, pursuant to Division 1, Part 6, Chapter 8 of the Revenue and Taxation Code, and a deed to the State dated August 1, 1935.

The trial court held with reference to bond 219, series 1130, that the claims of plaintiff under its commissioner's deed were valid and on a parity with the claims of defendant under the rules stated in *Monheit v. Cigna*, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995, and ordered partition of the property, and further held that the lien of bond 360, series 903, is conclusively presumed extinguished under the provisions of Section 2911 of the Civil Code. Both parties have appealed from the judgment.

Defendant city attacks that portion of the judgment ordering partition and decreeing that the parties are owners of the property as tenants in common, each having an equitable lien thereon and plaintiff contends that the court erred in holding that the lien on bond 360, series 903 is conclusively presumed extinguished.

Bond 219, Series 1130

On June 16, 1930, one M. Blakesley commenced a foreclosure action in the Superior Court in San Diego county against the San Diego Beach Company, the then record owner of the property involved, to foreclose street improvement bond 219, series 1130, issued by the city treasurer of San Diego on February 25, 1929. Judgment of foreclosure was obtained in said action on January 7, 1931. A commissioner was appointed and sold the property to M. Blakesley and issued a certificate to her on February 9, 1931. Thereafter, M. Blakesley assigned her interest in the certificate of sale and the real property to the Pacific States Savings and Loan Company. On February 23, 1932, a commissioner's deed was issued to said company and the deed was recorded June 30, 1932. On March 5, 1947, the Pacific States Savings and Loan Company executed and delivered its quitclaim deed of the property

to plaintiff and that deed was recorded on March 13, 1947.

The real property involved became subject to a lien for taxes on March 4, 1929. It was sold to the State on June 30, 1930, deeded to it on July 1, 1935, and deeded by the State to the defendant city on October 3, 1946.

[1,2] The Pacific States Savings and Loan Company, on February 23, 1932, had a lien on the property involved on a parity with the lien for general taxes. This lien right was in existence at and after the defendant city procured its deed from the State. *Elbert, Ltd. v. Nolan*, 32 Cal. 2d 610, 197 P.2d 537; *Monheit v. Cigna*, 28 Cal.2d 19, 23, 168 P.2d 965, 167 A.L.R. 995. It is apparent that M. Blakesley, plaintiff's predecessor in interest, preserved her right to seek partition against the ultimate purchaser by tax deed from the State by bringing an action to foreclose her bond and procuring a certificate of sale, thus perfecting her lien and carrying it into title before the expiration of the time limits specified in Section 2911 of the Civil Code. The Pacific States Savings and Loan Company acquired the title to the property as well as the lien right of M. Blakesley and a tenancy in common with the State as holder of the tax title was established under the parity principle declared in *Monheit v. Cigna*, supra, 28 Cal. 2d 27, 168 P.2d 965, 167 A.L.R. 995. As such tenant in common, plaintiff, as successor in interest of Pacific States Savings and Loan Company, was in a position to bring the instant action in partition. *Sipe v. Correa*, 38 Cal.2d 131, 134, 238 P.2d 989.

Section 752 of the Code of Civil Procedure, under which the present action was commenced, contains no limitation as to the time within which such action may be maintained, and where, as here, plaintiff's predecessor in interest perfected foreclosure proceedings, she thus preserved her lien rights. The presumptions of extinguishment stated in Section 2911 of the Civil Code are not applicable. As was said in *Rombotis v. Fink*, 89 Cal.App.2d 378, 388, 201 P.2d 588, 594:

"The extinguishment resulted, not from the legislation itself, but from the conduct of the bondholder in continuing to fail to assert his right after due notice. The legislation in question does no more than recognize the logical inference to be drawn from long inaction on the part of the bondholder—that the claim has been paid, abandoned or otherwise extinguished."

Bond 360, Series 903

[3]. Bond 360, series 903, was issued by the city treasurer of the city of San Diego under date of January 12, 1928. Following a delinquency, an action to foreclose the bond was filed in the Superior Court of San Diego county on December 30, 1941. In 1943 this action was assigned to plaintiff and no further action was taken in the case. The trial court in its memorandum decision dismissed the foreclosure action as to bond 360, series 903, and properly rendered judgment extinguishing the lien of said bond. Section 581a, Code of Civil Procedure; *Scheas v. Robertson*, 38 Cal.2d 119, 238 P.2d 982; *Sipe v. Correa*, supra; *Elbert, Ltd. v. City of Long Beach*, 108 Cal.App.2d 463, 239 P.2d 4.

The judgment is affirmed. Each party to bear its own costs.

BARNARD, P. J., and GRIFFIN, J., concur.



116 Cal.App.2d 475

PEOPLE v. BEAL.

Crim. 4936.

District Court of Appeal, Second District,
Division 3, California.

March 3, 1953.

Defendant was convicted in the Superior Court, Los Angeles County, of having accomplished an act of sexual intercourse with and upon a 13 year old girl, and he appealed.

The District Court of Appeal, Vallée, J., held that the misconduct of the prosecuting attorney required reversal.

Reversed and remanded for new trial.

1. Criminal Law ⇨719(3)

Prosecuting attorney's statement to jury, to effect that he had never in his life prosecuted an innocent man, that there was not the slightest doubt in his mind as to the guilt of the defendant, that he had more "records" than the jury had, that he had lots of evidence that he was not permitted to bring before jury, and that before he began prosecution he had convinced himself of guilt of defendant, constituted misconduct.

2. Criminal Law ⇨317

Where physician who had examined prosecutrix was not called as witness and there was no showing that he was unavailable, it was to be presumed that his testimony would not be corroborative of that given by prosecutrix.

3. Criminal Law ⇨1171(1)

Where case was closely balanced and it was highly probable that harmful effect of prosecuting attorney's misconduct turned scales against defendant, such misconduct compelled reversal.

Cary Glover Branch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

VALLÉE, Justice.

Defendant was charged in count I of an information with having accomplished an act of sexual intercourse with and upon Margaret, and in counts II and III with having committed the same offense upon Luressie. A jury convicted him of the offense charged in count I, and acquitted him of the offenses charged in counts II and III. He appeals from the judgment rendered and from the order denying his motion for a new trial.

As grounds for reversal defendant contends that: (1) the verdict is unsupported

by the evidence; (2) the testimony of the complaining witness is inherently improbable; (3) the court did not adequately instruct the jury on circumstantial evidence; (4) the court erred in the admission of evidence; (5) the District Attorney was guilty of prejudicial misconduct.

The complaining witness, a girl 13 years of age, testified that on the night of April 16, 1952, she "had intercourse" with defendant while they were in the rear seat of an automobile; he pushed her on the seat and then she was forced to have intercourse with him after she was down on the seat; defendant pushed the legs of her panties aside; it lasted about five minutes; it hurt; this was the first time she ever had "sexual intercourse"; defendant "raped" her. There was evidence from which the jury could infer that the complaining witness was not the wife of the defendant. Defendant was 19 years of age. This was sufficient evidence to warrant the jury in concluding that defendant had sexual intercourse with the complaining witness as charged, and that she was not the wife of the defendant. *People v. Stangler*, 18 Cal.2d 688, 690, 117 P.2d 321; *People v. Owsley*, 76 Cal.App.2d 166, 171, 172 P.2d 561; *People v. Vicencio*, 71 Cal.App.2d 361, 365, 162 P.2d 650.

In his closing argument, the District Attorney made the following statements to the jury: "Ladies and Gentlemen, I assure you, I have been a prosecutor for 20 years. When I first entered the District Attorney's Office, a very distinguished gentleman, now dead, who was Chief Deputy, caused me to read some cases from the Supreme Court of the United States, to read the Constitution of the United States, the Bill of Rights, and the Supreme Court of California as to the duties of a prosecutor. Every one of the higher courts, the Constitution, everything in the records; the law says that a prosecutor shall at all times be fair, shall go down the middle of the road and shall not take sides, that this defendant there is his client, and his duty to the defendant comes first to the duty of anybody else, because he is the attorney for all the people. I assure you on my word of honor, I am an old man now; some day soon I have

got to meet a higher Judge than any Judge here, and I am confident as I stand here I have never in my life prosecuted an innocent man. If there is the slightest doubt in my mind, and remember I have more records than you have on these cases. There is lots of evidence that we are not permitted to bring before a jury. I would not, I am not obligated to, and I am forbidden to prosecute any man whom I have first not investigated on my own part and convinced myself of his guilt. The law says that I must give him the benefit of the doubt before I ask anybody to do it." Counsel for defendant immediately asked the court to strike the statement, assigned it as misconduct, and asked the court to instruct the jury to disregard it. The court said: "The motion is denied."

[1] That the argument of the District Attorney was highly improper and constituted prejudicial misconduct compelling a reversal is not debatable. In the recent case of *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1, 4, the District Attorney made substantially the same argument to the jury as was made in the present case. In holding that the argument was prejudicial and in reversing the judgment the court said: "It is well established that statements by the prosecuting attorney, not based upon legitimate inferences from the evidence, to the effect that he has personal knowledge of the defendant's guilt and that he would not conduct the prosecution unless he believed the defendant to be guilty are misconduct. [Citations.] 'There can be no excuse for such comment.' [Citation.] The classic expression of the rule appears in this oft-quoted statement in *People v. Edgar*, 34 Cal.App. 459, 468, 167 P. 891, 894. 'When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial that the defendant was guilty of the crime charged. *People v. Rogers*, 163 Cal. 476, 126 P. 143. But his declaration to the jury that he would not prosecute

any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown, in evidence.'

"The latter portion of the quotation is especially pertinent here. Not only did the deputy district attorney state his belief in Kirkes' guilt, without which he would not have been associated with the prosecution, he also flatly stated that he knew of Kirkes' guilt 'prior to the time' that he entered the case. Such knowledge could not have been based upon inferences from the evidence presented. In effect, the prosecutor, who had just laid a foundation by showing his own excellent character and long years of public service, was testifying to the ultimate fact in issue without disclosing the source of his information. Such eminently unfair conduct cannot be condoned." See also *People v. Hidalgo*, 78 Cal.App.2d 926, 938, 179 P.2d 102; *People v. Brown*, 81 Cal.App. 226, 241, 253 P. 735; *People v. Hale*, 82 Cal.App.2d 827, 832, 187 P.2d 121; *People v. Talle*, 111 Cal.App.2d 650, 673, 245 P.2d 633. In the present case the District Attorney was guilty of other improper conduct which it is not necessary to relate.

It has been said many times that a District Attorney may strike hard blows, but he is not at liberty to strike foul ones. Here he struck foul ones. He told the jury he had never in his life prosecuted an innocent man; that there was not the slightest doubt in his mind as to the guilt of the defendant; that he had more "records" than the jury had; that he had "lots of evidence" that he was not permitted to bring before the jury; that before he began the prosecution he had convinced himself of the guilt of the defendant. And he prefaced these statements by saying he had been a prosecutor for 20 years, that he is

an old man now, and that someday soon he is going to meet his creator.

[2] The evidence, while sufficient to support a conviction, was weak. The act is claimed to have occurred in the rear seat of an automobile about 3:30 in the morning. The complaining witness, the defendant, and several girls and boys had been out since early evening. They had been to a canteen, to a party, to a dance, and had driven around for several hours. Shortly before the complaining witness says the act occurred they stopped the automobile. Some of the group had left. The complaining witness, the defendant, and two girls and two boys were in the automobile. Two girls and two boys got out, leaving the complaining witness and the defendant in the rear seat. The complaining witness testified the act occurred at this time. She testified she had not had sexual intercourse before; that she did not bleed; and made no outcry. One of the girls who had left the car made considerable noise and a special officer appeared. She made no complaint to him. Because of the disturbance he called the police who arrived immediately. She made no complaint to them. They arrested the boys and girls and took them to a police station where they were kept the remainder of the night. It was not until the next morning when she was questioned by a policewoman that the complaining witness told that defendant had intercourse with her. She was examined by a physician the next morning. The prosecution did not produce the physician as a witness. There was no showing that he was not available. It is to be presumed that his testimony would not be corroborative of that given by the complaining witness. *Julson v. Julson*, 110 Cal.App.2d 797, 801, 243 P.2d 558. The testimony of the complaining witness varied in several material particulars from the testimony she had given at the preliminary examination. The only corroboration of her testimony was evidence that she and defendant were left in the rear seat of the car for a short period of time. There was no direct evidence of penetration. There was no evidence of a ruptured hymen, or of the presence of

semen, or even of an unusual appearance. The defendant at all times denied he had committed the act. There was no admission of any kind. The court found defendant is not a sexual psychopath. There was much evidence from which the jury could have concluded that there was a reasonable doubt of defendant's guilt.

[3] The case is closely balanced. It is highly probable that the harmful effect of the misconduct turned the scales against the defendant. In such a case the misconduct compels a reversal.

The conclusion makes it unnecessary to consider the other points made by defendant.

The judgment and the order denying a new trial are reversed and the cause is remanded for a new trial.

SHINN, P. J., and WOOD, J., concur.



116 Cal.App.2d 438

In re VEZINA'S ESTATE.

VEZINA v. DAM.

Civ. 15397.

District Court of Appeal, First District,
Division 1, California.

March 3, 1953.

Rehearing Denied April 2, 1953.

Hearing Denied April 30, 1953.

Proceeding by decedent's creditor to protest confirmation of sale of several parcels of estate realty. The Superior Court, County of Alameda, S. Victor Wagler, J., entered order confirming sale, and creditor appealed. The District Court of Appeal, Peters, P. J., held that return of appraisers showing estate owned only half interest in realty and evidence that sale was necessary to obtain funds made mandatory the court's approval of the sale.

Order is affirmed.

1. Courts ⇨200½

Title cannot be tried as between an adverse claimant and estate in probate proceedings.

2. Executors and Administrators ⇨375

In proceeding by decedent's creditor to protest confirmation of sale of realty, where return of appraisers showed estate owned only one-half interest in realty; and Probate Court found that proposed purchaser was highest bidder, that sale was legal and fair, that bid was within 90 per cent of appraised value and was not disproportionate to value of lots, and that sale was for benefit and best interests of estate, it was mandatory upon the Probate Court to approve the sale. Probate Code, §§ 785, 786.

3. Judicial Sales ⇨16

At common law, and in California, no condition making the offeror's performance dependent on an uncertain contingency can be received by an officer conducting a judicial sale.

4. Executors and Administrators ⇨366

Even if sale of realty by administratrix under Probate Court order constituted a judicial sale, condition of order that receipts be used to pay enumerated taxes and mechanic's liens did not render transaction an invalid judicial sale on a "conditional bid." Probate Code, §§ 716, 755, 762, 929.

See publication Words and Phrases, for other judicial constructions and definitions of "Conditional Bid".

F. H. Dam, Berkeley, in pro. per.

Alfred F. Taddeucci, San Francisco,
Ralph E. Bancroft, San Francisco, for respondent.

PETERS, Presiding Justice.

Appellant, a lawyer who appears *in propria persona*, is a holder of a promissory note executed by decedent, whose estate is apparently insolvent. As such creditor he protested the confirmation of sale of several parcels of the estate property. The probate court, by two separate orders, confirmed the sales. From these orders this appeal is taken.

On September 7, 1951, the administratrix filed a return of sale at private sale and a petition for confirmation of such sale of two parcels of real property belonging to the estate located in Oakland, and on the

same date filed a similar petition in reference to a parcel of real property located in Berkeley. The Oakland petition, after setting forth the appointment and qualification of petitioner as administratrix and the return of an inventory and appraisal and partial amended inventory and re-appraisal, avers that it is for the best interests of the estate that the realty be sold to obtain funds for the payment of claims and expenses of administration; that a notice of sale was published as required by law; that one Florkewicz was the highest bidder and that the two described parcels had been sold to him at private sale on August 30, 1951. It is further averred that the total purchase price was \$5,050; that Florkewicz made a \$505 deposit; that the balance of \$4,545 was to be paid upon confirmation of the sale. The petition describes the interest of the estate in the parcels to be sold as "that certain real estate" or "those certain parcels of real property," but the prayer is that the sales be confirmed and the administratrix be directed to convey to the purchaser "the right, title and interest of said decedent in and to said real property at the time of his death and all of the right, title and interest of said estate in and to the same."

This return and petition, in setting forth the conditions of the sale, stated that the bid of Florkewicz was conditional upon the administratrix paying an enumerated list of taxes, assessments and liens out of the purchase price. The list included eleven items. The first item was delinquent county and city taxes in an unspecified amount. The next four items were United States tax liens, each enumerated, and totalling \$649.98. The next six items refer to specified mechanic's liens totalling \$2,619.80.

The petition also alleges the legality and fairness of the sale, that it exceeds 90% of the appraised value, and that an increase in the bid of 10% could not be secured.

The petition and return as to the Berkeley property was identical except that the sale had been made for \$600, with a \$60 deposit, the balance to be paid upon confirmation. As to this sale, however, only the city and county taxes, and the four

United States tax liens were listed as items that had to be paid from the purchase price.

Proper notices of hearings of these petitions were given. Appellant contested both petitions. He averred that he had filed a creditor's claim for \$2,500 against the estate; that his claim had been ignored by the administratrix; that on February 19, 1951, he had filed an action on his claim; and that he was interested in the estate. He admitted that letters of administration had been issued to the administratrix, and that the estate owned the parcels involved, but denied all of the other allegations of the petitions, and prayed for their denial.

A hearing was had on October 2, 1951. Appellant called the counsel for the administratrix as his sole witness. He testified that earlier appraisements of the two Oakland parcels, and the Berkeley parcel had been filed showing values more than twice the amounts of the bids, but that it was later discovered that the estate only owned a half interest in the parcels, and later re-appraisals and inventories were filed showing the proper values.

Respondent thereupon called as her witness the bidder, Florkewicz, and tried to ascertain if he owned the other half interest in the properties, but appellant's objections that title could not be tried in such proceeding were sustained. Appellant, during argument, contended that the estate owned the entire interest in the properties but made no showing to that effect except to rely upon the original incorrect appraisalment.

The trial court noted that the proceedings were regular on their face, overruled the objections to confirmation of the sales, and made separate orders confirming the two sales. In the Oakland order the court found that the notices were properly given and that the sale was properly held. The court then recited the terms of the sale, including the payment of taxes, and the tax and mechanic's liens. It was found that Florkewicz was the highest bidder; that the sale was legal and fair; that the bid was within 90% of the appraised value; that the bid was not disproportionate to the value of the lots; that an advance of 10% could not be obtained; and that the

sale was for the benefit and best interests of the estate. The order then confirmed the sale, authorized the administratrix to convey, and required an additional \$500 surety bond of her. The Berkeley order and findings were identical except as to the amounts, the number of liens to be paid off, and no additional bond was required.

The appellant contends that the trial court exceeded its jurisdiction by trying title in the probate proceeding. In this connection appellant points to the evidence that original appraisals were filed when the estate believed it owned the entire interest in the lots, and then re-appraisals of less than half the original appraisals were made. He also refers to the evidence that this was done because the estate discovered it owned only a half interest, and points out that the findings do not divulge that it was only a half interest that was being sold. He then urges that in some way this amounted to trying title in the proceedings. Respondent correctly points out that the trial court sustained all of appellant's objections to trying title, and that it was for this reason that it failed to find whether the estate owned a half or whole interest. Appellant, while successfully objecting to any determination that the estate owned but a half interest, apparently seeks a determination that the estate owns the entire interest. This inconsistent position is unsound.

[1] It is, of course, the law that title cannot be tried as between an adverse claimant and the estate in the probate proceedings. *Estate of Dabney*, 37 Cal.2d 672, 234 P.2d 962; *McCarthy v. Superior Court*, 64 Cal.App.2d 468, 149 P.2d 55; *Guardianship of Vucinich's Estate*, 3 Cal. 2d 235, 44 P.2d 567. The trial court did not try title and could not have done so.

[2] Respondent correctly relies on sections 785 and 786 of the Probate Code as demonstrating that the function of the probate court is strictly limited on confirmation proceedings. Under section 785 the court is required to investigate into

the necessity for the sale and the advantage therefrom, as ascertained from the return and the evidence. If it finds good reason for the sale, legality and fairness in the conduct of the sale, and that the bid meets certain specified standards, then "the court shall make an order confirming the sale". Section 786 then requires the conveyances to be executed which "convey all the right, title, interest and estate of the decedent" plus after-acquired title. The return, and the evidence believed by the trial court, were such that, under the sections, the court's approval was mandatory. The court, quite properly, under section 786, ordered the estate's title to be conveyed. That is all that it was empowered to do. If there are other assets of the estate, or if the administratrix conveys a greater interest than represented, the appellant may object to her account.

The only other contention of appellant is that the orders of confirmation are void because they approved the acceptance of bids conditioned upon the administratrix' payment of taxes, tax and mechanic's liens. Neither this, nor any other claimed defect in the bids, was made at any time in the trial court and admittedly is raised for the first time in this court. Appellant claims, however, that the claimed defect is jurisdictional.

[3] While the notice of sale recited that the property was to be sold subject to taxes and other claims of record, the bids carefully enumerated the taxes, and tax and mechanic's liens that were to be paid off by the administratrix, and the bids were conditioned on such payments. The administratrix agreed to these provisions. All this was fully disclosed not only in the bids but in the petitions for confirmation. But appellant urges that, because the bids and confirmations were expressly conditioned on the payment of such liens, the bids and confirmations were absolutely void. It is contended that conditional bids at a judicial sale are invalid. At common law and in California no condition making the offeror's performance dependent on an uncertain contingency can be received by the officer conducting a judicial sale. The rationale of this rule is that the rule of

caveat emptor prevails as to judicial sales, and that the purchaser merely receives a quitclaim title. See, generally, cases collected and commented on in *Dorris v. Johnson*, 363 Ill. 236, 2 N.E.2d 74, 104 A.L.R. 632; 31 Am.Jur. 445, § 89.

Under the old probate law in California under which the administrator had to first secure authorization from the court to sell, a probate sale was a judicial sale, and subject to the rule that the administrator was without power to accept a conditional bid. The leading case is *Estate of Bradley*, 168 Cal. 655, 144 P. 136. In that case one Going was a real estate broker who had listed certain property of an estate for sale. One Tobin offered to buy the property for \$5,500, depositing with Going \$2,750 as a down payment. Going then, in the estate proceedings, had a dummy offer \$4,500 for the property, depositing \$450 with the bid. The administrator asked for authorization to sell at that price. At the court hearing the court was informed of the true facts. Tobin testified that he was willing to pay \$5 500 and submitted a written bid on condition that Going, who was not a party to the court proceeding, return to him the \$2,750. The court authorized the sale, applying the \$450 down payment on the purchase price and ordering Going to return the balance of \$2,300 to Tobin. The court held the Tobin bid invalid because it was conditional. At page 661 of 168 Cal., at page 138 of 144 P. the court stated: "This was, in effect, a condition attached to the offer. Such condition deprived the offer of the absolute character which the terms of the order of sale, and the nature of the transaction, required. Tobin did not undertake to pay the entire purchase price, except upon an event which might or might not take place. The probate law contemplates a contract which the buyer may be compelled to complete. Tobin did not agree to enter into any such contract."

[4] Of course, the condition in the Bradley case that was attached to the offer was one within the control of a third person who was not a party to the proceeding, and therefore the court order provided for a contingency that might or might not occur. In the present case, the "condi-

tion" was that the administratrix pay certain tax and mechanic's liens—all matters that rested entirely within the control of the administratrix, who was subject to court control. For that reason the offer could be interpreted to have been an "absolute" one within the meaning of the Bradley case.

There is another factor involved. If the holders of the tax and mechanic's liens here involved had filed claims for such amounts and had such claims been allowed, then, under the express terms of section 762 of the Probate Code, the administratrix would have been required to apply the purchase price to the payment of these claims. In the instant case there is no evidence that such claims were filed and allowed but the section does indicate a statutory intent that such claims be paid out of the purchase price. Of course, under the provisions of section 716 of the Probate Code such claimants are not required to file claims, and section 929 of that code permits any debt of the decedent to be paid without the filing of any claim. Thus the condition here—that the tax and mechanic's liens first be paid—was one within the power and control of the administratrix. Of course, if she should pay a lien that is invalid, and no claim had been filed and allowed, objection could be made to her account, and if no estate money was then available, she would be liable on her bond. It was undoubtedly for this reason that the trial court increased her bond on the order confirming the Oakland sale.

The respondent calls attention to another and alternative reason why the orders here involved were valid and not within the rule of the Bradley case. In *Mains v. City Title Insurance Co.*, 34 Cal.2d 580, 212 P.2d 873, the court held that under present law a sale by an administrator is not a judicial sale; that it is a private sale; that the rule of *caveat emptor* does not apply to such a sale, and that implied warranties of title do apply to such sales. The opinion is predicated upon the change in the law accomplished in 1919 by the amendment to old section 1517 of the Code of Civil Procedure (now as amended, section 755 of the Probate Code) which struck from the law the requirement of a prior court order

as a prerequisite to a valid probate sale. Hence, said the court, under present law, such a sale is not pursuant to a court order and therefore is not a judicial sale. If this decision is sound (it has been criticized—see 2 Stanford Law Rev. 599; 23 So. Cal. Law Rev. 604) then, of course, the administratrix was required to pay off all tax and mechanic's liens against the property, and the condition imposed in the offer added nothing to what the law already compelled.

For these several reasons the offers to buy and the orders confirming the sales were valid and not subject to attack in these proceedings.

The orders appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



116 Cal.App.2d 480

ELBERT, Limited v. McKENNA et al.
Civ. No. 19112.

District Court of Appeal, Second District,
Division 3, California.

March 4, 1953.

Hearing Denied April 30, 1953.

Action to quiet title to land sold on foreclosure of street improvement bonds. From an adverse judgment of the Superior Court of Los Angeles County, Harold B. Jeffery, J., defendants appealed. The District Court of Appeal, Shinn, P. J., held that judgment in former quiet title action between the same parties was not res judicata of plaintiff's claim of title based on deeds issued by city treasurer after entry of such judgment.

Judgment affirmed.

1. Municipal Corporations ⇐582

Deed from city treasurer reciting that described realty had been sold to foreclose street improvement bond and had not been redeemed from sale was primary evidence of the regularity of foreclosure proceedings and constituted prima facie evi-

dence of title. Streets and Highways Code, §§ 5000-6794, 6555.

2. Judgment ⇐570(3, 12)

Dismissal of actions to foreclose street improvement bonds either for want of prosecution or by plaintiff was not res judicata of claims of title asserted in action to quiet title subsequently instituted by holder of city treasurer's deeds conveying realty sold on foreclosure of same bonds. Streets and Highways Code, §§ 5000-6794.

3. Quieting Title ⇐10(1, 2)

Quiet title action against one in possession claiming legal title to realty may be maintained only by one with a right to immediate possession founded on legal title and may not be brought by a mere lien holder.

4. Execution ⇐264, 283

Purchaser at sheriff's execution sale holds legal title to realty purchased and may maintain action to quiet title thereto against judgment debtor even before expiration of period of redemption. Code Civ. Proc. § 700.

5. Municipal Corporations ⇐579, 581

Purchaser at sale upon foreclosure of street improvement bond is vested with a lien on the property purchased, but issuance of city treasurer's deed on certificate of sale is necessary to transfer legal title and owner may redeem at any time before application is made for treasurer's deed. Streets and Highways Code, §§ 5000-6794, 6517, 6530, 6555.

6. Quieting Title ⇐10(2)

Purchaser at sale on foreclosure of street improvement bonds, who had not received treasurer's deeds for the land purchased, could not maintain quiet title action against former owners in possession on basis of certificates of sale alone. Streets and Highways Code, §§ 5000-6794, 6517, 6530, 6555.

7. Judgment ⇐739

Judgment holding city treasurer's deeds issued on certificates of sale of land on foreclosure of street improvement bonds invalid and refusing to quiet title in grantee against former owners in possession was

not *res judicata* of grantee's claim of title to the land based on deeds subsequently issued by treasurer on certificates of sale of land on foreclosure of other bonds for improvement of another street, since such claim of title could not have been adjudicated in former action before issuance of deeds, though at the time plaintiff held certificates of sale. Streets and Highways Code, §§ 5000-6794, 6517, 6530, 6555.

8. Municipal Corporations ⚡582

City treasurer's deeds to land sold on foreclosure of street improvement bonds were not invalid for failure to show assignment of certificates of sale by purchaser named in deeds to grantee therein, since it would be presumed that grantee had acquired interest of purchaser derived from sale. Streets and Highways Code, §§ 5000-6794, 6554, 6555.

9. Adverse Possession ⚡60(1)

Former owners did not acquire title as against assignee of purchaser at sale of land on foreclosure of street improvement bonds by adverse possession prior to issuance of city treasurer's deeds to land, since such possession must be against one having a right to possession and purchaser's assignee had no such right prior to issuance of deeds. Streets and Highways Code, §§ 5000-6794, 6517, 6530, 6554, 6555.

10. Quieting Title ⚡44(4)

In action to quiet title to land sold on foreclosure of street improvement bonds in holder of city treasurer's deeds thereto, evidence failed to sustain claim of invalidity of deeds because of want of notice or affidavit of notice, in view of evidence of compliance with all statutory requirements. Streets and Highways Code, §§ 5000-6794, 6555.

Catherine A. McKenna, in pro. per., for appellants.

Robt. E. Roskopf, Beverly Hills, John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an action to quiet title. Some twenty years prior to any of the proceed-

ings hereafter mentioned Catherine A. McKenna and J. Irving McKenna acquired title by deed to lots 8 and 9, block B of the Cambridge Tract as per map recorded in book 9, page 188, records of Los Angeles County. They have been in possession and have paid taxes on the property since that time. Plaintiff claims title by virtue of two deeds of the City Treasurer of Los Angeles, dated August 23, 1949. One deed conveyed lot 8 to Elbert, Ltd. and recited that the property had been sold to Frank R. Sipe for \$1,507.24 to foreclose Street Improvement Bond No. 627, Series No. 3, for the improvement of Montana Avenue and that the property had not been redeemed from the sale. The other deed was the same except that it conveyed lot 9 and the bond foreclosed was No. 637 and the amount of the foreclosure was \$1,595.53.

[1] Plaintiff introduced into evidence the two Treasurer's deeds and rested. These deeds which were issued under the Improvement Act of 1911 (now §§ 5000-6794, Sts. & Hy.Code), were primary evidence of the regularity of foreclosure proceedings theretofore had. § 6555, Sts. & Hy. Code. They were *prima facie* evidence of title. *Sipe v. McKenna*, 106 Cal.App.2d 559, 235 P.2d 416.

[2] Defendants in their answer alleged that the issues of the present action had previously been adjudicated in their favor. They introduced in evidence superior court files Nos. 293146 and 293143. The first of these was an action brought by M. Blakesley against J. Irving McKenna to foreclose Bond No. 637. This action was dismissed for want of prosecution. The second action was brought by Blakesley against J. Irving McKenna and others and was for the foreclosure of Bond No. 627. It also was dismissed for want of prosecution. Each bond had been issued in July, 1928. Each action was filed in December, 1929, and was for the failure to pay certain bond installments. The orders of dismissal did not adjudicate the claims of title asserted by plaintiff in the present action. Defendants introduced file No. 471495 which was an action brought in December, 1941, by Ralph W. Evans, as Building and Loan Commissioner of the State of California, against J. Irving

McKenna and others to foreclose Bonds No. 627 and No. 637 for the full amount thereof. This action was dismissed by the plaintiff. None of these actions adjudicated title in favor of defendants as against plaintiff or any predecessor in interest.

Defendants' principal contention of prior adjudication rests on a former action between these same parties brought to quiet title to the parcels of real property here involved. The file in that case (superior court No. 535504) was introduced by defendants who contend that since the present issues could have been litigated in that action, plaintiff may not now re-litigate them. The crucial question is whether the present issues were or could have been litigated in that action. A negative answer is required.

The prior action was one to quiet title in plaintiff based on a treasurer's deed issued under the Street Improvement Act of 1911, after sale on foreclosure of street bonds. These bonds were on lots 8 and 9 herein involved but were for improvement of Texas Avenue while the bonds herein involved (Nos. 627, 637) were for improvement of Montana Avenue. At the time the prior action was filed plaintiff also held certificates of sale under bonds 627 and 637 but did not have the deeds upon which it now relies. In the prior action the court held the former deeds void but adjudged plaintiff to be the holder of a lien represented by its valid certificate of sale. Defendants had asked for no affirmative relief and judgment was that plaintiff had merely a lien but had not acquired title.

[3-7] Defendants argue that since at the time of the prior action plaintiff held the certificates of sale on which the present deeds were issued, it could have maintained a quiet title action on the basis of the title evidenced by those certificates. If the certificates of sale were sufficient as a basis for an action to quiet title the plaintiff is barred from relying upon them in this action even if the trial court in the prior action erroneously refused to quiet title on the basis of the certificates of sale there involved. *Leaver v. Smith*, 47 Cal. App. 474, 190 P. 1050; 22 Cal. Jur. 128. The error in defendants' position is that a quiet

title action against a possessor with claimed legal title may be maintained only by one with a right to immediate possession founded on legal title and may not be brought by a mere lien holder. 22 Cal. Jur. § 6, p. 109. Defendants attack this proposition, pointing out that a purchaser at a sheriff's execution sale may maintain an action on the certificate. It is true that such a purchaser may maintain an action to quiet title against the judgment debtor even before the period of redemption has expired, *Leaver v. Smith*, supra, 47 Cal. App. 474, 190 P. 1050; *Truelsen v. Nelson*, 42 Cal. App. 2d 750, 755, 109 P. 2d 996, but this is because he holds "legal" title. *Pollard v. Harlow*, 138 Cal. 390, 398, 71 P. 454, 648; *Leaver v. Smith*, supra, 47 Cal. App. 474, 190 P. 1050; *Allen v. McGee*, 54 Cal. App. 2d 476, 483, 129 P. 2d 143. Section 700 of the Code of Civil Procedure reads in part: "Upon a sale of real property [under execution], the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto". Therefore he may sue to quiet his title. This is not the effect of a sale upon foreclosure of a street bond. The nature of the interest acquired at a foreclosure sale under the Improvement Act of 1911 is defined by § 6517 of the Streets and Highways Code which reads: "Immediately on the sale, the purchaser shall become vested with a lien on the property sold to him, to the extent of his bid. He may only be divested of that lien by redemption." It is the deed that transfers legal title. § 6555. The owner may redeem at any time before a treasurer's deed is applied for. § 6530. From the conclusion that a quiet title action could not have been maintained by plaintiff on the certificate alone it follows that the issues in the present action could not have been litigated until the deeds had issued. The deeds here involved were issued after judgment in the prior action. The title upon which plaintiff relies could not have been adjudicated in the former action. The defense of *res judicata* was not established.

[8] Defendants contend the deeds to plaintiff are void in that they recite one Frank Sipe was purchaser but do not show an assignment of the certificate of sale

from Sipe to Elbert, Ltd. The applicable statute, Streets and Highways Code, § 6554, does not require a recital of the assignment. It requires only recitals of "substantially the matter contained in the certificate of sale" and provides that the deed may be issued "upon application of the purchaser or his assignee". It will be presumed that plaintiff had acquired the interest of Sipe derived from the sale. *Sipe v. McKenna*, supra, 106 Cal.App.2d 559, 235 P.2d 416. The deeds conformed to the statutory requirements.

[9] There is no merit in defendants' claim of adverse possession. To be adverse such possession must be against one who has a right to possession. Plaintiff had no such right prior to issuance of the treasurer's deeds, August 23, 1949.

[10] Nor is there merit to defendants' claim of invalidity of the deeds because of want of notice or affidavit of notice. There was evidence that all statutory requirements were complied with.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



116 Cal.App.2d 565

ERDE v. CITY OF LOS ANGELES et al.
Civ. 19238.

District Court of Appeal, Second District,
Division 1, California.

March 6, 1953.

Action against a city and its water and power department for injuries sustained by an employee thereof when struck by a falling light standard. From a judgment of the Superior Court of Los Angeles County, Ellsworth Meyer, J., on the sustaining of defendant department's general demurrer to the complaint without leave to amend, plaintiff appealed. The District Court of Appeal, White, P. J., held that whether plaintiff

had actual knowledge of the hazard of the standard falling and voluntarily exposed himself to such risk or was contributorily negligent were issues to be determined from evidence on trial of merits and should not be decided on demurrer by inferences based on a statement made in a claim filed by plaintiff with the city before commencement of the action that he noticed when reporting for work that the glass shade of the standard was broken and likely to fall.

Judgment reversed and cause remanded with directions.

1. Municipal Corporations ⇨741(1)

While a complaint does not state cause of action against city or department thereof, in absence of allegation showing substantial compliance with law requiring that verified claim for damage be filed with proper authorities before commencement of action, such claim is not a pleading or foundation of plaintiff's cause of action.

2. Municipal Corporations ⇨741(1)

The purpose of statute requiring that verified claim for damage be filed with proper authorities before commencement of action against municipality or other public agency for damages claimed is to give municipality or such agency timely notice of nature of claim, with particulars required by law, so that authorities thereof may make investigation and determine course of action respecting claim.

3. Master and Servant ⇨260(2)

In action against city and its water and power department for injuries to department employee struck by falling light standard, complaint, to which was attached a copy of claim for damage, filed with city before commencement of action, was not fatally defective as disclosing all elements of affirmative defense of assumed risk, even if statement in claim that plaintiff noticed when reporting for work on morning of accident that glass shade of standard was broken and likely to fall should be treated as having been adopted by plaintiff as averment of complaint.

4. Master and Servant ⇨217(1)

The elements of affirmative defense of assumption of risk are actual knowledge of danger and voluntary acceptance of risk.

5. Master and Servant ⚡217(1)

The doctrine of assumption of risk is based on theory of voluntary acceptance of risk, and such acceptance, whether express or implied, requires knowledge and appreciation of risk.

6. Master and Servant ⚡217(4), 227(1)

Where facts are such that employee, suing employer for injuries sustained, must have had knowledge of hazard, situation is equivalent to actual knowledge and there may be an assumption of risk by employee, but where it merely appears that he could or should have discovered danger by exercising ordinary care, defense is not assumption of risk, but contributory negligence.

7. Pleading ⚡216(1)

Whether city employee, suing city and water and power department thereof for injuries sustained when struck by falling light standard while working in vicinity thereof, had actual knowledge of such hazard and voluntarily exposed himself to risk or was contributorily negligent were issues to be determined by trier of facts on consideration of all evidence pertaining to occurrence and plaintiff's conduct and should not be decided on demurrer to complaint by inferences based on statement in claim for damage filed with city before commencement of action, that plaintiff, when reporting for work on morning of accident, noticed that glass shade of standard was broken and likely to fall.

Arthur Garrett and Everett W. Leighton, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., Los Angeles, Wallace J. Manley, Deputy City Atty., Desmond J. Bourke, Deputy City Atty., Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff and appellant seeks reversal of a judgment entered upon the sustaining of a general demurrer to his complaint without leave to amend.

By his complaint plaintiff sought to recover damages for injuries alleged to have

been sustained when he was struck by a falling "light standard." The injuries, it was alleged, were caused by the negligence of the defendants in knowingly permitting a defective light standard to remain unrepaired and failing to place warnings to persons in its vicinity. In its general demurrer the Department of Water and Power of the City of Los Angeles contended that the complaint did not state facts constituting a cause of action, in that it alleged that plaintiff, "with knowledge of the alleged dangerous condition of public property and of its alleged potentiality to cause harm, voluntarily assumed the risk, as a matter of law." This contention is based upon the fact that attached to the complaint was a copy of a "Claim for Damage" filed with the City of Los Angeles prior to the commencement of the action, and with reference to which it is alleged in the complaint "that a true copy of said Claim for Damage is attached hereto and identified as 'Exhibit A' and is hereby incorporated by reference so as to be made a part of this complaint just as if set forth in full hereat."

The claim filed by plaintiff contained the following language pertinent to the question here under consideration:

"What particular act or omission do you claim caused the injury or damage? When reporting for work Wednesday A.M., we notice that shade was broken and in a position likely to fall. We reported this fact to traffic officer and also called the Light & Power Co. Also Light & Power truck arrived to put in line and we asked him to fix but he stated that he was unable to do so."

It is the position of respondent that the quoted language of the claim shows that plaintiff-appellant was aware of the dangerous condition of the light standard, but voluntarily chose to expose himself to the risk of remaining in its vicinity; that the allegations of the claim having been incorporated by reference in the complaint and "made a part" thereof, the complaint upon its face discloses all the elements of the affirmative defense of assumption of risk.

Appellants argue that while the language of the claim shows that plaintiff, when re-

porting for work, saw that the standard glass shade was broken and likely to fall, "one element of assumption of risk", that all other elements are lacking. It is further urged that since the claim herein is not the foundation of the cause of action, as would be in a suit upon a contract, a variance between the claim and an otherwise sufficient complaint is not a proper basis upon which to uphold a general demurrer. We are in accord with appellant's contentions.

[1,2] As appellant suggests, it should be realized that the claim filed with the City of Los Angeles is not a pleading, nor is it the foundation of the plaintiff's cause of action. It is true, of course, that a complaint does not state a cause of action unless it contains an allegation showing substantial compliance with the law requiring that a verified claim containing required particulars be filed with the proper authorities. When a proper claim has been filed, however, its purpose has been served. The purpose, as has been so uniformly held in the recent decisions of this state, is to give the municipality or other public agency timely notice of the nature of the claim, with the particulars required by law, so that the authorities may make an investigation and determine upon a course of action with respect to such claim. *Cruise v. City & County of San Francisco*, 101 Cal.App. 2d 558, 563, 225 P.2d 988; *Natural Soda Products Co. v. City of Los Angeles*, 23 Cal.2d 193, 203, 143 P.2d 12; See, also, *Knight v. City of Los Angeles*, 26 Cal.2d 764, 767, 160 P.2d 779; *Holm v. City of San Diego*, 35 Cal.2d 399, 400, 217 P.2d 972.

[3] The language of the claim is: "Upon reporting for work Wednesday A.M., we notice that shade was broken and in a position likely to fall." The claim is made out on a questionnaire form provided by the city. At the end of the claim are listed the names of witnesses to the accident, apparently members of the work crew working with the plaintiff. It is not clear that the claim was made out with the aid of legal advice.

Assuming, without deciding, that the statements contained in the claim should be treated as having been adopted by the pleader as averments of the complaint, we are nevertheless of the view that the pleading is not fatally defective in disclosing all the elements of an affirmative defense.

[4-6] The elements of the affirmative defense of assumption of risk are two: Actual knowledge of the danger and voluntary acceptance of the risk. The Supreme Court of this state, in *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 384, 240 P.2d 580, 585, has clarified the distinction between assumption of risk and contributory negligence in the following language: "The doctrine of assumption of risk is based on the theory that there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, requires knowledge and appreciation of the risk. See Rest., Torts, § 893; Prosser on Torts (1941), pp. 377-386; 10 So.Cal.L.Rev. 67, 74. Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of risk; *but where it merely appears that a person could or should have discovered the danger by the exercise of ordinary care, the defense is not assumption of risk but contributory negligence.* See Prosser on Torts (1941), pp. 379-380, 400." (Emphasis added.)

[7] It may well be that the evidence upon the trial might show that plaintiff knew of the defect but failed to realize the danger of remaining in the vicinity of the standard. It may be that some exigency resulted in momentary forgetfulness of the danger. It may be that plaintiff mistakenly supposed that he was maintaining a safe distance when in fact he was not. It is only by drawing from the fact of injury an inference that plaintiff's conduct in the light of his knowledge was inexcusably reckless or negligent that he can be denied the right to present his evidence; and such an inference is not compelled by the fact of injury or the statement in the claim. We cannot infer voluntary exposure to risk from the

fact of injury. Whether plaintiff appreciated his danger and chose to expose himself or was guilty of contributory negligence are issues for determination by a trier of fact upon consideration of all the evidence pertaining to the occurrence and to plaintiff's conduct. Even where the evidence or facts are not in dispute, there often remains a field for the function of the trier of fact in determining whether the conduct of a party was that of a reasonably prudent person in the light of the circumstances and his knowledge.

We hold, therefore, that whether plaintiff had actual knowledge of the hazard, whether he voluntarily exposed himself to the risk, or whether he was guilty of contributory negligence in the circumstances, are issues to be determined from the evidence, upon a trial of the merits, and should not be decided upon demurrer by inferences based upon the one statement made in his claim.

The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer and permit defendant a reasonable time to answer if it be so advised.

DORAN and DRAPEAU, JJ., concur.



116 Cal.App.2d 664

SPOERER v. BAKER.

Civ. 4601.

District Court of Appeal, Fourth District,
California.

March 11, 1953.

Hearing Denied May 7, 1953.

Action on notes wherein defendant alleged payment and accord and satisfaction. The Superior Court, Kern County, Robert B. Lambert, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence supported the finding that there had been no payment or accord and satisfaction.

Affirmed.

254 P.2d—8

1. Accord and Satisfaction ⇨26(3)

Bills and Notes ⇨527(1)

In action on notes, evidence supported finding that there had been no payment or accord and satisfaction.

2. Evidence ⇨119(1)

In action on notes wherein defendant contended that notes had been delivered conditionally as security for payment of like amounts by mining corporation, and that there had subsequently been an accord and satisfaction, testimony of person who took notes at corporation meeting with reference to alleged accord and satisfaction and as to certain statements made by another at the meeting were admissible as part of the transaction in question.

3. Appeal and Error ⇨1051(1)

Even if admission of certain evidence was error, it was not prejudicial where other evidence was ample to support court's findings.

Eugene L. Wolver, Los Angeles, Johnston, Baker & Palmer, Bakersfield, for appellant.

Deadrich, Gill & Bates, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action on five notes, each for \$2000. These notes, dated June 24, 1949, were given to the Benders and the Handels and assigned by them to the plaintiff. The answer admitted the execution of the notes but alleged that they were delivered conditionally as security for the payment of like amounts to the Benders and the Handels by El Dorado Gold Mines, Ltd., and that there had subsequently been an accord and satisfaction through which El Dorado Gold Mines, Ltd. had fulfilled the obligation and discharged this debt. The court found that no part of these notes had been paid and that it was not true that there had been any accord and satisfaction. Judgment was entered for the plaintiff and the defendant has appealed.

The real parties in interest and all of the witnesses were connected with a mining venture in Nevada operated by El Dorado Gold Mines, Ltd. For convenience, this

company will be referred to as El Dorado and the Benders and the Handels, to whom the notes were given, will be referred to as the respondents.

The appellant contends that the findings, to the effect that there was no payment or accord and satisfaction, are unsupported by any material evidence. It is further contended that the court erred in admitting testimony as to certain statements made by a Mr. Wickham with reference to the cancellation of a stock certificate and the reissuance of other stock in lieu thereof; that this evidence was hearsay and inadmissible; and that these statements, had they been admissible, would have been legally insufficient to prove the cancellation of the certificate in question and the reissuance of other stock in lieu thereof. This Mr. Wickham was a stockholder in and an officer of El Dorado, and was active in its business affairs.

The respondents were potato growers at Shafter. On May 7, 1949, they entered into a written agreement with one Kelso, by the terms of which Kelso agreed to issue 100,000 shares of El Dorado stock to the respondents in exchange for certain stock in another company owned by them. On February 15, 1950, the respondents signed a memorandum on the bottom of the May 7 agreement stating, in effect, that this agreement was consummated on that day by giving them El Dorado stock Certificate No. 317 for 100,000 shares. In April, 1950, the respondents received certificates for 100,000 shares of stock in El Dorado made out in their names, which were dated October 8, 1949, and which are referred to as "Exhibit B". They held this stock at the time of the trial, and Certificate No. 317 had not been returned or cancelled of record. The controversy here is as to whether they obtained "Exhibit B" through this deal with Kelso, or obtained it from El Dorado in exchange for their chattel mortgage and loans, thus wiping out El Dorado's debt to them and the appellant's obligation on these notes.

Prior to June 24, 1949, the respondents had agreed to lend \$50,000 to El Dorado, and had received a chattel mortgage in that amount. They had advanced \$35,000 of this

amount. On June 24, 1949, the appellant, who was then manager of El Dorado, called on the respondents at Shafter and asked them to advance the \$15,000 still due on the chattel mortgage, and also asked them to advance an additional \$10,000. The respondents refused to make the additional advance without further security. The appellant gave the respondents these notes for \$10,000 as such security, and the respondents gave him checks for \$25,000 covering the \$15,000 on the chattel mortgage and the additional \$10,000, all of which was placed in the corporate funds. On the same day, June 24, the respondents signed a letter agreeing to release their chattel mortgage upon the receipt of new notes for \$60,000 signed by El Dorado and endorsed by the appellant and his wife, with the further condition that these notes were to be given after a resolution of approval by the board of directors and after the respondents had received a full financial statement of the appellant and his wife. On the bottom of that letter, the appellant signed a statement that El Dorado agreed to deliver to the respondents on demand 100,000 shares of stock in El Dorado in compliance with the Kelso agreement (of May 7, 1949). The respondents' letter of June 24, 1949, was given with the understanding that other parties were going to put additional money into the corporation, in which event it would be necessary to have the chattel mortgage released. This additional money was never secured, no new notes were ever signed by El Dorado and none of the conditions of this letter agreement, conditionally providing for the release of the chattel mortgage, was ever performed. The appellant contends, however, that the respondents later agreed to accept stock in El Dorado in lieu of El Dorado's debt to them, and to release their chattel mortgage; that Mrs. Wickham had agreed to contribute stock in El Dorado for this purpose; that the stock finally received by the respondents, "Exhibit B", came from that source, and was issued to the respondents in payment of El Dorado's debt; and that there is no evidence to support the finding to the effect that El Dorado's debt was not fully paid.

One of the respondents, who acted for the others, testified that he received Certificate No. 317 from Kelso on February 15, 1950, in compliance with their agreement dated May 7, 1949; that Certificate No. 317 was in the name of Mrs. Wickham; that she had endorsed it and handed it to Kelso, but Kelso had not had it transferred of record; that at the next meeting of the board of directors he told them that he had received this certificate and asked what he should do with it and was told that it was cancelled and would be picked up later, and Wickham told him "Your stock is laying in the office at Winnemucca, and the next time you are up there you can pick it up in lieu of this certificate"; and that at the next meeting at Winnemucca in April he was given the other certificates (Exhibit B), at which time Wickham told him "They have been issued and laying here."

At a meeting of the corporation held in Winnemucca on September 17, 1949, the respondent just referred to was elected a director of El Dorado. There is evidence that there was some talk at that meeting about the respondents' releasing their chattel mortgage in exchange for stock in the corporation, and that this respondent said he would have to consult the other respondents and that they might do this if the mine was placed on a paying basis. There was also talk at that time to the effect that Mrs. Wickham had agreed to contribute some stock to be used for this purpose. There is evidence that Mrs. Wickham later contributed 150,000 shares of stock to the corporation, but there is little, if any, evidence as to what was done with that stock.

Mr. Desmond took notes of the proceedings at the meeting on September 17, 1949, and while his notes show that there was a discussion of these things he made no note to the effect that any agreement had been made to accept stock in lieu of the corporation's debt to the respondents. He testified that he could not say that he recalled that this respondent had made any statement that he would accept stock in lieu of the loans. Mr. Roummel, who acted as president at that meeting testified that there was no discussion about trading stock for the mortgage; that he had attended all

meetings of the board and the only thing that had been said was that this respondent stated that if the mine was put on a paying basis and if it was agreeable to the other respondents they would make such an exchange; that at a meeting in Stockton in February or March, 1950, this respondent told them he had received a certificate for 100,000 shares from Kelso and asked what to do with it; that Wickham told him it was cancelled, to hold it and he would pick it up, and that his stock in lieu thereof had been made out and he could pick it up at the office in Winnemucca; that at a later date in the office Wickham handed this respondent the other certificates (Exhibit B); that Wickham then asked this respondent to send him the cancelled notes; that this respondent replied that this was an exchange for the cancelled shares that Kelso had, and had nothing to do with the notes in any way, shape or form; and that Wickham "clammed up and didn't say any more." Mr. Stanley, who was president of the corporation during most of the time in question testified that at the meeting on September 17, 1949, Desmond asked this respondent if he would take stock in exchange for the notes they held and this respondent replied that he personally would be willing to do so if the mine was on a paying basis but he would have to consult his partners; that at a later date he heard Wickham tell this respondent that the Kelso certificate was cancelled and for him to keep it until Wickham picked it up; that the new shares (Exhibit B) were then delivered to this respondent; and that these shares (Exhibit B) came from Mrs. Wickham's shares on some outside deal and the corporation itself had no treasury stock at that time.

Kelso testified that he acquired Certificate No. 317 from Mrs. Wickham; that this was his own stock and not the stock Mrs. Wickham had agreed to donate to the corporation; that Certificate No. 317 was in his safe in Sacramento on October 8, 1949, the day on which the other stock certificates (Exhibit B) were dated, and remained there until February 12, 1950; that on February 15, 1950, he transferred Certificate No. 317 to the respondents and en-

dorsed on the back "This certificate is to be issued to William Kelso and transferred in five equal amounts of 20,000 shares each in the name of Bender and Handel." The appellant Baker testified that on June 24, 1949, there was a discussion that the respondents would release their mortgage on receipt of corporation notes for \$60,000 endorsed by Baker and his wife, with the further condition that Baker was to furnish a complete financial statement; that a few days later he took the respondent above referred to to the mine for the "sole purpose of Mr. Bender foreclosing and collecting this \$10,000 and instead of collecting anything he threw it all aside and gave them \$500 more"; that on that trip he and this respondent talked about the Kelso agreement and he then told Kelso that he must give this respondent 100,000 shares in El Dorado in accordance with that agreement of May 7, 1949, and Kelso said that he would do so; that on the trip back he asked this respondent to return his notes and this respondent replied that if he foreclosed the mortgage they would all lose the money that had been invested in the mine; that this respondent said he would talk to the other respondents when he got back to Shafter and thought they would take the stock to clear the debt but that he could not say until he talked to the others; and that later on, he could not remember when, this respondent said he would destroy the notes.

On May 11, 1950, the respondents received a writing signed by Mr. and Mrs. Wickham stating that the respondents have the option to exchange their chattel mortgage and notes from El Dorado for stock in El Dorado at \$1 per share; that Mrs. Wickham "will furnish the stock to cover the above"; and that "This option is good for a period of ninety days from date—up to and including August 11th, 1950."

[1] While the evidence shows that the stock certificates finally received by the respondents (Exhibit B) were dated October 8, 1949, and that they were being held in

the office of the company at Winnemucca, there is no evidence that the respondents ever agreed to accept those shares in exchange for the corporation's debt to them. No reason is suggested why certificates should have been made out for 100,000 shares for that purpose when such talk as there was contemplated only the delivery of 60,000 shares. There is very clear evidence that the respondents received these shares (Exhibit B) in exchange for Certificate No. 317 which he received from Kelso in compliance with their agreement of May 7, 1949. The evidence shows that the affairs of this corporation were being very loosely conducted and the fact that Certificate No. 317 was not cancelled of record, as it should have been, could have no controlling effect on the issues of this case. The evidence clearly shows that the respondents received only one block of 100,000 shares of stock in connection with these transactions, and not two separate blocks, and fully supports the implied finding and conclusion that they received these 100,000 shares from Kelso in compliance with their agreement with him, and not from El Dorado in exchange for the corporation's debts to them.

[2, 3] No reversible error appears in connection with the admission of testimony which was objected to with respect to certain statements made by Mr. Wickham with reference to the cancellation of Certificate No. 317 and the issuance of other stock in lieu thereof. Other evidence to the same effect was received from other witnesses without objection, and the statements were made at meetings of the board of directors in the course of business and as a part of the transaction in question. Moreover, no prejudice appears as the other evidence is ample, irrespective of any such cancellation of record, to support the court's findings.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur

115 Cal.App.2d 538

Ex parte McBRIDE.**Cr. 2429.**

District Court of Appeals, Third District,
California.

Jan. 27, 1953.

Habeas corpus proceeding brought to test validity of arrest and detention of fugitive, by authorities of asylum state, for extradition purposes. The District Court of Appeals, Schottky, J., held that the demanding state's right to extradition had not been waived by its prior inaction in the matter.

Order in accordance with opinion.

1. Extradition ☞30

Extradition is authorized only when one charged with crime in demanding state has fled from its justice to another state. U.S.C.A.Const. art. 4, § 2, cl. 2; 18 U.S.C.A. § 3182.

2. Habeas Corpus ☞92(2)

In habeas corpus proceeding brought to test validity of arrest and detention of fugitive, by authorities of asylum state, for extradition purposes, court of asylum state may determine whether crime has been charged in demanding state, whether fugitive in custody is person so charged, and whether fugitive was in demanding state at time alleged crime was committed. U.S.C.A.Const. art. 4, § 2, cl. 2; 18 U.S.C.A. § 3182.

3. Criminal Law ☞1205

Unserved term of a sentence can be satisfied only by actual service unless remitted by compliance with conditions of parole followed by discharge granted by parole authorities and approved by Governor, or by pardon or commutation of sentence by Governor.

4. Extradition ☞24

State's right to extradite escaped prisoner was not waived by release of prior detainers and failure to exercise right of extradition on prior occasions. U.S.C.A. Const. art. 4, § 2, cl. 2; 18 U.S.C.A. § 3182.

Edmund G. Brown, Atty. Gen. and Gail A. Strader, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice.

This is an application for a writ of habeas corpus filed by the public defender of Sacramento County on behalf of Wayne H. McBride.

The petition alleges that said Wayne H. McBride is being imprisoned and detained under a warrant issued by the governor of California upon demand by the governor of Texas for the extradition of said Wayne H. McBride as a fugitive from justice of the State of Texas.

The facts as shown by the petition and the return are substantially as follows: On the 25th of June, 1934, said Wayne H. McBride was sentenced for the crime of burglary for a period of two years by the Superior Court of Brown County, Brownwood, Texas. By virtue of said term petitioner was subsequently confined at the Central Farm, Sugarland, Texas, from where he escaped on May 9, 1935; after his escape petitioner was arrested by the Federal Bureau of Investigation at Seattle, Washington, as a fugitive from justice as a result of this escape; while he was held under arrest the Texas authorities were notified of his detention. After detention of a period of one week he was released by the Federal Bureau of Investigation, after being informed by them that the State of Texas was not going to extradite him and was going to do nothing about him as long as he stayed away from the State of Texas.

In the year 1941 said Wayne H. McBride was released from the Washington State Prison at Walla Walla, Washington, after having served five years. During the time that he was incarcerated the Texas authorities were again notified of where he was being detained; that the Texas authorities, although knowing of his whereabouts and having opportunity to extradite him from the State of Washington at the termination of his sentence, did not apprehend him nor seek to extradite him from said state; in fact the Texas authorities did correspond with the Washington prison authorities and

Robert R. Harlan, Public Defender, Sacramento, for petitioner.

informed them that they would be unable to extradite the prisoner.

Upon his release from the Washington State Prison at Walla Walla said Wayne H. McBride continued to serve two and one-half years on parole under Washington authority. At all times the Washington authorities knew where he was and could contact him as could all others including the State of Texas, if they so desired. Wayne H. McBride was subsequently discharged from parole. During the time that he was on parole, at no time did the Texas authorities seek to extradite him.

During March of 1950 said Wayne H. McBride was sentenced to state prison from Riverside County on the charge of petty theft with a prior conviction; he has been discharged from said imprisonment as of December 21, 1952.

The petitioner alleges that the present restraint of the liberty of said Wayne H. McBride is illegal by virtue of the fact that the State of Texas has waived jurisdiction over the body of said Wayne H. McBride in failing to exercise its right to extradite him on occasions long past.

The extradition of fugitives from justice from one state to another is provided for in the Constitution of the United States and is governed by a federal statute enacted to make effective the constitutional provision. Article IV, section 2, clause 2, of the Constitution of the United States provides that:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

Title 18, section 3182, U.S.C. (1946), the statute which implements the constitutional provision, has been substantially in its present form since 1793. It is as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an in-

dictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

(June 25, 1948, ch. 645, 62 Stats. 822, eff. Sept. 1, 1948.)

[1] Thus, one charged with crime in any state who flees from its justice to another state may be extradited by the latter. Under no other circumstances is extradition authorized.

[2] It has therefore been consistently held, as was said in *Johnson v. Matthews*, 86 U.S.App.D.C. 376, 182 F.2d 677, that in a habeas corpus proceeding involving extradition the subjects of inquiry are: (a) whether a crime has been substantially charged in the demanding state; (b) whether the prisoner is the person so charged; (c) whether the prisoner was in the demanding state at the time of the crime.

[3, 4] While there is some authority to the effect that a state's right to extradite an escaped prisoner may be waived by knowledge of the prisoner's whereabouts and filing detainers on him in another state and then releasing them, we believe that the great weight of authority supports the rule laid down in *People ex rel. Barrett v. Dixon*, 387 Ill. 420, 56 N.E.2d 816, at page 819, where the Supreme Court of Illinois said:

"It is contended that the State of Illinois lost jurisdiction to arrest and return the prisoner to the penitentiary at Joliet by their failure and neglect to retake him until after the expiration of

the term of his maximum sentence. It must be conceded as definitely settled in this State that from the date of his parole violation in December, 1931, he owed the State of Illinois service for the remainder of his maximum sentence, or eight years and approximately three and a half months. *People [ex rel. Barrett] v. Crowe*, 387 Ill. 53, 55 N.E.2d 84; *Purdue v. Ragen*, 375 Ill. 98, 30 N.E.2d 637; *People ex rel. Ross v. Becker*, 382 Ill. 404, 47 N.E.2d 475; Ill.Rev.Stat. 1931, chap. 38, par. 808, sec. 7a. This term could be satisfied only by actual service, unless remitted by some legal authority. *People ex rel. Ross v. Becker*, 382 Ill. 404, 47 N.E.2d 475; *Purdue v. Ragen*, 375 Ill. 98, 30 N.E.2d 637; *People ex rel. Cassidy v. McKinley*, 372 Ill. 247, 23 N.E.2d 50; *People ex rel. Kerner v. McKinley*, 371 Ill. 190, 20 N.E.2d 498; *People ex rel. Crews v. Toman*, 367 Ill. 163, 10 N.E.2d 657. There were only two methods provided by law for this unsatisfied sentence to be legally remitted, (1) a compliance with the conditions of his parole followed by a discharge granted by the parole authorities, approved by the Governor (*People ex rel. Michaels v. Bowen*, 367 Ill. 589, 12 N.E.2d 625); and (2) by a pardon or commutation of sentence by the Governor, the power to issue which cannot be delegated. *People ex rel. Brundage v. LaBuy*, 285 Ill. 141, 120 N.E. 537; *People ex rel. Fullenwider v. Jenkins*, 322 Ill. 33, 152 N.E. 549. It is conceded that these are the only methods by which the term of unsatisfied service could be remitted by some legal authority, and that no such authority had been exercised. The failure of officials to perform their duties creates no right in a defendant to have his discharge as a beneficiary of their failure. [Citing cases.]”

See, also, *People ex rel. Ross v. Becker*, 382 Ill. 404, 47 N.E.2d 475; *United States ex rel. Palmer v. Ragen*, 7 Cir., 159 F.2d 356; *Fowler v. Ross*, 90 U.S.App.D.C. 305, 196 F.2d 25.

Petitioner cites *In re Whittington*, 34 Cal. App. 344, 167 P. 404, and *In re Reed*, 80

Cal.App.2d 330, 181 P.2d 662, neither of which is in point. In *re Whittington* merely holds that a person who, while under arrest in Texas, was taken from Texas to California under extradition proceedings, was not a fugitive from justice. In *re Reed* holds that a state did not waive its right to extradite a parolee after his term of parole would otherwise have expired where his parole had been canceled by the paroling state and a warrant issued for his arrest prior to his conviction of a felony in California, and the paroling state did not know of his whereabouts until his imprisonment in this state, and the prison records of other states, in which he had been imprisoned during this period, contained no record of any communication from the paroling state relating to him.

We are satisfied that both reason and authority support the conclusion that a person who has fled from a state while a criminal charge is pending against him or who, while confined in a penal institution has escaped and fled from the state, is and remains a fugitive from justice while he remains out of the state, and that he does not cease to be a fugitive from justice until his sentence is commuted or he is pardoned. The mere fact that extradition proceedings may have been commenced but not completed, or the fact that the whereabouts of the person may have been known to the authorities in the state from which he fled, does not change his status nor discharge his obligation to answer the charge or serve the remainder of his sentence. These may be matters for both the governor of the demanding state and the state in which extradition is sought to consider, but when, as in the instant proceeding, the governor of Texas from which state the prisoner has fled has demanded his arrest and detention, and the governor of California, upon whom the demand has been made, has certified that the representations of the governor of the demanding state are true and that the prisoner sought is a fugitive from justice, we do not believe that a court is justified in discharging the prisoner upon the ground that the demanding state has waived its right to extradite him, when there is no doubt (1) as to the identity of the prisoner;

(2) that he was a resident of the demanding state at the time of the crime; (3) that he has fled from the state; and (4) that he had neither served the term of his sentence nor had there been a pardon or commutation of sentence.

In view of the foregoing the writ heretofore issued is discharged and the prisoner is remanded.

VAN DYKE, P. J., and PEEK, J., concur.



116 Cal.App.2d 594

SHEPARD v. SHEPARD.

Civ. 19263.

District Court of Appeal, Second District,
Division 2, California.

March 9, 1953.

A wife brought an action against her husband wherein wife was granted a decree of divorce which approved property settlement agreement entered into by parties and required defendant to pay specified amount of money monthly for support of minor child of the parties. The Superior Court of Los Angeles County, Mildred L. Lillie and Louis H. Burke, JJ., upon defendant's application, reduced monthly payments for support of minor child of the parties required of defendant, and the plaintiff appealed. The District Court of Appeal, Fox, J., held that court could reduce support payments.

Order in accordance with opinion.

McComb, J., dissented.

1. Evidence ☞43(1)

It is common knowledge that in domestic relations cases court trustee is frequently used to collect and transmit support money, but seldom, if ever, required to handle funds growing out of a settlement of property rights in such cases.

2. Divorce ☞309

Under agreement incorporated into interlocutory divorce decree, whereby plain-

tiff wife received all community property in lieu of alimony or support, and requiring defendant to make monthly payments of specified amount for support of minor child whose custody was awarded to plaintiff, provision for support was not part of adjustment of property rights, and was severable from settlement of property rights, so that court could reduce amount of support payments, as against contention that support provision was part of property adjustment and that since agreement was approved by court and its provisions incorporated in interlocutory divorce decree, court could not reduce support payments. Civ. Code, § 138.

Julius Blank, Los Angeles, for appellant.

Levy, Bernard & Jaffe, Los Angeles, for respondent.

FOX, Justice.

Marital difficulties causing a separation having arisen between the parties, they entered into a property settlement and custody agreement in December, 1949, by which plaintiff accepted all "community property in lieu of alimony or support." In a separate paragraph the husband agreed to pay \$100 per month to the wife "for the support and maintenance" of their minor child until "the child reaches the age of 21, is self-employed or is married," such payments to be made "directly to the wife at her home." Thereafter plaintiff was granted an interlocutory decree of divorce which approved the property settlement agreement and specifically awarded her the several items of property enumerated in the agreement. The decree then states: "The court takes cognizance that due to the disposition of the community property made by this order, and heretofore agreed to by and between the parties, no alimony nor support of any kind is due the plaintiff."

The custody of the minor child was awarded plaintiff and, in a separate numbered paragraph, defendant was ordered to pay the plaintiff \$100 per month "for the support of the minor child" until she "attains her majority, marries or is self-employed," said payments "to be made to John

M. Zuck, Court Trustee." The final decree did not change the interlocutory.

In February, 1952, upon application of defendant, the court reduced the payments to \$75 per month. Plaintiff appeals from this order on the ground that the court lacked jurisdiction to modify the decree for child support. She contends that the provision for the support of the minor child is a part of the adjustment of their property rights and that since their agreement was approved by the court and its provisions incorporated in the interlocutory decree the court did not have jurisdiction to reduce the payments. Plaintiff, however, does not correctly analyze either the agreement with her husband or the interlocutory decree.

[1] By the terms of the agreement plaintiff received all the community property, and specifically agreed that she accepted all of such property "in lieu of alimony or support." That undoubtedly constituted a settlement of their property rights. The provision for the custody and support of the child are in separate paragraphs. The payments are stated to be "for the support and maintenance" of the child. They are to continue until she is either of age, married or employed. Upon the occurrence of any of these events the payments cease. They are therefore obviously for the benefit and use of the child, and not a part of the adjustment of the property rights of the parents. The adjustment of the property rights of the parties and the agreement to pay \$100 per month for the support of the minor child are separate and severable provisions of the contract. The terms of the interlocutory decree lend support to this conclusion in two particulars: First, it recognizes that by accepting all the community property "no alimony nor support of any kind is due the plaintiff." The \$100 per month is not enmeshed in any decree with the provisions relative to the property settlement of the parties. It is treated entirely separately. The second significant provision in the decree is that the payments for the support of the child are ordered to be made to the court trustee rather than directly to the plaintiff as specified in the agreement. It is a matter of common knowledge that in domestic relations cases

the court trustee is frequently used to collect and transmit support money, but seldom, if ever, required to handle funds growing out of a settlement of property rights in such cases.

In reducing the amount of the payments the trial court impliedly found that the agreement and order for the support of the minor child were not a part of the adjustment of the property rights of the parties. Such an interpretation is reasonable and consistent with the apparent intent of the parties to the agreement. In such circumstances an appellate court ought not substitute another interpretation even though it might seem equally tenable. *Alexander v. Alexander*, 88 Cal.App.2d 724, 727, 199 P.2d 348; *Riccomini v. Riccomini*, 77 Cal.App.2d 850, 853, 176 P.2d 750; *LaJolla Casa deManana v. Hopkins*, 98 Cal.App.2d 339, 348, 219 P.2d 871.

[2] Since the provision for the support of the child was separate and severable from the settlement of the property rights of the parties, the court had jurisdiction to reduce the amount of the monthly payments. *Civ.Code*, sec. 138; *Streeter v. Streeter*, 67 Cal.App.2d 138, 153 P.2d 441; *Henzgen v. Henzgen*, 62 Cal.App.2d 214, 144 P.2d 428.

Plaintiff relies on *Puckett v. Puckett*, 21 Cal.2d 833, 136 P.2d 1. That case, however, is not here applicable. The decisive distinction between the *Puckett* case and this one lies in the fact that in the former the trial court impliedly found that the monthly payments to the wife were an inseparable part of the property settlement, while here the contrary is true. In the *Puckett* case the wife agreed that out of the monthly payments she would support, educate and maintain the minor child. There was no direct agreement by the husband to pay any specific amount for the support of the child. See *Streeter v. Streeter*, *supra*, 67 Cal.App.2d at page 143, 153 P.2d 441. The payments ceased not upon the child's reaching a specified age or particular status but upon the remarriage of the wife. Here there was a separate and express agreement to pay a specific amount for the support and maintenance of the minor child until she became of age or achieved a designated status. It is thus plain that the principle of the *Puckett*

case cannot be the foundation for the decision in this case.

The order reducing the payments for the support of the minor child to \$75 a month is affirmed. The attempted appeals from all other orders, since they are nonappealable, are dismissed.

MOORE, P. J., concurs.

McCOMB, Justice.

I dissent. See *Puckett v. Puckett*, 21 Cal. 2d 833, 843[5], 136 P.2d 1.



116 Cal.App.2d 649

HARLESS v. JOHNSON et al.
Civ. 4555.

District Court of Appeal, Fourth District,
California.

March 11, 1953.

Rehearing Denied April 9, 1953.

Hearing Denied May 7, 1953.

Action to quiet title wherein claim of plaintiff was based upon unforeclosed street improvement bonds. The Superior Court of San Diego County, William A. Glen, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that Civil Code provision establishing statute of limitations as to liens upon real property to secure payment of public improvement assessment provides definite period of time upon expiration of which the liens are not only unenforceable by foreclosure, but are presumed to have been extinguished.

Judgment affirmed.

1. Municipal Corporations ☞564

Civil Code provision establishing period of limitations for liens upon real property to secure payment of public improvement assessments, is a definite statute of limitations, providing a period of time, upon the expiration of which, street improvement liens are not only unenforceable by foreclosure, but are presumed to have been extinguished. Civ.Code, § 2911.

2. Limitation of Actions ☞4(2)

Provision of Civil Code establishing period of limitations as to liens upon real property to secure payment of public improvement assessments is valid and constitutional. Civ.Code, § 2911.

3. Quieting Title ☞49

Where owner of unforeclosed street improvement bonds failed to protect her liens by appropriate action within time specified by Civil Code provision, with result that lien rights were presumed to be extinguished, and presumption of extinguishment was not overcome by sufficient evidence, judgment decreeing that liens were extinguished was proper. Civ. Code, § 2911.

4. Quieting Title ☞51

One whose claim of lien under street improvement bonds was determined to have been extinguished could not attack findings that defendants were owners of and entitled to possession of property involved, since a plaintiff in an action to quiet title must rely upon strength of his own title rather than upon the weakness of that of his adversary. Civ.Code, § 2911.

5. Quieting Title ☞10(1)

A plaintiff in a quiet title action must rely upon the strength of his own title rather than upon the weakness of that of his adversary.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for appellant.

James B. Abbey, San Diego, for respondents.

MUSSELL, Justice.

This is an action filed by plaintiff on January 20, 1949, to partition real property in San Diego county and was brought pursuant to the provisions of Section 752 of the Code of Civil Procedure. Plaintiff is the owner and holder of unforeclosed street improvement bonds issued on February 25, 1929, by the city treasurer of the city of San Diego pursuant to the Improvement Act of 1911. More than four years had expired after the due date of said bonds or of the last installment due thereon of the

last principal coupons attached thereto prior to the filing of plaintiff's complaint and prior to January 1, 1947. The bonds had not been paid and were not discharged of record. The interest of defendant Johnson in the property was based upon improvement bonds issued July 2, 1929, and proceedings to foreclose the same. The interest of defendant John Roulac was acquired by tax deed and a deed from the executrix of the estate of Earl Smyth Roulac, deceased.

The trial court found that the lien of plaintiff's bonds and each of them terminated as of January 1, 1947, under the provisions of Section 2911 of the Civil Code of the State of California and that under the terms of said section, the lien of said bonds and each of them have been extinguished. Judgment was entered ordering cancellation of plaintiff's bonds and decreeing that defendants Johnson and Roulac are the owners of and entitled to the possession of the property involved. From this judgment plaintiff appeals.

[1, 2] It has been held that Section 2911 of the Civil Code is a definite statute of limitations and provides a definite period of time upon the expiration of which street improvement liens would be not only unenforceable by foreclosure but would be presumed to have been extinguished. *Rombotis v. Fink*, 89 Cal.App.2d 378, 384, 201 P.2d 588. The validity and constitutionality of this section has been fully considered and established by the recent Supreme Court cases of *Scheas v. Robertson*, 38 Cal. 2d 119, 238 P.2d 982; *Sipe v. Correa*, 38 Cal.2d 131, 238 P.2d 989, and *Anger v. Borden*, 38 Cal.2d 136, 238 P.2d 976.

[3] Plaintiff failed to protect her liens by appropriate action within the time specified in the statute. Her lien rights were therefore presumed to be extinguished. The presumption of extinguishment was not overcome by sufficient evidence and the judgment decreeing that plaintiff's liens were extinguished was proper.

[4, 5] Plaintiff attacks the trial court's findings that defendants are the owners of and entitled to the possession of the property. However, since plaintiff's liens under her improvement bonds were extinguished,

she cannot successfully attack the questioned findings. It is well settled that a plaintiff in an action to quiet title must rely upon the strength of his own title rather than upon the weakness of that of his adversary. *Denman v. Smith*, 14 Cal.2d 752, 758, 97 P.2d 451.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



116 Cal.App.2d 531

BUCHHOLZ v. DENISON et al.

Civ. No. 15335.

District Court of Appeal, First District,
Division 2, California.

March 5, 1953.

Seller's assignee's action against buyer and his mother for purchase price of store. The Superior Court, in and for the City and County of San Francisco, Frank T. Deasy, J., rendered judgment for the buyer's mother, and the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the evidence sustained findings that the buyer's mother had not agreed to answer for the debt or default of the buyer and that the buyer had not been the agent of his mother.

Affirmed.

Guaranty ⇨25(3)

Parent and Child ⇨12

In seller's assignee's action against buyer's mother for purchase price of store, evidence sustained findings that buyer's mother had not agreed to answer for debt or default of her son and that the son had not been her agent in the transaction. Civil Code, § 1624, subd. 2.

Lorne M. Stanley, San Francisco, for appellant.

John Shortridge, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued Mrs. Denison and her son for the purchase price of a store owned by plaintiff's assignor. McGowan, the son, was without funds and plaintiff's attorney took him to see his mother to urge her to guarantee payment. A promissory note had been previously prepared by which mother and son jointly agreed to pay the purchase price. The son had already signed and when the attorney presented the note to the mother she refused to sign. Her name was thereupon stricken from the paper.

There is some slight controversy as to what then occurred. Plaintiff's evidence was that Mrs. Denison promised to back the purchase and to make good her son's delinquency if she could raise the funds. Contrary evidence was that the mother refused to sign the note and told her son and appellant's counsel that she did not have the funds for that purpose and could not guarantee payment in case of delinquency. There was some evidence that she told the parties that if she should be able to dispose of some of her properties she might then consent to help her son meet the obligation.

In this respect the trial court found: "It is not true that on or about January 20, 1950, or at any other time the defendant Blanche Denison agreed to pay to C. R. Beran, the plaintiff's assignor, the sum of \$5,237.81 or any sum or ever agreed to pay any interest upon said or any sum to the said C. R. Beran, plaintiff's assignor."

There is ample evidence to support this finding and it is sufficient alone to sustain the judgment because if the respondent did not agree to answer for the debt or default of the purchaser (an agreement which must be in writing [Civil Code, section 1624, subd. 2]), and was not the primary obligor, as all the evidence demonstrates, there is no legal liability on her part to meet her son's obligation. The suggestion that the son might have been the agent for respondent is not supported by any evidence.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

116 Cal.App.2d 598

JOHNSON v. WARNER et al. (two cases).

Civ. 19068.

District Court of Appeal, Second District,
Division 3, California.

March 10, 1953.

Actions arising out of intersection collision occurring on rainy night. The Superior Court, Los Angeles County, A. A. Scott, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that the evidence sustained the finding of contributory negligence.

Affirmed.

1. Automobiles ⇨244(43)

In action arising out of intersection collision occurring on rainy night, evidence sustained finding of contributory negligence.

2. Automobiles ⇨245(80)

Whether mistake in judgment when crossing a street, as to speed and danger of approaching vehicle, constitutes contributory negligence is a question for jury.

3. Witnesses ⇨330(1)

In intersection collision case, wherein plaintiff denied on cross-examination that he had said there were no automobiles approaching intersection at time he entered it, asking police officer impeachment question, as to whether plaintiff had told officer after accident that there had been no automobiles approaching at time he entered intersection, did not constitute basis for cross-examining officer as to matters not within scope of that question.

4. Witnesses ⇨392(1)

Fact that police officer's report of automobile accident does not include statements regarding certain or all things that were said or done at scene of accident does not indicate that statements which are in report are incorrect and does not impeach officer as witness.

5. Negligence ⇨93(2)

Contributory negligence of automobile driver was imputable to his wife who was riding with him at time of intersection collision.

Edward Raiden and J. B. Tietz, Los Angeles, for appellants.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiffs, husband and wife, filed separate actions for damages allegedly sustained as the result of a collision between their automobile and an automobile owned by defendant John F. Warner, and operated by defendant Joanne Marie Warner, a minor. Defendants filed answers in which they denied negligence and alleged, as an affirmative defense, that plaintiff Elmore M. Johnson, who was operating plaintiffs' automobile at the time of the collision, was guilty of contributory negligence. The actions were consolidated for trial. The court found, among other things, that defendant Joanne Marie Warner and the plaintiff Elmore M. Johnson were negligent and that the accident proximately resulted from the negligence of each of said persons. Judgment was for defendants and plaintiffs appeal therefrom.

Appellants contend in effect that the evidence does not support the finding of contributory negligence. Respondents concede that the evidence supports the finding of negligence on the part of Joanne Marie Warner.

The accident occurred about 5:30 p. m. on January 28, 1950, at the intersection of Oxnard and Colfax Avenues in North Hollywood. Oxnard Avenue extends east and west, and Colfax extends north and south. There were boulevard stop signs requiring traffic on Colfax to stop before entering the intersection. There were no boulevard stop signs requiring traffic on Oxnard to stop before entering the intersection. Plaintiffs' automobile was traveling south on Colfax in the inside lane for southbound traffic. The Warner automobile was traveling east on Oxnard in the inside lane for eastbound traffic.

Plaintiff Elmore M. Johnson, hereinafter referred to as plaintiff, testified it was getting dark, there was a misty rain and the streets were wet; the lights of his automobile were on, and the windshield wipers were operating; he made a boule-

vard stop before he entered the intersection and shifted into low gear; he saw an automobile proceeding northerly on Colfax about 100 feet south of Oxnard; he looked to the east and saw no automobile; he then looked to the west and saw one automobile (Warner's) at a point about 300 feet west of the intersection; the lights of the automobile were on and it was proceeding toward the intersection at a speed of 30 to 35 miles an hour; plaintiff then proceeded to cross the street; he didn't turn and keep his eyes on the automobile but it was coming toward him; he glanced at the automobile and it was increasing its speed—it was coming at a terrific rate of speed; at this time plaintiff was getting right up to the center of the intersection; plaintiffs' automobile was still in low gear and was traveling about 18 miles an hour; plaintiff pushed the accelerator to the floor board, and the next thing he knew the accident happened; at the time of impact, plaintiffs' automobile had crossed the center line of Oxnard and lacked about 3½ feet of being across the traffic lane in which the Warner automobile was traveling; plaintiff did not sound his horn, swerve right or left, or apply his brakes prior to the accident; when the Warner automobile was about 30 feet from plaintiffs' automobile, plaintiff Mrs. Johnson exclaimed that the car was going to hit them; he was already looking at the Warner automobile at that time, and he was doing his best to get out of the way; he did not attempt to stop because, in his estimation, it would have been more dangerous to try to stop than to try to get across, and he thought he could get across. He testified further that the impact caused the rear of plaintiffs' automobile to swing about so that it was turned around; it then traveled about 45 feet south on Colfax where the rear of the automobile struck the front of a third automobile, a Chevrolet, which was traveling north on Colfax.

Plaintiff Mrs. Johnson testified that it was dark on the night of the accident, it was raining and she could see a glare of lights in the rain—it seemed to her that there were headlights and street lights; she first saw the glare when plaintiffs'

automobile was stopped at the boulevard stop sign; the Warner automobile was then a block away; the next time she noticed the automobile it was about 20 feet from plaintiffs and she said: "We are going to get hit."

Barnie Glazer, called as a witness by plaintiffs, testified that he was the driver of the Chevrolet automobile which was struck by plaintiffs' automobile; at the time of the accident it was still light, his automobile headlights were not on and he saw no lights on the other automobiles involved in the accident; when he (witness) was about 150 feet from the intersection, he saw the other automobiles; it was a matter of seconds before the impact of said automobiles; plaintiffs' automobile was going between 10 and 20 miles an hour, it was progressing slowly and did not appear to increase its speed before the impact; the Warner automobile was going approximately 40 miles an hour, it did not swerve and the brakes were not applied; after the impact he did not see plaintiffs' automobile until a split second before it struck his Chevrolet.

Officer Jensen, called as a witness by defendants, testified that he investigated the accident and made a report, and that he talked to the witness Glazer at the scene of the accident. He testified that Glazer said: that as he was slowing down for a boulevard stop on Colfax, he saw an automobile southbound on Colfax and an automobile eastbound on Oxnard; the automobile on Oxnard was traveling at a high rate of speed; he was unable to estimate the speed of either automobile prior to the impact; he was unable to state whether plaintiff made a boulevard stop; the first time he saw plaintiffs' automobile it was in the intersection.

Officer Gough, called as a witness by defendants, testified that he interviewed plaintiff at the scene of the accident and that plaintiff made substantially the following statement: He (plaintiff) had made a complete stop at the boulevard stop sign at the intersection of Oxnard, and shifted into low gear; there were no cars coming in either direction that he could see, so he started up; when he got across into the

intersection he saw an eastbound car coming toward him very fast; he was unable to judge how fast the car was coming; it struck the rear of his automobile and that was all he knew about the accident.

Defendant Joanne Warner testified that she first observed plaintiffs' automobile when it was about three car lengths back of the stop sign, at which time her automobile was also about three car lengths from the intersection; she was going about 30 miles an hour; after she saw plaintiffs' automobile she looked to the right on Colfax, then ahead, and then plaintiffs were in front of her and she slammed on her brakes. It was stipulated that the testimony of a passenger in the Warner automobile would be substantially the same as the testimony of the last witness.

[1,2] As above stated, appellants contend in effect that the evidence does not support the finding of contributory negligence. Whether plaintiff's conduct under all the circumstances constituted contributory negligence was a question of fact for the trial court. There was evidence that it was dark, it was raining, the streets were wet, and lights caused a glare; that plaintiff (according to testimony of officer) saw no automobile on Oxnard before he entered the intersection, and the first time he saw the Warner automobile was after he was in the intersection. That evidence was legally sufficient to support a finding of contributory negligence. Furthermore, there was evidence from which it could have been found that plaintiff misjudged the speed of the other automobile and the danger created by it. Plaintiff testified that he proceeded into the intersection when the other automobile was about 300 feet away, and after he was in the intersection he pushed the accelerator to the floor in the belief he could get across the lane in which the other car was traveling. Whether a mistake in judgment "when crossing a street, as to the speed and danger of an approaching vehicle constitutes contributory negligence, is a question for the jury." See *Kirk v. Los Angeles Ry. Corp.*, 26 Cal.2d 833, 839, 161 P.2d 673, 676, 164 A.L.R. 1.

[3] Appellants contend further that the court erred in refusing to permit their counsel to cross-examine an officer as to a police report from which he refreshed his recollection. As above shown, Officer Gough was called as a witness by defendants. On direct examination, counsel for defendants (apparently reading from the report) asked the officer if, at the scene of the accident, plaintiff made the following statement to him: "I had been driving south on Colfax and came to a stop at the boulevard stop sign at the intersection of Oxnard and made a complete stop, shifted into low gear. There were no cars coming in either direction that I could see, so I started up. When I got into the intersection, I saw an eastbound car coming toward me very fast. I am unable to judge just how fast this car was coming. However, it struck the rear of my car, and that is all I know about the accident. I did not yield to any cars before entering the intersection." The officer testified that plaintiff made that statement in substance to him. On cross-examination by plaintiffs' counsel, the officer stated that his memory as to what plaintiff told him was refreshed by his examination of the report. Plaintiffs' counsel then sought to question the officer regarding other portions of the report which did not pertain to the matter involved on direct examination. The court sustained defendants' objections to said questions and stated that only one question had been asked concerning plaintiff's statement and that was asked for the limited purpose of impeaching plaintiff. It is obvious that the question was asked for the purpose of impeachment. As a foundation for impeachment, defendants' counsel had previously asked plaintiff that same question on cross-examination. In reply thereto, plaintiff denied that he said there were no cars coming in either direction that he could see. Asking the officer the impeachment question did not constitute a basis for cross-examining him as to matters not within the scope of that question. The court did not err in its ruling.

[4] Appellants also contend in effect that their counsel should have been permitted to cross-examine Officer Jensen re-

garding statements purportedly made at the scene of the accident and not referred to on direct examination. As above shown, Glazer was called as a witness by plaintiffs. Counsel for defendants, while cross-examining Glazer, said that he would lay a foundation for possible impeachment of the witness, and thereupon he asked him if, at the scene of the accident, he said: "I am unable to estimate the speed of either vehicle prior to the impact, and I am not able to state whether party 2 [plaintiff] made a boulevard stop or not because the first time I saw it it was in the intersection." Glazer replied: "I don't remember that." As above shown, Officer Jensen was called as a witness by defendants. On direct examination counsel for defendants asked him if, at the scene of the accident, Glazer stated as follows: "I was northbound on Colfax. I was slowing down for a boulevard stop sign at Oxnard. I saw a vehicle southbound on Colfax coming towards me. At this time the eastbound vehicle on Oxnard was traveling at a high rate of speed, struck the right rear of vehicle 2 [plaintiffs' vehicle], swinging it in a circle. This car backed into the front of my car. I am unable to estimate the speed of either vehicle prior to the impact and I am not able to state whether party 2 made a boulevard stop or not because the first time I saw it it was in the intersection." The officer replied that he (Glazer) did so state. The officer, on cross-examination by plaintiffs' counsel, testified that his memory was refreshed by reading the police report. Counsel for plaintiffs then asked him regarding a statement allegedly made by Mr. Warner at the scene of the accident, which statement did not appear in the report. The question was whether Mr. Warner asked his daughter Joanne why she did not stop. Defendants' objections to the question were sustained. Counsel for plaintiffs stated that he was attempting to impeach the officer by showing that his report was incomplete and inaccurate. The fact that a police officer's report of an automobile accident does not include statements regarding certain or all things that were said or done at the scene of the accident does not indicate that the statements which are in the

report are not correct, and does not impeach the officer as a witness. The court did not err in its ruling.

[5] The contributory negligence of plaintiff Mr. Johnson is imputed to the other plaintiff, his wife. See *Dicken v. Souther*, 59 Cal.App.2d 203, 210, 138 P.2d 408.

By reason of the above conclusions, it is not necessary to discuss other contentions.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



116 Cal.App.2d 550

**CHARLTON v. PAN AMERICAN WORLD
AIRWAYS, Inc.**
No. 15411.

District Court of Appeal, First District,
Division 1, California.

March 6, 1953.

Action by employee for unpaid expense allowance due under contract of employment. The Superior Court, San Mateo County, A. R. Cotton, J., rendered judgment in favor of employee for \$1,158.55 and employer appealed. The District Court of Appeal, Fred B. Wood, J., held where amount due for living expenses was capable of calculation by employer at end of period of employment from expense reports with supporting vouchers furnished by employee, employee was entitled to recover interest from termination of employment and not just from entry of judgment.

Judgment affirmed.

1. Dismissal and Nonsuit ⇐60(2)

In action by employee for unpaid expense allowance due under contract of employment, refusal to grant employer's motion to dismiss action for employee's failure to submit proposed findings of fact and conclusions of law within 10 days

after announcement of decision was proper since rule providing for submission within 10 days is directory and not mandatory. Rules for Superior Courts, rule 19.

2. Appeal and Error ⇐997(2)

In action by employee against employer for unpaid expense allowance due under contract of employment, question of whether mere lapse of 18 months between minute entry ordering judgment in employee's favor and serving of proposed findings of fact and conclusions of law on employer operated as abandonment of action was for trial court.

3. Interest ⇐39(1)

Where amount due as living expenses under contract of employment was capable of determination by employer at end of period of employment from expense reports with supporting vouchers furnished by employee, employee was entitled to recover interest from termination of employment and not just from entry of judgment. Civ.Code, § 3287.

Athearn Chandler & Hoffman, F. G. Athearn and Leigh Athearn, San Francisco, for appellant.

Bullock, Wagstaffe & Daba and Carlos R. Hulse, Redwood City, for respondent.

FRED B. WOOD, Justice.

The defendant has appealed from a money judgment covering an unpaid expense allowance of the plaintiff while on a temporary foreign assignment in defendant's employ.

In support of its appeal defendant claims (1) that the trial court should have granted its motion to dismiss the action for the failure of the plaintiff's counsel to submit proposed findings of fact and conclusions of law within ten days after announcement of decision, as required by Rule 19 of the Rules for Superior Courts, and (2) that interest should run only from the entry of judgment, not from June 1, 1948, as provided in the judgment.

[1] (1) *In respect to non-compliance with Rule 19*, it appears that a minute

entry was made June 28, 1950, ordering that judgment be granted in favor of the plaintiff for \$1,158.55 plus interest from June 1, 1948, at 7% per annum. January 15, 1952, plaintiff's counsel served proposed findings of fact and conclusions of law upon the defendant. January 17, 1952, defendant filed notice of motion to strike the proposed findings and conclusions, and to dismiss the action, motions which were heard and denied January 28, 1952. Meanwhile, on January 23, the court signed and filed the findings of fact and conclusions of law. Written judgment, signed by the judge and dated January 28, was filed January 31, 1952.

Defendant's theory is that Rule 19 imposed a duty upon the "prevailing party" to prepare and submit the documents within the time limited, a duty which can not later be performed unless the time be extended pursuant to section 1054 or leave be granted pursuant to section 473 of the Code of Civil Procedure.

Under that theory, defendant insists, its motion to dismiss should have been granted and thereupon it would have been proper for plaintiff to apply, under section 473, for relief from his default and for permission to submit proposed findings of fact and conclusions of law.

No such consequence is expressed in Rule 19. It simply declares that when written findings of fact and conclusions of law are required "counsel for the prevailing party shall, within ten (10) days after announcement of decision, unless otherwise ordered, prepare, serve and submit to the court proposed written findings of fact and conclusions of law together with the proposed judgment or decree." There is not therein expressed, nor can we read into it, an intent to penalize the prevailing party for his delay, nor to suspend or terminate the court's jurisdiction over the cause, nor the court's duty to render its decision and decree by making and filing written findings of fact, conclusions of law, and judgment. Significantly, too, the rule says "unless otherwise ordered". Here, in effect, the trial court did "otherwise order" by signing and filing the findings and denying the motion to dismiss.

Obviously, Rule 19 was designed to implement section 634 of the Code of Civil Procedure, which declares that proposed findings "shall" be served upon all parties, that the court "shall not" sign any findings prior to the expiration of five days after such service, and that the court "may direct a party to prepare findings." Rule 19 declares that counsel for the "prevailing party shall," within ten days after announcement of the decision, "unless otherwise ordered," prepare and submit the findings. We do not infer that the Judicial Council intended Rule 19 to have greater mandatory or prohibitory effect than the statute which it implements. The provisions of section 634 of the code are directory, not mandatory. *Chamberlain v. Wakefield*, 95 Cal.App.2d 280, 292, 213 P.2d 62, and cases cited. Similarly, the declaration, in section 632 of the same code, that the decision "must be * * * filed * * * within thirty days after the cause is submitted for decision" is but directory. *Van Der Most v. Workman*, 107 Cal.App. 2d 274, 279, 236 P.2d 842, and cases cited.

In lieu of prescribing penalties for failure to comply with its directions as to time, Rule 19 leaves the enforcement of its provisions to the trial court, which has inherent power, in the exercise of a sound discretion, to deal appropriately with each violation as may be meet and proper under the circumstances in each particular case.

Defendant speaks of the great hardship the losing party will suffer if the view we have indicated should prevail. It contends that the losing party must then stand by until the prevailing party acts, unable to appeal or to move for a new trial until judgment has been rendered. The losing party is in no such helpless position. He may at any time bring the matter to the attention of the trial court for dismissal or other appropriate action. He might, for example, prepare, serve, and submit his own version of findings of fact and conclusions of law that would express and implement the announced decision of the court.

[2] Defendant further suggests that the mere lapse of time, eighteen months, demonstrates a discontinuance and aban-

donment of the action by the plaintiff. The trial court by denying the motion to dismiss decided otherwise. We can not say, as a matter of law, that the mere lapse of time, under the circumstances described, operated as a discontinuance and abandonment of the action.

The situation here presented is not unlike that which obtained in *Hand v. Cleese*, 202 Cal. 36, 258 P. 1090, decided prior to the adoption of Rule 19. There the trial court announced its decision in December and directed the plaintiff to prepare findings. The following September, the defendant moved to dismiss for want of prosecution. The trial court continued the motion until October 16. Meanwhile, findings were submitted and signed. Said the reviewing court: "It appeared, therefore, that at the time to which the motion was continued the findings had been signed and filed, and no reason for the granting of the motion existed. No prejudice resulted to defendant, therefore, by the failure to hear and pass upon such motion." 202 Cal. at page 46, 258 P. at page 1094.

[3] (2) *Was it error to allow interest prior to judgment?*

The court found that plaintiff was employed at a certain salary, plus foreign station allowance, "plus all traveling and living expenses," from July 30, 1947, to May 12, 1948; that he was paid his living expenses under the contract with defendant from July 30, 1947, until January 15, 1948, and thereafter only \$300 per month as part payment on living expenses until May 12, 1948; and that his living expenses from January 15, to May 12, 1948, exceeded the \$300 per month in the amount of \$1,158.55, which amount was due and owing him as of June 1, 1948.

The evidence shows that plaintiff submitted to defendant his expense reports, with vouchers supporting each item, for the period in question. This he did every few weeks, the last of them in May, 1948. He made errors in two of the reports; i. e., he twice reported the cost of meals from January 18 to 20 and from April 5 to 9. Correction in respect to this duplication of charges reduced plaintiff's claim from

\$1,206.35 to \$1,158.55, the amount which the court found due.

Defendant claims that the action is similar to an action upon an open account for an unliquidated sum. Plaintiff claims it is an action for breach of a contract for reimbursement of fixed sums expended.

It appears that the amount due was capable of calculation by the defendant at the end of the period of employment and that demand for payment was made at that time. All items of expense were listed and supported by vouchers, apparently no different in kind or form from the expense accounts plaintiff submitted for the period ending January 15, 1948, which defendant audited and paid. The fact that certain items were duplicated was obvious. Subtraction of the amount of the duplication from the amount of the demand could readily be made, to fix the amount due. That could as readily be done upon receipt of the expense account as it was done at the trial. Incidentally, those accounts, as to the excess over \$300 per month, after January 15, 1948, were not rejected by defendant because of any difficulty in ascertaining their accuracy or in calculating the amount due, but because of its decision (contrary to its contract with him) to take plaintiff off the expense account basis and put him on its "living cost differential" basis, a flat rate of \$300 per month.

It is apparent, therefore, that the living expense accounts in question met the requirements of section 3287 of the Civil Code. It declares that every "person who is entitled to recover *damages* certain, or *capable of being made certain by calculation*, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *." (Emphasis added.)

"The rule is stated in the Restatement of the Law of Contracts, section 337(a) as follows: 'Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market

prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled.' (See review of the many cases cited in Restatement of Contracts, California Annotations, p. 193, et seq.)" *Lineman v. Schmid*, 32 Cal.2d 204, 211, 195 P.2d 408, 412, 4 A.L.R.2d 1380. See also *California, etc., Ass'n v. Rindge Land & N. Co.*, 199 Cal. 168, 184, 248 P. 658, 47 A.L.R. 904; *Bare v. Richman & Samuels, Inc.*, 60 Cal. App.2d 413, 419-420, 140 P.2d 895; *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App.2d 568, 578-579, 126 P.2d 644; *Meyer v. Buckley*, 22 Cal.App. 96, 98, 133 P. 510; and *Farnham v. California, etc., Trust Co.*, 8 Cal.App. 266, 272-274, 96 P. 788.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



116 Cal.App.2d 638

JOHN PAUL LUMBER CO. v. AGNEW et al.

Civ. 8389.

District Court of Appeal, Third District,
California.

March 11, 1953.

Petition for writ of supersedeas. The District Court of Appeal, Per Curiam, held that where principal, if not only, value of certain land was derived from timber thereon, appellant who, in action to quiet title, had been determined to have no right in land and had been enjoined from thereafter asserting any interest in it, was entitled to writ of supersedeas with respect to injunction, pending his appeal from decree quieting title in appellee.

Order in accordance with opinion.

1. Appeal and Error ⇨485(1)

The purpose of the writ of supersedeas is to stay proceedings of court below and

thus to preserve status quo until appeal has been completed, and it issues only in aid of reviewing court's jurisdiction.

2. Appeal and Error ⇨477

Appellate courts have power to issue writs of supersedeas in exercise of their appellate jurisdiction where it is necessary to preserve the appellate jurisdiction and make it effective.

3. Appeal and Error ⇨458(3), 460(2)

Where principal, if not only, value of certain land was derived from timber thereon, appellant who, in action to quiet title, had been determined to have no right in land and had been enjoined from thereafter asserting any interest in it, was entitled to writ of supersedeas with respect to injunction, pending his appeal from decree quieting title in appellee, but such writ would not be surrounded with conditions, nor would security be required.

Brobeck, Phleger & Harrison, San Francisco, for petitioner.

Falk & Falk, Eureka, for respondent.

PER CURIAM.

Petition for writ of supersedeas. Respondent, John Paul Lumber Company, brought action in the Superior Court of Del Norte County to quiet its title to a tract of timber land. It was successful in its suit and the trial court decreed it to be the owner of the property as against the claim of appellant Agnew. In addition to the decree quieting title, the trial court made an injunctive order which restrained Agnew from thereafter asserting any interest in the property. Agnew appealed from the judgment and the appeal is pending in this Court. He has petitioned this Court to issue its writ of supersedeas staying the enforcement pending appeal of that portion of the judgment appealed from which prohibits his assertion of interest in or claim to the property. It appears that the principal, if not the only value, of the lands in question derives from the timber thereon, and that since the rendition of the judgment appealed from certain persons are proceeding to cut and remove the timber.

It is apparent that if, pending the appeal, material parts of the timber or perhaps all of it should be removed from the land that the appeal, if successful, will fail of its purpose. Even though the appellant might have an action for damages against those who would have denuded the land, he would not have the property which was the subject of litigation and which therein he claimed to own.

It was held in *Wolf v. Gall*, 174 Cal. 140, 162 P. 115, that a prohibitive injunction issued in a quiet title action which restrained the party against whom the decree had been announced from asserting any claim to the land was not stayed by an appeal. It was further held that the assertion of such a claim even by the institution of an action to restrain waste upon the land was a contempt of the court issuing the injunction. Petitioner, therefore, says that whosoever may desire to remove the timber from this land can now do so since he is helpless under the injunctive order of the trial court to protect his interest in any way, since howsoever he may do so he will be asserting a claim to the property and therefore will be violating the order of the court.

[1, 2] The purpose of the writ of supersedeas to stay the proceedings of the court below and thus to preserve the status quo until the appeal has been completed. *Smith v. Smith*, 18 Cal.2d 462, 116 P.2d 3. It issues only in aid of the reviewing court's jurisdiction. *McCann v. Union Bank & Trust Co.*, 4 Cal.2d 24, 47 P.2d 283. Although by the force of the appeal the enforcement in the trial court of that part of the decree quieting title in the Lumber Company is suspended, the injunctive orders, as we have seen, are not. It is well settled that appellate courts have power to issue writs of supersedeas in the exercise of their appellate jurisdiction where it is necessary to preserve the appellate jurisdiction and make it effective. *Food and Grocery Bureau v. Garfield*, 18 Cal.2d 174, 114 P.2d 579; *Ohaver v. Fenech*, 206 Cal. 118, 273 P. 555.

[3] Under the circumstances shown here the writ should issue. The injunction depends entirely upon the validity of the decree quieting title, which decree is stayed

by the appeal. The entire controversy is therefore still before the courts and undetermined. That the continued removal of timber could completely destroy the subject of appeal is clear. We see no need at this time of surrounding the issuance of the writ with conditions or requiring security therefor. If any action which petitioner begins in protection of his asserted rights include a prayer for injunction against cutting of the timber pendent lite, the court in which such action is begun may, if it grant such relief, properly protect those claiming the right to cut the timber by requiring an adequate undertaking. If this source prove for any reason to be inadequate this court can be appealed to.

Let a writ of supersedeas issue staying until further order of this Court any process of the court below enforcing that portion of the judgment appealed from which prohibits the appellant Agnew, petitioner herein, from asserting any right, title or interest in and to the real property involved.



117 Cal.App.2d 64

CHAMBERLAIN v. GUGLIELMETTI.

Civ. No. 15364.

District Court of Appeal, First District,
Division 2, California.

March 27, 1953.

Rehearing Denied April 25, 1953.

Hearing Denied May 21, 1953.

Action was brought to recover on written contract for construction of building, and defendant filed a cross complaint. The Superior Court, County of Santa Clara, Wm. F. James, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that parol evidence was properly admitted to show agreement to permit minor variations in contract since nothing was said in the contract concerning the variations.

Judgment affirmed.

1. Appeal and Error ⇨762

Raising of new ground for first time in closing brief of appellant was not proper appellate practice, and ordinarily a point so raised may be disregarded.

2. Evidence ⇨442(5)

Where written construction contract merely authorized plaintiff to use old material on the premises, and some of that material was admittedly defective because of exposure to the elements, and nothing was said in written contract as to substitution of other material or variations in contract in event that such material was found unusable, evidence was admissible in action on contract to show oral agreement to permit minor variations in event that such material was found unusable.

Rea, Jacka & Frasse and Irvin A. Frasse, San Jose, L. G. Hitchcock, Santa Rosa, for appellant.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the balance due upon a written contract for the construction of an auto laundry. Defendant filed a cross-complaint alleging minor defects and omissions in performance under the contract. At the outset of the trial the parties stipulated as to the contract, the amount due for work performed under it, and the amount due for extra work performed by plaintiff. The parties then agreed that the issues to be tried were those raised in the cross-complaint.

It was developed that defendant had previously executed a similar contract with two corporations which had done the ground work, laid the foundation, and "poured" the walls. These, with a considerable amount of materials, were left on the premises when the two corporations failed and abandoned the contract. When the parties hereto were negotiating the contract in suit, several discussions were had regarding these abandoned materials and the effect their use might have on the finished building, but they were used by agreement of

the parties in order to get the building completed as early as possible and to save expense.

Because of the stipulation of the parties the only issues tried were whether material defects occurred and, if so, how much should be deducted from the contract. There was no issue as to compliance with building regulations—state, county or city—hence that question is not before us.

On the issue of deviation from the contract or defects in construction, evidence was taken from both expert and lay witnesses. There was very little controversy—chiefly differences of opinion of some of the witnesses—but there was sufficient evidence to disclose that in most instances the difficulties in construction arose from the use of the old materials left by the former contractors, some of which had become warped or otherwise defective from being left lying on the ground by those contractors. In addition to this conflicting testimony the trial judge, under stipulation of the parties, made a personal inspection of the premises.

[1,2] In his closing brief appellant raises for the first time the question of the admission of parol evidence showing an agreement to permit minor variations in the contract relating to the use of some of the old materials which had been left on the premises. The raising of a new ground for the first time in appellant's closing brief is not proper appellate practice and ordinarily a point so raised may be disregarded. However the answer here is simple. The written agreement merely authorized the plaintiff "to use the material now on the premises." Some of it was admittedly defective because of exposure to the elements. Nothing was said in the contract as to substitution of other material or variations in the contract in the event that any of such material was found unusable. The oral conversations were offered to cover those contingencies. Such evidence is admissible where the writing is silent on the matter to which the evidence is addressed. *Buckner v. A. Leon & Co.*, 204 Cal. 225, 227, 267 P. 693; *Kohl v. Lytle Creek Water & Improvement Co.*, 24 Cal. App.2d 353, 357, 75 P.2d 71.

On the evidence before it the trial court made certain minor deductions from the contract price, gave judgment for plaintiff for the balance, and denied defendant recovery on his cross-complaint. The appeal presents nothing but a conflict in the evidence with sufficient evidence to support the findings.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



117 Cal.App.2d 78

PEOPLE v. BOWMAN.

Cr. 4912.

District Court of Appeal, Second District,
Division 2, California.

March 7, 1953.

Defendant was convicted in the Superior Court, Los Angeles County, John J. Ford, J., of grand theft, and he appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained conviction.

Judgment affirmed.

1. Larceny ⚡65

Evidence sustained conviction of grand theft for larceny of a motor truck.

2. Criminal Law ⚡1159(2)

On appeal from conviction, reviewing court does not weigh the evidence, but determines only whether sufficient, substantial facts could be deduced from the evidence to warrant inference of guilt.

3. Criminal Law ⚡1159(2)

Appellate Court is not bound to exculpate one who tells a plausible story in explanation of charge and evidence against him.

4. Larceny ⚡68(2)

Existence of larcenous intent on the part of one who takes property from its owner is question for the trier of fact.

5. Larceny ⚡57

Showing that stolen automobile was found in possession of accused 25 miles from its usual place of storage was persuasive of a criminal intent.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

From his conviction of grand theft appellant seeks now to effect a reversal of the judgment on the plea that the evidence is insufficient to support the findings of the trial court. A brief resume of the proof will at once dispel any justification of a reasonable person's sympathy for the appeal.

Appellant spent an afternoon of February 1952 loitering in and near the premises of the Avalon Woodworking Company in Los Angeles. About 2:00 p.m. one Harrison, a truck driver, parked the company's International truck in front of the shop. On emerging from the interior at 4:30, Harrison could not find the vehicle. On the following day Officer McMahan of Long Beach found appellant asleep in the front seat of the truck parked in a service station. He stated that the vehicle belonged to his boss but he did not mention the name of Joseph Terrish, president of the victimized corporation, or the name of any employee of the Avalon Woodworking Company. Three days later the investigating officer drove to Los Angeles about twenty five miles north of Long Beach accompanied by appellant. In response to the officer's request, appellant told him that the shop of Mr. Terrish's company was the place he got the truck, and he pointed to the spot where it was standing when he took it in hand. He explained that he had been drinking all the afternoon of the theft; had stopped in to ask for a job and on leaving took the truck along.

[1] At the trial he testified that (1) he had met a stranger at a nearby bar where he and one Hatch sat and drank for an

hour and a half; (2) he accepted the stranger's invitation to ride to Long Beach; (3) he did not drive and he could not drive; (4) on arriving at the seaside city he remained in the truck and went to sleep and remembered nothing until he was arrested for drunkenness in an automobile. He asserted to the officers that he had been with Hatch just prior to the theft. He could not produce Hatch, but found him later when moved to the Firestone Police Station. However, at the trial Hatch testified only to having been with appellant in the bar rooms and at the woodworking company, but could not remember any transportation when they parted. The court was not obliged to believe appellant's testimony but chose to be governed by the confessions he had made to the officer. Such testimony, coupled with that of President Terrish and driver Harrison to the effect that no consent had been given for appellant to drive the truck, and that of others who had seen him near the shop, left with the court sufficient proof of his asportation of the truck.

[2,3] The reviewing court does not weigh the evidence for and against the accused. It decides only whether it can reasonably be held that sufficient, substantial facts could not have been skimmed from the evidence introduced to warrant the inference of guilt. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. Neither is the appellate court bound to exculpate one who tells a plausible story in explanation of the charge and the evidence against him. *People v. Shellenberger*, 25 Cal.App.2d 402, 406, 77 P.2d 506; *People v. Von Benson*, 38 Cal.App.2d 431, 434, 101 P.2d 527. His vacillating account of his experience, his pointing out the locality of his crime, his narrative that a stranger took him to the end of his journey—these things inspire no credulity when contrasted with the incriminating, established facts.

[4,5] The concomitant, criminal intent of the appellant in driving away the truck was established by the judgment to have been to appropriate the conveyance to his own use and to deprive its rightful owner of it. *People v. Ragone*, 84 Cal.App.2d 476, 481, 191 P.2d 126; *People v. Wade*,

71 Cal.App.2d 646, 652, 163 P.2d 59. Deciding the existence of a larcenous intent on the part of him who takes property from its owner is the function of the trier of fact. *People v. Wissenfeld*, 36 Cal.2d 758, 763, 227 P.2d 833. It is persuasive of a criminal intent when it is shown that the stolen article was, when discovered, twenty five miles distant from its usual place of storage and in the possession of the accused.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.



115 Cal.App.2d 536

Ex parte ELLIOTT.

Cr. 2428.

District Court of Appeal, Third District,
California.

Jan. 27, 1953.

Habeas corpus proceeding by which mother of two infant daughters sought to obtain custody from father. The District Court of Appeal, Peek, J., held that writ would be denied when mother's petition for custody was pending in trial court.

Writ denied.

1. Infants ☞19

Parent and Child ☞2(3,2)

Where the question of care and custody of a child is presented, the paramount consideration must be the welfare of the child, but other things being equal, the mother should be awarded custody of children of tender years.

2. Parent and Child ☞2(4)

Where the record is devoid of any evidence of unfitness of the mother for custody of children of tender years, the award of sole custody to the father is an abuse of discretion.

3. Infants ☞19

A custodial order is not irrevocable, irrespective of its terms, and upon a proper showing being made, the court may, at any time during the minority of the child, modify or vacate the order.

4. Infants 19

Generally, an order modifying a custodial order is subject to the rule of changed circumstances.

5. Habeas Corpus 62

Where mother's petition for custody of children of tender years was pending in trial court, writ of habeas corpus to obtain children from their father would be denied in order that a full and thorough consideration and proper determination might be made upon mother's petition.

Bruce A. Werlhof, Red Bluff, for petitioner.

Theodore G. Elges, Quincy, for respondent.

PEEK, Justice.

By habeas corpus, petitioner, the mother of two infant daughters, aged 2½ and 4 years respectively, seeks to have her husband, the father of said children, deliver to her custody of the two girls.

From the record now before this court it appears that on September 5 1952, petitioner and her husband separated. At that time they were both residents of Shasta County. On October 9, 1952, she filed an action for divorce in said county. It further appears that on or about the 26th day of September, 1952, the father took the children from the custody of the mother in Shasta County and that she has neither heard of nor seen them since. Although she alleges that he obtained their custody by a subterfuge he denies such allegation. Shortly thereafter on September 29, 1952, the mother filed a custody proceeding in the Superior Court of Plumas County whereby she sought a return of the children. She alleges that in response to the order to show cause why she should not be given temporary custody of said infant children, the father appeared in the superior court; that the judge refused to allow testimony to be taken, and without a proper hearing thereon summarily denied said order to show cause. However, it appears from the return of the father to the order to show cause issued by this court that testimony was taken at said hearing and that the court

at the conclusion thereof denied the mother's motion. After numerous continuances, both the custody proceeding and the divorce action, which in the meantime had been transferred to Plumas County, were, on December 22, 1952, taken off the calendar to be reset by stipulation of counsel. The mother further alleges that since September 26, 1952, she has attempted to have the defendant served with an order to show cause issued by the Shasta County Superior Court while the case was pending there, why petitioner should not have the custody of said children, attorney's fees and court costs, and support for the two children, pendente lite, but neither she nor the constable of the Plumas Judicial District have been able to locate either the father or the children in Plumas County.

It appears that under the showing made, petitioner is not entitled to the writ, but not for the reasons advanced by counsel for the father; neither the code sections nor the cases cited and relied upon are in point.

[1, 2] It is the well established rule in this state that where the question of care and custody of a child is presented, the paramount consideration must be the welfare of the child. *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96.

But other things being equal, children of tender years, such as those in the present case, should be with their mother. *Moon v. Moon*, 62 Cal.App.2d 185, 144 P.2d 596. Furthermore, where the record is devoid of any evidence of unfitness of the mother the award of sole custody to the father is an abuse of discretion and will be reversed on appeal. *Juri v. Juri*, 69 Cal.App.2d 773, 160 P.2d 73.

[3, 4] A custodial order is not irrevocable, irrespective of its terms, and upon a proper showing being made the court may, at any time during the minority of the child, modify or vacate the same. *Parker v. Parker*, 203 Cal. 787, 266 P. 283. Generally, such a modification order is subject to the rule of changed circumstances. But see *Peterson v. Peterson*, 64 Cal.App.2d 631, 149 P.2d 206. In the present case the only facts shown by the meager record before us which in any way could have influenced the trial court were circumstances

surrounding the mother's home and her employment as shown to be then existing. From the statements of counsel at the oral argument before this court it now appears that she has changed her residence, is no longer employed, is living at the home of her parents and is well able to care for her children.

[5] It would seem unnecessary to further discuss this phase of the case since the elements herein discussed can be more thoroughly considered and a proper determination made thereon upon a hearing of the mother's petition for custody which is now pending in the trial court.

The writ is denied.

VAN DYKE, P. J., and SCHOTTKY, J., concurred.



116 Cal.App.2d 719

ROSENFELD et al. v. ZIMMER et al.

Civ. 19390.

District Court of Appeal, Second District,
Division 2, California.

March 16, 1953.

Rehearing Denied April 2, 1953.

Hearing Denied May 14, 1953.

Stockholders' derivative action against contractor for recovery of difference between actual cost of building plus 10 percent, the amount due contractor under bona fide contract, and \$300,000 paid contractor under sham contract which had been entered into for purpose of obtaining loan from insurance company to finance construction of building. The Superior Court, Los Angeles County, James G. Whyte, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that the action was barred by the doctrine of unclean hands.

Affirmed.

1. Corporations ⚡207½

A stockholders' derivative suit is an equitable action.

254 P.2d—9 ¼

2. Equity ⚡65(1)

It is duty of trial court upon discovery that transaction is tainted with fraud or lack of good faith to inquire into facts in regard thereto.

3. Equity ⚡65(1)

The doctrine of unclean hands is applicable in stockholders' derivative action.

4. Equity ⚡65(1)

A court of equity will not assist party to a fraudulent scheme to secure objective of such plan.

5. Corporations ⚡204

A corporation is the real party in interest in stockholders' derivative action and cause of action is corporation's and if corporation is not in position to attack transaction, stockholders may not maintain derivative action.

6. Equity ⚡65(2)

Where it appears that plaintiff has intended to defraud another, court of equity will apply doctrine of unclean hands and leave plaintiff in position in which he is situated when he seeks assistance of court.

7. Equity ⚡65(2)

Where corporation had obtained loan from insurance company for construction of building on basis of sham contract which exaggerated cost of building, stockholders could not, because of doctrine of unclean hands, maintain derivative action against contractor for recovery of difference between actual cost of building plus 10 percent, the amount due under bona fide contract, and the \$300,000 paid under the sham contract.

Fred Horowitz and Alvin F. Howard,
Los Angeles, for appellants.

Mitchell, Silberberg & Knupp and Arthur Groman, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in a stockholders' derivative action, plaintiffs appeal.

Viewing the evidence in the light most favorable to defendants (respondents) and pursuant to the rules set forth in *Re Estate of Isenberg* (63 Cal.App.2d 214, 216, 146 P.2d 424), the essential facts are:

Defendant Zimmer had an option to buy a parcel of real property in the City of Pasadena. This option was turned over to defendant Euclid Properties, Inc. (hereinafter called Euclid) at a valuation of \$120,000. One hundred shares of stock of Euclid were issued. Plaintiffs Victor and Morris Rosenfeld bought thirty-three and one-third shares at \$10 a share. Mrs. Coren bought sixteen and two-thirds shares for \$166.66. Plaintiffs Rosenfeld loaned Euclid \$60,000, Mrs. Coren loaned the corporation \$30,000 and defendant Max Zimmer loaned it \$30,000. Defendant Nathan Krems secured two long term leases for a drug store and market building to be erected on the property.

In order to secure a loan from the Massachusetts Mutual Life Insurance Company to finance the erection of the building to be constructed for Euclid by defendant Zimmer Construction Company, Euclid entered into a written contract with defendant Zimmer Construction Company to pay the latter \$300,000 for the construction of the building. At the same time defendant Zimmer Construction Company, through defendant Zimmer, orally agreed to erect the building for Euclid at a price of cost plus 10%. It was understood between plaintiffs and defendants that the difference between the price which Euclid agreed to pay Zimmer Construction Company for the erection of the building and the \$300,000 which defendant Euclid received

through its loan from the insurance company was to be used to pay off the loans which plaintiffs Rosenfeld and Mrs. Coren had made to defendant Euclid.

The aforementioned written contract was submitted to the Massachusetts Mutual Life Insurance Company in connection with defendant Euclid's application for a loan of \$300,000 which the life insurance company made to it. The building was erected and defendant Euclid paid to the Zimmer Construction Company in accordance with the terms of the written contract \$300,000 for the erection of the building which actually cost not in excess of \$160,000. Plaintiffs instituted the present stock-holders' derivative suit to recover the difference between the cost of the building and \$300,000 which had been paid to defendant Euclid.

The trial court found that plaintiffs' cause of action was barred by the doctrine of unclean hands of plaintiffs and defendant Euclid, the corporation on whose behalf plaintiffs instituted the present action.

This is the sole question necessary for us to determine:

Was there substantial evidence to sustain the trial court's finding that plaintiffs' cause of action was barred by the doctrine of unclean hands?

This question must be answered in the affirmative. Plaintiffs' own witnesses testified to each of the material facts set forth above which, together with the pleading in their amended complaint, constitutes substantial evidence to sustain the above stated fact.*

* The amended complaint alleges:

"(b) During the month of April, 1949, Euclid decided to erect a market, drug store, and parking lot on a portion of the above described real property. Defendant Max Zimmer orally stated and represented to Euclid and to its other shareholders, officers and directors, that it would be to the best interest of the corporation and its shareholders to have him, through Zimmer Construction Company, erect the aforesaid improvements on said property because his skill and experience were such that he could do the work at a smaller cost than any oth-

er contractor, that he would charge the corporation not more than his actual cost, plus 10% thereof, and that he would get competitive bids from responsible contractors, and, in no event, would he charge more than the amount of the lowest contractor's bid, but that before Euclid could undertake the work of constructing said improvements, it was necessary for it to obtain a loan to be secured by the property upon which the improvements would be constructed.

"That during the month of June, 1949, defendant Max Zimmer orally promised and represented to Euclid and to its oth-

[1-6] Hence the following rules are here applicable:

(1) A stock-holders' derivative suit is an equitable action. (*Nessbit v. Superior Court*, 214 Cal. 1, 8, 3 P.2d 558; *Bell v. Bayly Bros.*, 53 Cal.App.2d 149, 155, 127 P.2d 662.)

(2) It is the duty of a trial court upon the discovery that a transaction is tainted with fraud or lack of good faith to inquire into the facts in regard thereto. (*Howe v. Brock*, 86 Cal.App.2d 271, 276, 194 P.2d 762.)

(3) The doctrine of unclean hands is applicable in a stockholders' derivative action. (*DeGarmo v. Goldman*, 19 Cal.2d 755, 764, 123 P.2d 1.)

(4) A court of equity will not assist a party to a fraudulent scheme to secure the

objective of such plan. (*Primeau v. Granfield*, 2 Cir., 193 F. 911, 912.)

(5) A corporation is the real party in interest in a stockholders' derivative action and the cause of action is the corporation's and if the corporation is not in a position to attack a transaction, the plaintiff stockholders may not maintain the suit. (*Di-fani v. Riverside County Oil Co.*, 201 Cal. 210, 216[7], 256 P. 210; *Reid v. Robinson*, 64 Cal.App. 46, 55[4], 220 P. 676.

(6) Where it appears that plaintiff has intended to defraud another a court of equity will apply the doctrine of unclean hands, and leave the plaintiff in the position in which he is situated when he seeks the assistance of the court. (*Belling v. Croter*, 57 Cal.App.2d 296, 306, 134 P.2d 532; *Babu v. Petersen*, 4 Cal.2d 276, 288,

er officers that in order to secure a loan from the Massachusetts Mutual Life Insurance Company, it was necessary to assure said company that the erection of said improvements would cost a certain sum and that such assurance must be made to said company by displaying to it a written contract whereby Zimmer Construction Company agreed to erect said improvements for a certain sum, and it would also be necessary to deliver to said company a certified copy of a resolution of Euclid authorizing the making of said written contract. Said defendants, Max Zimmer and Zimmer Construction Company, further promised and agreed that said written contract would not affect or create any rights as between the parties thereto nor would it in any way affect the aforesaid promises and representations of defendant Max Zimmer that the maximum cost to Euclid of said improvements would be the actual cost, plus ten per cent. thereof; that in reliance on said promises and representations, a written instrument was signed on June 22, 1949, by Euclid, calling for the construction of said improvements by Zimmer Construction Company for the sum of \$335,000.

"That on or about September 22, 1949, said defendant Max Zimmer orally represented to the Secretary of Euclid, one Morris G. Coren, that it would be advisable to reduce the apparent contract price shown in said written instrument from \$335,000.00 to \$300,000.00, the amount of the loan which the Massachusetts Mutual Life Insurance Company

was making, and, in reliance upon the aforesaid representations and promises, on or about said date a written instrument was signed by Euclid and Zimmer Construction Company, calling for the construction of said improvements for the sum of \$300,000.00.

"That but for said representations and promises, Euclid would not have executed either of the aforesaid written instruments dated, respectively, June 22, 1949 and September 22, 1949.

"In further reliance upon said promises and representations, Euclid allowed said defendant, Max Zimmer, through defendant, Zimmer Construction Company, to proceed with the erection of said improvements. Said defendant failed and neglected to secure competitive bids as aforesaid. Said defendant caused the erection of said improvements at a cost not in excess of the sum of \$160,000.00, the exact amount being unknown to plaintiffs, but known to said defendant, but concealed this fact from Euclid and its shareholders, and represented to Euclid and its shareholders and directors that the cost of the said improvements, plus 10% thereof, was \$307,764.25. Said defendant procured Euclid to pay to him, and for his account, said sum as reimbursement for the cost of erecting said improvements, plus 10%. Defendant's aforesaid representations and concealment of the actual cost of erection of said improvements were done with the purpose and intent of securing for himself a secret profit, at the expense of Euclid, in the sum of \$147,000.00."

48 P.2d 689; *Mitchell v. Cline*, 84 Cal. 409, 415, 24 P. 164.)

[7] Applying the foregoing rules to the facts of the present case we find that under rule (1) the present action is in equity, and that under rule (2) it was the duty of the trial court upon the discovery that the action was tainted with fraud and lack of good faith to make an inquiry into the subject, which it did. Since the evidence disclosed that plaintiffs and defendant Euclid had intended to and actually did misrepresent the facts to the Massachusetts Mutual Life Insurance Company in obtaining a loan from it, by which they hoped to benefit, they came into a court of equity with unclean hands. Therefore under rules (3), (4), (5) and (6), *supra*, the trial court properly held that plaintiffs' cause of action was barred.

In view of our conclusions it is unnecessary to discuss other points argued by counsel in their briefs.

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.



116 Cal.App.2d 692

**PEOPLE v. ONE 1951 MERCURY 2-DOOR
SEDAN et al.**
Civ. 19264.

District Court of Appeal, Second District,
Division 3, California.
March 13, 1953.

Forfeiture action under narcotics law, wherein the Superior Court, Los Angeles County, entered a judgment forfeiting the automobile, and the registered owners of the vehicle appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to establish that either the registered owners or their entrustee had had knowledge of a passenger's possession of marijuana.

Reversed.

1. Forfeitures ◀5

Inference of knowledge on part of owner or entrustee may be drawn from presence of narcotics sitting in automobile which is in possession of owner or entrustee, but no such inference may be drawn from mere fact that passenger has narcotic hidden upon his person. Health and Safety Code, § 11610.

2. Forfeitures ◀5

Entrustee's knowledge that passenger had marijuana in his possession would be imputable to parents of entrustee, who had trusted him with their automobile. Health and Safety Code, § 11610.

3. Forfeitures ◀5

Evidence would not sustain finding that either entrustee or registered owners of automobile knew that passenger therein had had marijuana in his possession. Health and Safety Code, § 11610.

Walter Lear Gordon, Jr., Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Donald D. Stoker, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

This is an appeal by the registered owners from a judgment forfeiting their automobile upon findings and conclusions that it was used unlawfully to conceal, convey, carry and transport marijuana. Health and Safety Code, § 11610. They challenge the sufficiency of the evidence to support the findings.

[1-3] Marshall Theus and Louise Theus were the registered owners; J. E. Coberly, Inc. was the legal owner as the holder of a conditional sales contract having an unpaid balance of \$886.99. Arthur Theus, 18 years of age, son of Marshall and Louise Theus, was driving the car in the City of Los Angeles when it was stopped by the police about 10:30 p. m. Marcus Woods, 19 years of age, was sitting at the right of Theus; two other passengers were in the rear seat. Theus was searched by the officers, who found brown cigarette papers in his pocket but no marijuana. Woods

was searched and five marijuana cigarettes wrapped in brown paper were taken from inside his sock. Several marijuana seeds were found on the seat to the right of Woods. Theus denied all knowledge of the presence of the marijuana. He had an orchestra and had known Woods for about five years, the latter being a member of the orchestra. They had been driving around during the evening, professedly looking for engagements for the orchestra. The question is whether the foregoing facts furnish substantial circumstantial evidence that young Theus had knowledge that Woods was in possession of the marijuana cigarettes and seeds. If he had such knowledge it would be imputable to his parents, who trusted him with the car. The evidence, in our opinion, was clearly insufficient. From the presence of brown cigarette papers in Theus' pocket it was reasonable to infer that he smoked cigarettes. Many good citizens smoke hand-rolled brown paper tobacco cigarettes and it has not heretofore been regarded as hazardous to have cigarette papers in one's pocket. Young Theus testified that he used Birdseye cigarette tobacco which he had left at home and that he had never smoked marijuana. He made no contradictory or inconsistent statements. No marijuana seeds were found around the driver's seat. Woods testified that Theus had no knowledge of the presence of the cigarettes. The evidence, as a whole, created no more than a suspicion that Theus might have known that Woods had the cigarettes hidden in his sock. Nothing was concealed in the car itself, nor was there any evidence as to the purpose of Woods in possessing the cigarettes, whether they were intended for sale or for personal use.

An inference of knowledge on the part of the owner or entrustee may be drawn from the presence of a narcotic hidden in a car which is in the possession of the owner or entrustee, *People v. One 1949 Cadillac Conv. Coupe*, 113 Cal.App.2d 115, 247 P.2d 848, but no such inference may be drawn from the mere fact that a passenger has a narcotic hidden upon his person.

If the evidence in this case were held sufficient to establish guilty knowledge upon the part of Theus it would impose upon drivers of automobiles a responsibility for the actions of their passengers beyond all reason. It would furnish a precedent for a finding of guilty knowledge upon "the wildest sort of surmise and conjecture." *People v. Foster*, 115 Cal.App.2d 866, 253 P.2d 50, 51.

The attempted appeal from the order denying motion for new trial is dismissed. The judgment is affirmed insofar as it awards a lien to J. E. Coberly, Inc., and reversed as to Marshall Theus and Louise Theus.

PARKER WOOD and VALLÉE, JJ.,
concur.



116 Cal.App.2d 729

MEHLING et al. v. ZIGMAN et al.

Civ. 4394.

District Court of Appeal, Fourth District,
California.

March 17, 1953.

Rehearing Denied April 13, 1953.

Hearing Denied May 14, 1953.

Owner and driver of tractor and trailers brought action against owner and driver of automobile to recover for property damage and personal injuries sustained when tractor and trailers jackknifed and stopped on highway and were struck by oncoming automobile, and driver and owner of automobile filed cross-complaints for property damage and personal injuries. The Superior Court of Tulare County, Glenn L. Moran, J., entered judgment against owner and driver of automobile on their cross-complaints, and they appealed. The District Court of Appeal, Mussell, J., held that evidence was insufficient to sustain application of last clear chance doctrine as to driver of tractor and trailers.

Judgment affirmed.

1. Negligence Ⓒ83.4

Elements of "last clear chance" rule are that plaintiff has been negligent and as result thereof is in position of danger from which he cannot escape by exercise of ordinary care, that defendant has knowledge that plaintiff is in such situation and knows or should know that plaintiff cannot escape, and that defendant has last clear chance to avoid accident by exercising ordinary care, and fails to exercise such care, and accident results thereby.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance".

2. Negligence Ⓒ83.8

"Last clear chance doctrine" should not be applied to ordinary case in which act creating peril occurs practically simultaneously with happening of accident and in which neither party can fairly be said to have had a last clear chance thereafter to avoid consequences.

3. Negligence Ⓒ83.8

Plaintiff will not be relieved of his own negligence under "last clear chance" doctrine unless defendant had last chance to avoid accident and a clear chance to do so by exercise of ordinary care.

4. Automobiles Ⓒ244(59)

In action by driver and owner of tractor and trailers against owner and driver of automobile to recover for property damage and personal injuries sustained when trailers "jackknifed" and were stopped on public highway and on-coming automobile ran into tractor and trailers, evidence was insufficient to sustain application of last clear chance doctrine as to driver of tractor.

5. Appeal and Error Ⓒ1068(1)

Where evidence was amply sufficient to establish negligence on part of driver of automobile which collided with tractor and trailers, without considering issue of alleged intoxication of driver, instruction in collision action that Vehicle Code makes it unlawful for any person, who is under influence of intoxicating liquor to drive vehicle on any highway, and that violation of statute constitutes negligence as a matter of

law, was not reversibly erroneous. Vehicle Code, §§ 501, 502.

James M. Thuesen and John D. Chinello, Fresno, for appellants.

Crowe, Mitchell & Hurlbutt, Visalia, Hansen & Barstow, Fresno, for respondents.

MUSSELL, Justice.

This action arises out of a collision which occurred when a Buick automobile owned by defendant and appellant Morris Carter, and being operated by defendant and appellant David Zigman, was driven into a tractor and two large van type trailers which had "jackknifed" and were stopped on a public highway near Dinuba. The tractor and trailers were owned by plaintiff Valley Motor Lines, Inc., a corporation, and were being operated by plaintiff Edward Mehling.

In the complaint filed herein plaintiff Mehling sought damages for personal injuries and plaintiff Valley Motor Lines claimed damages for repairs to its equipment and for loss of use thereof. The defendants filed a cross-complaint in which David Zigman sought damages for personal injuries sustained as a result of the collision and Morris Carter sought damages for the destruction of his automobile. A jury trial was had which resulted in a verdict that plaintiffs take nothing by their complaint and that cross-complainants take nothing by their cross-complaint. Cross-complainants appeal from the judgment entered against them on the cross-complaint and base their appeal on the grounds (1) that the court erred in refusing to give an instruction to the jury on the doctrine of last clear chance; and (2) in giving an instruction in the language of Section 502 of the Vehicle Code.

The collision occurred at about 7:00 o'clock P.M. on October 5, 1950, near the city of Dinuba, on El Monte Way, an east-west paved highway, divided by a white center line into eastbound and westbound traffic lanes, each 10 feet wide. There was an oil shoulder 1½ feet wide on the south side of the paved portion of the highway.

On the night of the accident Edward Mehling was driving a tractor and two van type trailers in a westerly direction on El Monte Way for his employer, Valley Motor Lines, Inc. Each of said vans was 20 feet in length, 8 feet in width and about 12½ feet in height. Shortly prior to the collision, a car was driven out on to the highway in front of this equipment. Mehling swerved to the left to pass this car and then observed the lights of an automobile coming from the west. He then turned back into the north traffic lane, behind the car which was being driven westward. In this operation, the tractor and trailers "jackknifed" and when they were brought to a stop, the tractor, headed south, was across the westbound traffic lane, with its front wheels on the white center line. There then was sufficient clearance for westbound traffic around the front end of the tractor. The first van, headed southwest, was off the roadway and the second van was approximately 9 feet north of the north edge thereof. The tractor motor was running and the two vans and tractor were still attached together. After his equipment was brought to a stop, Mehling did not attempt to move it for 10 or 15 seconds. He opened the door, put one foot on the running board of his tractor, and looked back to determine that the clearance lights and taillights on his equipment were still burning. Mehling testified that he then got behind the wheel of the tractor and was endeavoring to get his equipment in gear when he saw the glare of the headlights of the Buick automobile driven by Zigman approaching from the east; that the Buick was then about 900 feet away; that when it was about 400 feet distant, he formed the opinion that it was traveling at a speed of 80 miles per hour; that the Buick did not decrease its speed; that he did not put out any flares because "it was faster getting the equipment off the road than it was putting out the flares".

There is evidence in the record from which a jury could infer that the tractor and trailers remained in a position in which they were stopped for a period of one to five minutes before the accident happened. The uncontradicted evidence shows that

during the last 1,000 feet of Zigman's approach to the point of impact there were no other vehicles approaching him from the west.

Appellant Zigman testified that he drove the Buick in the westbound traffic lane at a speed between 50 and 60 miles per hour; that he was driving a new automobile; that the lights on it were good and that he had them on "high beam"; that he did not see the persons who were at the side of the road several hundred feet east of the standing tractor "trying to flag him down"; that he did not see the equipment blocking the westbound traffic lane and was unaware of its existence; that he saw no lights on the equipment or any part of it; that he did not decrease his speed, and did not apply his brakes at any time; that he was "right on top of this object" before he knew of its existence or nature and that he may or may not have swerved his automobile to the left a moment before the impact.

[1] The elements of the last clear chance rule are:

"(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." *Selinsky v. Olsen*, 38 Cal.2d 102, 104, 237 P.2d 645, 646; *Rodabaugh v. Tekus*, 39 Cal.2d 290, 246 P.2d 663.

All of the elements necessary for the application of the rule must be present or the doctrine is inapplicable. If any one of them be absent, the rule does not apply and

the case is governed by the ordinary rules of negligence and contributory negligence. *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36; *Ralston v. Hewitson*, 82 Cal.App. 2d 143, 144, 185 P.2d 644.

[2, 3] There is no question but that the appellant Zigman by his own negligence got himself in a position of danger. He arrived at that position when he reached the point at which he could no longer stop or slow down sufficiently to avoid the collision or pass to the left around plaintiffs' tractor. *Rodabaugh v. Tekus*, 39 Cal.2d 290, 246 P.2d 663. Since Zigman was traveling, according to his own testimony, between 50 and 60 miles per hour with a new automobile equipped with good lights on high beam, it is apparent that his position of danger was attained within a very short distance of the tractor and trailers. Obviously, plaintiff Mehling then did not have a last clear chance to avoid the accident which occurred within a few seconds. As was said in *Rodabaugh v. Tekus*, supra, 39 Cal.2d 295, 246 P.2d 663, 666, quoting from *Poncino v. Reid-Murdock & Co.*, 136 Cal.App. 23, 28 P.2d 932:

"Like many other cases involving collisions between moving vehicles, the accident may be said to have happened within the twinkling of an eye after the first indication of danger. While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences. To apply the doctrine to such cases would be equivalent to denying the existence of the general rule which makes contributory negligence a bar to recovery."

* * * * *

"In other words, it is not enough to relieve a plaintiff of his own negligence that the defendant may have had

a *chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear chance* to do so by the exercise of *ordinary* care. That he should have had the *last chance* implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a *clear chance* implies that he must have had more than a *bare possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party."

There is no evidence that plaintiff Mehling had any actual knowledge of the perilous position of Zigman in time to have backed his equipment off the roadway. When he first saw the lights of the Buick 900 feet away, Mehling had the right to assume that Zigman possessed normal faculties; that he saw the tractor and trailers and would slow down to pass to the left around the tractor.

[4] We conclude there was no substantial evidence to sustain the application of the last clear chance doctrine as to plaintiff Mehling and that the trial court did not err in refusing to instruct the jury on the subject. *Ralston v. Hewitson*, supra; *Rather v. City and County of San Francisco*, 81 Cal.App.2d 625, 630, 184 P. 2d 727; *Dalley v. Williams*, 73 Cal.App.2d 427, 437, 166 P.2d 595; *Erwin v. Morris*, 10 Cal.App.2d 168, 171, 51 P.2d 149; *Johnson v. Southwestern Eng. Co.*, 41 Cal.App. 2d 623, 626, 107 P.2d 417; *Folger v. Richfield Oil Corp.*, 80 Cal.App.2d 655, 662, 182 P.2d 337.

Appellants contend that it was prejudicial error to instruct the jury as follows:

"You are instructed that Section 502 of the Vehicle Code of California, in effect at the time of the accident involved in this case, provides in part as follows:

"It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway."

"The violation of said section of the Vehicle Code of California constitutes negligence as a matter of law."

In support of this contention appellants cite two cases: *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal.2d 157, 195 P.2d 416 and *Tossman v. Newman*, 37 Cal.2d 522, 233 P.2d 1. In the *Stickel* case the defendants offered an instruction setting forth the provisions of Sections 501 and 502 of the Vehicle Code. Section 501 contained, in part, the following language:

"Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person * * * is guilty of a felony".

This was clearly an instruction as to criminal responsibility and the court held that the refusal to give such instruction was proper and said, 32 Cal.2d at page 169, 195 P.2d at page 423:

"The refusal to instruct as to the criminal responsibility of an intoxicated driver was correct. (See *Greening v. Ford*, 1932, 127 Cal.App. 462, 16 P.2d 143, where, after injection into a civil action of the question of criminal responsibility, the jury brought in a verdict of 'for the defendant Not Guilty'; on this ground a new trial was granted.) An instruction specifically directed to drunken driving as negligence could have been given but, in the circumstances, the failure of the court to modify and give defendants' proposed instruction does not appear to have prejudiced them."

In the *Tossman* case the court held that it was not error to refuse to give an instruction on Section 540 of the Vehicle Code of California because said section applies only to the intersection of public highways and not to the intersection of a private road and a public highway and because disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all cir-

cumstances. In this connection, the court said [37 Cal.2d 522, 233 P.2d 2]:

"It is settled that disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a presumption of negligence arises on proof of such a violation, and the presumption can be rebutted by evidence of justification or excuse." (Citing cases.)

In *Ornales v. Wigger*, 35 Cal.2d 474, 479, 218 P.2d 531, 534, the Supreme Court, in discussing an instruction given on the effect of a violation of a Vehicle Code section, said:

"Undoubtedly the instruction given on the effect of a violation of a statute should have been qualified by an instruction on the type of evidence necessary to rebut the presumption of negligence. In the *Satterlee* case [*Satterlee v. Orange Glenn School District*, 29 Cal.2d 581, 177 P.2d 279] it is said that '* * * the fact which will excuse the violation of a statute has been defined by the court as one resulting "from causes or things beyond the control of the person charged with the violation."' The trial court need not of its own motion give special instructions in the absence of a request therefor by counsel. *Comstock v. Morse*, 107 Cal.App. 71, 290 P. 108; *Crooks v. White*, 107 Cal.App. 304, 290 P. 497; *Sherman v. Kirkpatrick*, 83 Cal.App. 307, 256 P. 570. In *Baldrige v. Cunningham*, 31 Cal.App.2d 128, 132, 87 P.2d 369, 371, where the violation of certain provisions of the Vehicle Code was involved, it was said 'If defendant Cunningham desired a further elaboration upon the instruction relative to the *quantum* of evidence necessary to establish justification or excuse, and thereby rebut the presumption of negligence arising from a violation of the California Vehicle Code, it was her duty to propose the further instruction which she desired and request the court to give it. This she did not do. *Maus v. Scavenger Pro-*

tective Ass'n, 2 Cal.App.2d 624, 629, 39 P.2d 209.' See, also, James v. Myers, 68 Cal.App.2d 23, 156 P.2d 69, and the cases there cited."

[5] In the instant case no instructions were offered by appellants to qualify the instruction complained of. The evidence was amply sufficient to establish negligence on the part of appellant Zigman without considering the issue of intoxication concerning which there was a conflict in the evidence. We find no reversible error in the giving of the questioned instruction.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.



116 Cal.App.2d 694

PEOPLE v. NEGLEY.

Cr. 4856.

District Court of Appeal, Second District,
Division 3, California.

March 13, 1953.

Hearing Denied April 8, 1953.

Proceeding to vacate judgment, sentence and plea of guilty. The Superior Court of Los Angeles County, Kenneth C. Newell, J., denied the motion, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that unfamiliarity with some provisions of law that could have been but were not invoked for defendant's benefit, and expectation of more lenient treatment of defendant than defendant received, were not such circumstances as would form basis for order vacating judgment.

Order affirmed.

I. Criminal Law ¶998

In proceeding to vacate judgment, sentence and plea of guilty, record of preliminary hearing justified trial judge's conclusion that defendant, upon advice of his own counsel, took the stand voluntarily and admitted the crime charged for purpose of supporting subsequent application to

have himself adjudged a sexual psychopath. Pen.Code, § 288a; Welfare and Institutions Code, § 5500 et seq.

2. Criminal Law ¶1158(1)

In proceeding to vacate judgment, sentence and plea of guilty, where defendant's averment that arresting officer induced him to believe that a confession would result in leniency, was expressly denied, trial court determination adverse to defendant upon such conflicting evidence was conclusive on appeal.

3. Criminal Law ¶998

In proceeding to vacate judgment, sentence and plea of guilty, unfamiliarity with some provisions of law which could have been but were not invoked for defendant's benefit, and expectation of more lenient treatment of defendant than defendant received, were not such circumstances as would form basis for order vacating judgment.

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Following a preliminary hearing the District Attorney of Los Angeles County filed an information charging the appellant in Count I with violation of Penal Code section 288a, and in Count II with violation of Penal Code section 286. The appellant pleaded "Guilty as charged in Count I of the information" and "Not Guilty" as to Count II. His attorney filed an affidavit in which he asserted that the appellant was a sexual psychopath and the court appointed three doctors to examine him under Welfare and Institutions Code section 5500 et seq. The appellant's application for leave to file an application for probation was granted. The court found the appellant to be a sexual psychopath, and committed him to Norwalk State Hospital for a period not to exceed ninety days, and directed the superintendent of the hospital to report his diagnosis and recommendation concerning the appellant to the court

within the ninety-day period. The appellant was subsequently returned to court from the hospital, his application for probation was denied, and he was sentenced to the State Prison for the term prescribed by law. Count II of the information was then dismissed. Subsequently he moved to set aside the judgment, sentence and plea of guilty, and his motion was denied. This appeal is from that order.

At the preliminary examination a fifteen year old boy testified that he slept for 6 nights in appellant's home; that during that time appellant committed an act constituting a violation of section 286 of the Penal Code and an act constituting a violation of section 288a of the Penal Code. After the testimony of the boy the following occurred: "Mr. Crail (Deputy District Attorney): You may step down. Do I understand you want to put the defendant on the stand? Mr. Orme (Attorney for the appellant): That is right. Mr. Crail: All right; come around. Mr. Orme: Vic, take the stand.'" At the suggestion of appellant's attorney the district attorney questioned the appellant. The questioning developed that appellant fully understood that he was not required to take the stand, that he was doing so voluntarily and understood that anything he said might be used against him. He admitted committing the acts to which the complaining witness had testified.

After judgment was entered appellant obtained new counsel and made his motion to set aside the plea, judgment and sentence. The grounds of the motion were, generally, that he was not sufficiently advised by his counsel or the court and would not have pleaded guilty if he had known that he might be sent to State Prison. He alleged that the officers who arrested him procured a confession by representing that leniency would be shown him if he admitted the acts of which he was accused. He alleged that his attorney, Archie D. Orme, represented to him that he would not go to prison but would be committed for a short time to a State Hospital and that he pleaded guilty on such advice and assurance of his attorney; that he later obtained different counsel and was advised that he had

had a good and valid defense to the charges because of the lack of corroboration of the testimony of the boy, if he was an accomplice. Appellant's former attorney filed an affidavit on behalf of the People; he said that at the time he was retained by appellant he "was not in possession of the new psychiatric laws applicable to the facts pertaining to said Victor U. Negley but was more or less familiar with the substance thereof." The affidavit was in vague terms and was to the general effect that Orme had encouraged and advised appellant to plead guilty and had told him that the offense charged "had been made a felony by the legislature." Although it appeared from the affidavit that the attorney had told affiant of instances in which sexual psychopaths had been released on probation, it did not appear that he had advised him that he could or might be sent to State Prison after he had spent a time in a State Hospital. There was little or nothing in the affidavit to contradict the averments of appellant's affidavit that he pleaded guilty in the belief induced by the assurance of his attorney that he would not be sent to State Prison. Neither did it appear that appellant was given any advice concerning the sufficiency of the evidence against him. One of the arresting officers made an affidavit to which was attached a copy of an interview between appellant and the affiant and another officer after appellant's arrest. In his affidavit the officer denied that it was represented to appellant that he would receive lenient treatment if he confessed, and also denied that any other promise was held out to appellant or that anything was done or said to induce a confession. The transcript of the interview, consisting of the questions and answers, did not disclose that any promises were made or any pressure was used to obtain the confession.

In appellant's brief it is urged that the district attorney insisted that appellant should take the stand at the preliminary examination and he argues that this was a violation of his constitutional rights. As previously stated the record of the proceedings at the preliminary shows that

defendant testified voluntarily pursuant to the advice of his own counsel.

[1] It appears, however, that upon argument of the motion to vacate, Mr. Crail, deputy district attorney, who had conducted the preliminary, stated that he had insisted that appellant take the stand in order that the prosecuting witness could return to his former home in Kansas. At the same time Mr. Crail stated that appellant and his attorney knew of his purpose in "insisting" that appellant take the stand. It may fairly be inferred that it was understood that appellant would admit commission of the offenses. If he had denied guilt the State might have required the presence of the complaining witness at the trial. It may not be inferred, however, from the fact that the deputy insisted that appellant take the stand, that any promise of leniency was made or that appellant was overreached in the matter. It was evidently the purpose of his attorney to have him plead guilty. This is borne out by the testimony, itself, which clearly shows that it was intended to lay a foundation for a proceeding, later instituted by the attorney, to have his client declared to be a sexual psychopath. It does not appear from the affidavit of appellant, or that of the attorney, that there was at any time an intention that appellant would stand trial. The trial judge, in ruling on the motion was justified in concluding that appellant took the stand voluntarily and made his admission for the purpose of supporting an application to be made later to have himself adjudged a sexual psychopath.

[2] The averment of appellant's affidavit that the arresting officers induced him to believe a confession would result in leniency was expressly denied. Presumably the court resolved this conflict of evidence against appellant and this determination is conclusive on the appeal.

[3] In substance the ground of appellant's motion was that he pleaded guilty upon the strength of the advice given him by his attorney, whose good faith he does not question. It is argued that

the attorney was unfamiliar with some provisions of the law that could have been, but were not invoked for his benefit. It appears, without contradiction, that the attorney expected more lenient treatment for his client at the hands of the court than he received, and that the advice given the client was unduly optimistic. These facts were legally insufficient as a basis for an order vacating the judgment. *People v. Hoshor*, 96 Cal.App.2d 40, 214 P.2d 36.

The order denying motion to vacate judgment, sentence and plea is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



116 Cal.App.2d 702

BONDY v. PHOENIX INDEMNITY CO.

Civ. 15244.

District Court of Appeal, First District,
Division 2, California.

March 16, 1953.

Beneficiary brought action against insurer on policy covering generally loss resulting from accidental bodily injuries of insured and making beneficiary his beneficiary in case of death occurring in manner covered by policy. The Superior Court of the County of Alameda, Donald K. Quayle, J., entered judgment adverse to beneficiary, and beneficiary appealed. The District Court of Appeal, Dooling, J., held that policy did not cover death of insured.

Judgment affirmed.

1. Insurance — 466

Policy providing indemnity for loss of life, limb, sight, speech, hearing or time by accidental bodily injuries, and providing that it insured insured against loss resulting independently and exclusively of all other causes from accidental bodily injury, and that if such injury alone shall wholly and continuously disable and pre-

vent insured from performing occupation to date of loss of life insurer will pay principal sum, was intended to cover loss of life caused exclusively by accidental bodily injuries, and did not cover situation where automobile accident caused insured no apparent physical injury, but where he was unable to perform any occupational duties from time of accident until time of death.

2. Insurance ⇐146(3)

Rule that insurance policies are to be strictly construed against insurer does not require strained and unnatural construction of policy. Civ.Code, § 1654.

3. Insurance ⇐146(2)

No term of policy is uncertain and ambiguous if its meaning can be ascertained by fair inference from other terms thereof. Civ.Code, § 1654.

Dreher, McLeod & Bowman, Oakland, for appellant.

Appelbaum & Mitchell, John Jewett Earle, Oakland, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment for defendant following the verdict of a jury. The action was upon a policy of insurance issued by defendant to plaintiff's husband covering generally loss resulting from accidental bodily injuries and making plaintiff the beneficiary in case of death of the insured in a manner covered by the policy.

The insured was involved in an automobile accident in 1949, which caused him no apparent physical injury and for which he made no claim under the policy. However there was testimony that from the date of the accident until his death he was unable to perform any of his occupational duties. The only question presented to the jury was whether the accident caused the death of the insured and the jury on this issue found against the plaintiff. That this finding is supported by the evidence is not disputed.

Appellant's sole contention is that under the language of the policy death from any cause was within the coverage of the pol-

Cal.Rep. 253-254 P.2d-39

icy if the insured was within 30 days of the accident permanently disabled thereby or in the alternative that the policy was ambiguous in this respect and she was entitled to introduce evidence of her construction of the policy to explain the ambiguity.

The following quotation from the language of the policy presents the material question on appeal:

"This policy provides indemnity for *loss of Life, Limb, Sight, Speech, Hearing or Time by Accidental Bodily Injuries*, as herein limited and provided.

* * * * *

"Phoenix Indemnity Company * * * In Consideration of the premium * * * hereby insures the person named in Statement 1 of the said application against *loss resulting independently and exclusively of all other causes from accidental bodily injury*, hereinafter referred to as 'such injury', as follows:

"Loss of Life

"Clause 1. If 'such injury' alone shall, commencing on date of the accident or within 30 days thereof, wholly and continuously disable and prevent the Insured from performing any and every duty pertaining to his occupation to the date of loss of life, or if within twenty-six weeks from date of accident regardless of intervening total disability, 'such injury' alone shall result in loss of life, the Company will pay the Principal Sum, and in addition weekly accident indemnity as hereinafter provided to the date of loss of life." (Emphasis ours.)

Despite the fact that in the language which we have emphasized the policy twice states clearly that the loss insured against is "loss of life * * * by accidental bodily injuries" and "loss resulting independently and exclusively of all other causes from accidental bodily injury" it is appellant's contention that the first provision of Clause 1 above quoted should be read as if some such words as "regardless of the cause of such loss of life" should be added thereto so that it would read: "If such injury alone shall, commencing on date of the accident or within 30 days

thereof, wholly and continuously disable and prevent the Insured from performing any and every duty pertaining to his occupation to the date of loss of life (*regardless of the cause of such loss of life*) * * the Company will pay the principal sum * * *."

The policy will simply not bear this construction. As pointed out above the loss insured against is twice previously described as loss "by" or "resulting from" accidental bodily injuries. In addition the use of the words "loss of life" instead of "death" in the clause in question has significance. If the intention had been to insure against death whether caused by the accidental injury or not it would have been the natural thing to use the word "death" in that connection. "Loss of life" has a narrower connotation than "death" indicating a "death" caused by some extraneous agency and in the framework of this policy it has the still narrower connotation of "loss * * * by accidental bodily injuries" or "loss resulting * * * from accidental bodily injury."

[1] It is perfectly clear that Clause 1 is intended to cover loss of life *caused exclusively by accidental bodily injuries* in two contingencies: (1) such loss of life at any time, whether within 26 weeks or longer, where the insured is continuously disabled, within the time limited, by the accident up to the time of loss of life, and (2) without regard to disability where such loss of life occurs within 26 weeks of the accident.

[2,3] While policies of insurance are to be strictly construed against the insurer, Civ.Code, § 1654; *Guidici v. Pacific Automobile Ins. Co.*, 79 Cal.App.2d 128, 179 P.2d 337, this rule "does not require the court to give the policy a strained and unnatural construction", *Baine v. Continental Assur. Co.*, 21 Cal.2d 1, 5, 129 P.2d 396, 398, 142 A.L.R. 1253, and "(n)o term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof", *Burr v. Western States Life Ins. Co.*, 211 Cal. 568, 576, 296 P. 273, 276; *Sampson v. Century Indemnity Co.*, 8 Cal.2d 476, 480, 66 P.2d 434, 109 A.L.R. 1162.

There is nothing in *Zuckerman v. Underwriters at Lloyds, London*, Cal.App., 250 P.2d 653, hearing granted by the Supreme Court, which appellant has cited, in conflict with our construction of the policy.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



116 Cal.App.2d 656

KIPP v. LUBERCO, Limited et al.

Civ. 4567.

District Court of Appeal, Fourth District,
California.

March 11, 1953.

Action by plaintiff who claimed title by virtue of commissioner's deed issued after foreclosure of street improvement bond to partition realty against defendants who claimed title by virtue of tax deed from the State. The Superior Court, San Diego County, ordered judgment for partition, and defendants appealed. The District Court of Appeal, Mussell, J., held that where owner of delinquent street improvement bond held bond at same time as State held tax title to realty, bond owner's right to foreclose bond lien against former owner's right of redemption and to redeem realty was terminated when State conveyed realty by tax deed, and bond owner obtained nothing by resumption of pending foreclosure action eight months after issuance of tax deed.

Judgment reversed.

1. Municipal Corporations ⇨562(1)

Owner of delinquent street improvement bond could not foreclose lien against state's tax title, in view of fact that state was immune from such action and that parity existed between state's tax title and owner's bond lien.

2. Municipal Corporations ⇨529

Owner of delinquent street improvement bond who held bond at same time State held tax title to realty could have

foreclosed bond lien against former owner's right of redemption, and, upon foreclosure, could have had bond lien satisfied.

3. Municipal Corporations ⇨529

Taxation ⇨697(1)

Owner of delinquent street improvement bond who held bond at same time State held tax title to realty could have foreclosed bond lien against former owner's right of redemption, purchased realty, and upon foreclosing would have had bond lien satisfied or would have stepped into place of former owner and could have redeemed realty from state any time prior to tax sale. Revenue and Taxation Code, § 3351 et seq.

4. Municipal Corporations ⇨529

Where owner of delinquent street improvement bond held bond at same time as State held tax title to realty, bond owner's right to foreclose bond lien against former owner's right of redemption was terminated when State conveyed realty by tax deed, and bond owner obtained nothing by resumption of pending foreclosure action eight months after issuance of tax deed. Code Civ.Proc. § 330; Civ.Code, § 2911; Revenue and Taxation Code, § 3351 et seq.

5. Partition ⇨16

After default on street improvement bond, and during time state held tax title to realty, bondholder could have preserved right to seek partition against ultimate purchaser by tax deed from state by taking proper steps to perfect holder's lien and to carry it into title before expiration of time limit in statute regarding presumption of extinguishment of such liens. Code Civ.Proc. § 330; Civ.Code, § 2911.

6. Municipal Corporations ⇨558

After default on street improvement bond, and, during period State held tax title to realty, bondholder by reason of parity existing between bond and tax lien, could have demanded that city treasurer sell realty. Revenue and Taxation Code, § 3351 et seq.

7. Municipal Corporations ⇨519(5)

Where bondholder held delinquent street improvement bond at same time State held tax title to realty, bondholder commenced action to foreclose lien in December,

1944, but took no further action until bondholder filed amended complaint in September, 1947, eight months after State had conveyed tax title to realty, mere filing of complaint did not avoid statutory presumption as to extinguishment of such lien. Code Civ.Proc. § 330; Civ.Code, § 2911; Revenue and Taxation Code, § 3351 et seq.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for appellants.

W. E. Starke and Solon S. Kipp, San Diego, for respondent.

MUSSELL, Justice.

This is an action, filed on August 31, 1951, to partition real property in San Diego county and was brought pursuant to the provisions of Section 752 of the Code of Civil Procedure. Plaintiff claims title to the property by virtue of a commissioner's deed dated February 25, 1949, and issued after foreclosure through court of a street improvement bond issued pursuant to the Improvement Act of 1911. Defendant claims title to the property by virtue of a tax deed to the State of California and a deed from the State to defendant.

Defendant appeals and attacks plaintiff's commissioner's deed, contending that it did not convey title to plaintiff and that the bond lien on which said deed is based was extinguished by reason of the provisions of Section 2911 of the Civil Code. The appeal is from the judgment of the trial court ordering judgment for partition, determining that plaintiff and defendant are owners of the real property involved as tenants in common, each owning an undivided one-half interest therein; decreeing that plaintiff holds an equitable lien against the entire property for the amount paid by plaintiff at the commissioner's sale in said foreclosure; that defendant has an equitable lien against the property for the amount paid by it for its tax deed and that said two equitable liens are on a parity.

On July 1, 1937, the real property in question was deeded to the State for non-payment of taxes levied for the fiscal year 1931-32, and on January 21, 1947, the State,

pursuant to Chapter 7, Part 6, Division 1, of the Revenue and Taxation Code, conveyed the property by tax deed to the defendant.

Plaintiff was the owner of delinquent street improvement bond No. 101, Series 1463, issued by the city treasurer of the city of San Diego pursuant to the Improvement Act of 1911. On December 29, 1944, she commenced an action in the Superior Court of San Diego county to foreclose the bond and on the same date filed a *Lis Pendens* in which Lizzie M. Wadha, Joseph Considine, Palmyra M. R. LaVence, Trustee, and various John Does were named as defendants in the action. Apparently, no further steps were taken in the foreclosure action until September 30, 1947, when plaintiff filed an amended complaint adding new parties defendant. The defendant in the instant action was not made a party defendant. Thereafter plaintiff published summons and on January 21, 1948, a decree of foreclosure was obtained and an order of sale was filed. On February 24, 1948, the property was sold by the commissioner in said action to plaintiff herein and on February 25, 1949, the said commissioner executed a deed to the plaintiff.

[1-6] The record shows that plaintiff first sought to enforce her lien rights under her improvement bond in 1944 when she filed the foreclosure action. At that time, the State held title to the property and plaintiff could not foreclose the lien against the tax title held by the State because of the sovereign immunity doctrine and because of the parity existing between the State's tax title and plaintiff's bond lien. *Rombotis v. Fink*, 89 Cal.App.2d 378, 393, 201 P.2d 588. Plaintiff, by timely action, could have foreclosed her bond lien against the former owner's right of redemption, and, upon foreclosing against the former owner's right of redemption, would have had the bond lien satisfied or would have stepped into the shoes of the former owner, in which latter case she could have redeemed the property from the State at any time prior to the tax sale. *Sipe v. Correa*, 38 Cal.2d 131, 135, 238 P.2d 989. However, the right of redemp-

tion was terminated when the State, in January, 1947, conveyed the property by tax deed to the defendant herein and plaintiff, having failed to obtain the right to exercise her right of redemption, she obtained nothing by her foreclosure action. Plaintiff could have preserved her right to seek partition against the ultimate purchaser by tax deed from the State if she had taken proper steps to perfect her lien and carry it into title before the expiration of the time limit specified by the 1945 legislation, Section 2911 of the Civil Code and Section 330 of the Code of Civil Procedure. After default on the bond, and during the period the State held title to the property, plaintiff, by reason of the parity existing between the bond and tax lien, could have demanded that the city treasurer sell the property. This was not done. The record shows that plaintiff filed the present action in partition on August 31, 1951, long after her lien was presumed to have been extinguished under the provisions of Section 2911 of the Civil Code.

In *Scheas v. Robertson*, 38 Cal.2d 119, 238 P.2d 982, the Supreme Court held that the amendment of Civil Code section 2911, in 1945, established an absolute limitation of four years after the due date of the bond or the last installment thereof or the last principal coupon attached thereto or until January 1, 1947, whichever is later, for the enforcement of the lien of bonds issued under the Improvement Act of 1911, and is a valid statute of limitations; that the amendment of 1945, when applicable, operates to prevent the holder of a street improvement bond issued under the Improvement Act of 1911 from enforcing his lien in any manner, whether the remedy pursued be a suit for partition or foreclosure; and that the lien of a street improvement bond is presumed to have been extinguished at expiration of the time stated in Civil Code section 2911, and one who purchases the property after such time has expired need not ascertain whether any lien securing such bond was in fact extinguished but may rely on the presumption.

Plaintiff did nothing with her foreclosure action until September 30, 1947, eight months after the defendant acquired title

to the property by tax deed from the State, at which time she filed an amended complaint in which the defendant herein was not named as a party.

[7] We conclude that by the mere filing of the complaint in foreclosure plaintiff did not avoid the presumptions set forth in Section 2911 of the Civil Code, having failed to take proper steps to perfect her lien and carry it into title before the time limits specified in Section 2911 of the Civil Code. *Sipe v. Correa*, supra, 38 Cal. 2d 134, 238 P.2d 989. Plaintiff argues that this statute is not applicable because it applies only to unencumbered bonds. However, the bond was not foreclosed at the time the defendant procured title from the State on January 21, 1947. The presumption of extinguishment was not overcome under the circumstances shown by the record.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



116 Cal.App.2d 580

**BACHENHEIMER v. PALM SPRINGS
MANAGEMENT CORP. et al.**

Civ. 19289.

District Court of Appeal, Second District,
Division 1, California.

March 9, 1953.

As Modified March 31, 1953.

Individual brought action against corporation and others to rescind certain agreements and to recover all moneys paid thereunder, on ground that agreements were violative of provisions of Business and Professions Code, regulating sale and leasing of subdivided lands. The Superior Court of Los Angeles County entered judgment adverse to individual, and individual appealed. The District Court of Appeal, Patrosso, J. pro tem., held that agreements were void as violative of provisions of Business and Professions Code.

254 P.2d—10½

Judgment reversed and cause remanded with directions.

1. Landlord and Tenant ⇨24(1)

Where corporation owning realty divided it into 38 lots with parking area, walks, and swimming pool, and corporation and individual entered into agreements whereby corporation leased one lot to individual for 99 years, and individual was to pay \$7,500 in installments, and corporation was to construct on lot a bungalow to become personality of individual after payment of entire \$7,500, and corporation was to maintain buildings and pay taxes, and individual was to pay corporation ⅓sth of cost of maintenance and taxes, realty constituted "subdivided lands" within meaning of section of Business and Professions Code regulating sale and leasing of "subdivided lands", and therefore agreements were void for failure of corporation to comply with the code. Business and Professions Code, §§ 11000, 11010.

See publication Words and Phrases, for other judicial constructions and definitions of "Subdivided Lands".

2. Landlord and Tenant ⇨24(1) Vendor and Purchaser ⇨39

Word "lot" as used in provision of Business and Professions Code regulating sale and leasing of subdivided lands and providing that regulations shall apply where land is divided, for purpose of sale or lease, into five or more "lots", applies to any portion, piece or division of land and is not limited to parcels of land laid out into blocks and lots regularly numbered and platted. Business and Professions Code, §§ 11000, 11010.

See publication Words and Phrases, for other judicial constructions and definitions of "Lot".

3. Landlord and Tenant ⇨122

Lease of entire house or building operates as lease of land on which it stands.

4. Landlord and Tenant ⇨122

Generally, lease of entire building *eo nomine* is a lease of land on which building stands, at least as far as needed for its support, and adjacent land which belongs to lessor and which is used with building as necessary to its proper occupation for purpose for which it was intended.

5. Landlord and Tenant ⇨122

Where lease is of "premises", with no qualifying words, "premises" generally means land and buildings thereon.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Premises".

6. Sales ⇨456

Where title to specific personalty is to pass to person taking possession thereof on completion of stipulated payments, together with interest and attorney's fees for collecting amount in case of default, term "lease" is a misnomer, and transaction is a "conditional sale".

See publication *Words and Phrases*, for other judicial constructions and definitions of "Conditional Sale" and "Lease".

7. Landlord and Tenant ⇨20

A "lease" is nothing more than an instrument by which one is granted, on stated terms and conditions, right to occupy parcel of land to exclusion of grantor.

8. Landlord and Tenant ⇨24(1)

A reservation of rent is not an essential requirement of a lease.

9. Landlord and Tenant ⇨70

Though leases of realty are chattels real or personalty, rather than realty, they are none the less estates in realty. Civ. Code, §§ 761, 765.

10. Landlord and Tenant ⇨70

A 999 year lease of realty, no less than a lease for one year, is personalty or a chattel real, but each is a lease of land. Civ. Code, §§ 761, 765.

11. Landlord and Tenant ⇨24(1)

Where corporation owning realty divided it into 38 lots with parking area, walks, and swimming pool, and corporation and individual entered into agreements whereby corporation leased one lot to individual for 99 years, and individual was to pay \$7,500 in installments, and corporation was to construct on lot a bungalow to become personalty of individual after payment of entire \$7,500, and corporation was to maintain buildings and pay taxes, and individual was to pay corporation $\frac{1}{3}$ sth of cost of maintenance and taxes, there was a lease of realty for 99 years, and not merely

lease of bungalow, and therefore agreements were void because of failure of corporation to comply with provisions of Business and Professions Code regulating sale and leasing of subdivided lands. Business and Professions Code, §§ 11000, 11010.

Alvin P. Jackson, Hollywood, and Martin Goldman, Los Angeles, for appellant.

David H. Cannon and Reed Callister, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Plaintiff instituted this action to rescind certain agreements executed between herself and the defendants which are hereinafter described and to recover all monies paid by her thereunder. Her complaint sought relief upon three grounds: (1) that the execution of the agreements in question was procured by the fraud of the defendants; (2) that the agreements constitute "securities" within the meaning of the Corporate Securities Act, Corporations Code, § 25000 et seq. and hence are void because the sale and issuance thereof was not authorized by a permit of the Commissioner of Corporations, and (3) that they are violative of the provisions of the Business and Professions Code regulating the sale and leasing of subdivided lands. The trial court's findings were adverse to the plaintiff upon all issues. Plaintiff however makes no attempt to challenge the sufficiency of the evidence to sustain the finding against her upon the issue of fraud and hence no consideration thereof is required.

At all the times herein mentioned the respondent corporation has been the owner of a parcel of real property situate in the City of Palm Springs approximately 270 feet square. Prior to the time when the agreements hereinafter mentioned were executed the property was unimproved. However, the corporation had theretofore filed with the Building Department of the City of Palm Springs a plot plan of this property which was designated thereon as "Bonaire Village". On this plot plan there are delineated separate rectangles, consecutively numbered, which in the agreements hereinafter mentioned are referred to as

"building units", a parking area, walks and a swimming pool. What purports to be a photographic copy of this plot plan appears upon the reverse side of the lease agreements hereinafter mentioned. While no notation appears thereon as to the scale of the drawing, the exterior dimensions of the property are noted thereon, and, applying the scale to be derived therefrom, each of the "building units" appear to be of the dimensions of 30' x 20'. The filing of this plot plan with the Building Department was preliminary to the execution of the plan of the respondent corporation to divide and improve the property in the manner therein designated, and to construct upon the "building units" bungalows of the character mentioned and described in the agreements now to be mentioned.

In July, 1948, appellant and respondent corporation executed two agreements, identical in terms except for the description of the "building unit" covered thereby, entitled "Lease Agreement" wherein the respondent corporation is designated as "Lessor" and appellant is designated as "Lessee", the terms of which may be summarized as follows:

"Lessor leases and lets to Lessee for the term of ninety-nine (99) years from this date (July 9 and 14, 1948, respectively) building unit marked No. 10 (25) as shown on the plot plan appearing on the reverse side of this Lease, which plot plan is known as 'Bonaire Village' on file with the Building Department of the City of Palm Springs, Riverside County, State of California, located on that parcel of real estate more particularly described as follows:", after which is set forth a description of the entire parcel of real property to which reference has previously been made and to which we will hereinafter refer by the designation given it by respondents, namely "Bonaire Village". Lessee agrees to pay lessor the sum of \$7,500 as follows: \$500 in cash, \$1,000 upon demand within thirty days and the balance in monthly payments of \$80, including interest at 6% per annum, beginning September 1, 1948. Lessor may cancel the lease "upon the failure of Lessee to meet his obligations imposed hereunder" and in the event thereof all monies

theretofore paid by the lessee shall be retained by lessor "and shall constitute rental for the use and occupancy of the *leased premises* up to that time, and lessor shall have the right to re-enter and take possession of said *leased premises*". Lessor shall within a period of thirty days begin to construct and thereafter diligently prosecute to completion "the construction of a *building* with the elevations, floor plan, dimensions and general specifications set out on the reverse side hereof, and will begin and diligently prosecute to completion the work necessary to landscape the entire *block* shown therein by planting shrubbery and lawns and by installing walks, drive-ways and a swimming pool." Turning to the reverse side of the agreement we find a perspective drawing of the building to be constructed by lessor together with floor plan thereof showing a building having the exterior dimensions of 28' x 18', which is to be of "frame and stucco construction, concrete slab floor, and Tropicool roof, to meet all requirements of City and State building codes".

Continuing, the lease agreement provides that if, for reasons beyond the control of the lessor, it is unable to deliver the *building* within five months, lessor shall refund all monies theretofore paid by lessee and "lessee agrees to relinquish all documents and execute any further documents *quitclaiming back to lessor any rights, title and interest under this lease which may have been acquired and recorded by said lessee*". The lease shall be binding upon the heirs, administrators, executors and assigns of the parties, and while the lessee may assign the lease, any such assignment "shall be made only to persons of the white or caucasian race", and "no persons of any other race shall occupy or use the said *leased premises* except as domestic servants". The lessee "shall have the right without cost to use the various walks, drive-ways, and the swimming pool * * * while this lease is in good standing", and lessor agrees to maintain the same, furnishing necessary water for the lawns, shrubbery and swimming pool "and to pay all real estate taxes assessed or assessable against the entire parcel embracing the leased

premises;" lessee, however, agreeing to pay "to said lessor his proportionate $\frac{1}{8}$ share of said money so expended by the lessor for the above items." "Lessor agrees to arrange for the furnishing of electric energy, domestic water and gas for the *building* referred to in the said lease and to furnish maid and laundry service as may be desired by lessee", for all of which the latter agrees to pay. The two final paragraphs of the agreement read as follows:

"10. That the *building* to be constructed for the lessee by lessor herein shall be considered the personal property of the lessee herein upon the payment in full of the amount of money as indicated on line 2, paragraph 2 herein (\$7,500.00), and a bill of sale to said personal property shall be given to said lessee by the said lessor without lien or encumbrance."

"11. That when lessee has paid the amount of money set out on line 2, Paragraph 2 herein as payment in full, lessor will within sixty (60) days thereafter cause this lease to be acknowledged in order that it may be recorded in the records of Riverside County, State of California, by the lessee herein." (Emphasis throughout is our own.)

At or about the same time as the execution of the lease agreements the parties entered into a "Property Management Agreement" whereby the respondent corporation agreed to care for, manage and operate the "building units", the manager being constituted the sole and exclusive agent to rent the building at such times as the owner desired to rent the same to other persons, for which the manager was to receive a compensation of 20% of the rental received. The Property Management Agreement covering unit No. 10 was to continue for a period of one year from December 1, 1948, and that covering Unit No. 25 was to continue until June 30, 1950. At the same time appellant purchased from the respondent corporation furniture and furnishings for the buildings for the price of \$3,653.24, on account of which she paid \$1,173.24, and executed a Conditional Sales Contract for the balance to the respondent, Clarke.

We have set forth the terms of the lease agreements in some detail because the provisions thereof are necessary to proper understanding of the questions presented upon the appeal.

We direct our attention first to the question as to whether the lease agreements in question fall within the purview of the statute regulating the sale and leasing of subdivided lands, for in our view it is decisive of the controversy. The particular provisions of the Business and Professions Code with which we are concerned are Sections 11000 and 11010 which, insofar as material here, read as follows:

"11000. Definitions. 'Subdivided lands' and 'subdivision' refer to improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels * * *."

"11010. Notice of intention to sell subdivided lands. (When and by whom notice to be given.) Prior to the time when subdivided lands are to be offered for sale or lease, the owner, his agent or subdivider shall notify the commissioner in writing of his intention to sell such offering.

"(Contents.) The notice of intention shall contain the following information:

"(a) The name and address of the owner.

"(b) The name and address of the subdivider.

"(c) The legal description and area of lands.

"(d) A true statement of the condition of the title to the land, particularly including all encumbrances thereon.

"(e) A true statement of the terms and conditions on which it is intended to dispose of the land, together with copies of any contracts intended to be used.

"(f) A true statement of the provisions, if any, that have been made for public utilities in the proposed subdivision, including water, electricity, gas and telephone facilities.

"(g) Such other information as the owner, his agent, or subdivider, may desire to present."

Failure to comply with the provisions of the last quoted section is denounced as a public offence punishable by imprisonment in the county jail for a term of not to exceed two years or by a fine of not to exceed \$2,000. B. & P. Code, § 11020. It may be noted in passing that the foregoing are a codification of substantially similar provisions of an earlier statute, the constitutionality of which was upheld in *re Sidebotham*, 12 Cal.2d 434, 85 P.2d 453.

[1,2] Admittedly respondent corporation did not comply with the provisions of Section 11010, and hence if the lease agreements executed by it with appellant are comprehended by the provisions of Section 11000, they are illegal and void. We entertain no doubt that Bonaire Village constitutes "subdivided lands" within the meaning of the statute quoted above, for a mere reference to the plot plan filed by the respondent corporation with the Building Department of the City of Palm Springs discloses a tract of land which is divided into more than five parcels, namely 38 separate areas, to which access is afforded by means of designated walks and driveways. The fact that these are designated in the agreements in question as "building units" and not as "lots" is of no significance. As used in the statute the word "lot" applies to any portion, piece, or division of land and is not limited to parcels of land laid out into blocks and lots regularly numbered and platted. See: *Westbrook v. Rhodes*, 92 Okl. 149, 218 P. 873, 875; *Cowell v. Clark*, 37 Cal.App.2d 255, 258, 99 P.2d 594; *People v. Gallinger*, 37 Cal.App.2d 261, 262, 99 P.2d 597. While the separate areas or parcels delineated upon the plot plan are not designated thereon as "lots" the entire parcel is referred to in the lease agreement as "the block", and the "units" into which it is divided unquestionably constitute "parcels" within the meaning of that term as used in the statute. Moreover, it is too clear to admit of argument that, as disclosed by the agreements executed between the parties, the respondent corporation dealt with each

"unit" as a separate parcel, and the testimony of Mr. Clarke, president of the respondent corporation, is to the effect that from the inception of the project the corporation intended to deal in a similar manner with more than one-half of the thirty-eight "units".

[3] Respondents, however, contend that the statute is not applicable because, so it is said, respondents did not, by the terms of the agreements in question, lease any land but only "a bungalow—which is by express written agreement of the parties to be regarded as personal property only". Conceding for the moment that each of the agreements constitutes a lease of a bungalow (a question to be hereinafter discussed), it by no means follows, as respondents assume, that this compels the conclusion that they do not constitute leases of real property. The very converse is true, for since the days of Lord Coke it has been recognized that the lease of an entire house or building operates as a lease of the land upon which it stands. *McMillan v. Solomon*, 42 Ala. 356, 358.

[4,5] "The general rule is that the lease of an entire building *eo nomine* is a lease of the land on which the building stands, at least as far as needed for its support, and adjacent land belonging to the lessor which is used with the building as necessary to its proper occupation for the purpose for which it was intended. * * * Where the lease is of the 'premises,' with no qualifying words, it is generally held that 'premises' means land and the buildings thereon." 51 C.J.S., Landlord and Tenant, § 289, p. 944.

The statements in the foregoing text will be found abundantly supported by the authorities. *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 P. 27, 33; *Crabtree v. Miller*, 194 Mass. 123, 80 N.E. 225, 226; *Szulerecki v. Oppenheimer*, 283 Ill. 525, 119 N.E. 643, 645; *Brager v. Bigham*, 127 Md. 148, 96 A. 277, 279; *Hooper v. Farnsworth*, 128 Mass. 487, 488; *Bacon v. Bowdoin*, 22 Pick., Mass., 401, 406; *Sherman v. Williams*, 113 Mass. 481, 484; *Lanpher v. Glenn*, 37 Minn. 4, 33 N.W. 10, 11; *Wheeler v. McIntyre*, 55 Mont. 295, 175 P. 892, 894;

Nashville, C. & St. L. Ry. Co. v. Heikens, 112 Tenn. 378, 79 S.W. 1038, 1040, 65 L.R.A. 298; Gainer v. Griffith, 76 W.Va. 426, 85 S.E. 713, 714; Bussman v. Ganster, 72 Pa. 285.

In *Bacon v. Bowdoin*, supra, the Court, 22 Pick. at page 405, says: "It is objected, that the land was not demised, but the buildings only, and that the plaintiff has only an easement in the land. * * * But by the demise of the building, the land on which it stood clearly passed as incident to the demise. The exclusive possession of the land was necessary to the enjoyment of the demise".

And the rule above stated is the same whether the building demised be in existence at the time of the lease or is to be constructed in the future. In *Bussman v. Ganster*, supra, the Court says, 72 Pa. at page 290: "By the agreement in suit, Ganster agreed as party of one part with Bussman, Rahe & Company as parties of the second part, to erect a store-house in front of his own house, on the Negley lot in East Liberty, and to furnish the same with counters, shelving and other fixtures, to be ready by the 1st of August 1868, or as much sooner as practicable, at the rate of \$600 until the 1st of April 1869, and thereafter, for the term of five years, at the rate of \$800 per annum. It is true that there are here no formal words of demise, but it is very manifest that after the erection of the building there was created a term of years in the premises with a certain commencement and a certain termination; in short, with all of the requisites of a demise. Ought there to be any doubt that if this was a demise of the buildings when erected it was also a demise of the ground upon which it stood?"

And at page 289 of 72 Pa. the Court says: "That the agreement in question was a lease of the land as well as of the building thereon, we think is very manifest."

[6] We need not, however, rest our determination upon the foregoing alone, for a reading of the lease agreement renders inadmissible the contention of respond-

ents that it constitutes nothing more than a lease of a house. Indeed, in the true sense of the word, it is not a lease of a house at all. As is said in *Pringle v. Canfield*, 19 S.D. 506, 104 N.W. 223: "[W]here title to specific personal property is to pass to the person taking possession thereof upon the completion of stipulated payments, together with interest and attorney's fees for collecting the amount in case of default, the term 'lease' is a misnomer, and the transaction a conditional sale, in exact accordance with the intention of the parties. Authorities are abundant in support of the suggestion that a transaction, by whatever name, is a conditional sale whenever payment is a prerequisite to the passing of title, and contracts framed to partake more of the qualities of a lease than the one before us have been so construed * * *." See also *Lundy Furniture Co. v. White*, 128 Cal. 170, 172, 60 P. 759.

The agreements here have a dual character: (1) a contract whereby lessor agrees to construct and sell to lessee a bungalow and which lessee agrees to purchase for the specified price payable at the times and in the manner therein set forth, with title to remain in the lessor until the full purchase price of \$7,500 is paid—a conditional sales contract, and (2) the grant by lessor to lessee of the right to occupy the site or parcel of real property therein described and upon which the bungalow is to be erected for a definite term of 99 years. It is in the latter aspect alone that the agreement answers to the legal description of a lease. The subject matter of the contract of sale is the bungalow; that of the lease the parcel of real property therein described by reference to the plot plan showing its situs and dimensions. While the lease is to continue for a period of 99 years, the bungalow is to become the absolute property of the lessee "without lien or encumbrance" upon the payment of the agreed price of \$7,500, which (in accordance with our hasty computation) is fully payable under the terms of the agreement in not to exceed nine years at the very latest. From and after the time that title to the bungalow vests in the purchaser it may not with rea-

son be said that the latter is the lessee of the house of which he is the absolute owner free of "lien or encumbrance". There is nothing in the agreement to suggest that the lessee may not remove the house from the premises after it has been fully paid for, and respondents concede that she may freely do so. It is equally clear that the removal of the house would not operate to terminate the rights of the lessee in and to the building site or release her from the obligations under the lease for the balance of the 99 year term, for it is expressly provided that the lessee shall, *for the full term*, pay $\frac{1}{38}$ of respondent corporation's cost of maintaining "the grounds, walks, driveways, and swimming pool", including the necessary water required therefor, as well as, "all real estate taxes assessed or assessable against the entire parcel embracing the leased premises". Of necessity there must be some consideration for lessee's continuing promise to make these payments. And lessee's obligation in this regard cannot be relegated to the purchase of the bungalow, for the *total price* therefor is fixed at \$7,500. Neither may it be considered as a charge for the right to use the bungalow after it is fully paid for (an event which must necessarily occur long prior to the expiration of 99 years) for it is then the sole property of the lessee. It becomes evident therefore that the obligations thus laid upon the lessee can only be in the nature of a charge or rent for the right to use and occupy the site upon which the building is erected without regard to whether it remains thereon for the full term or not.

Indeed, although perhaps unwittingly, counsel for respondents concede this to be true for in their brief they say: "Those obligations (maintenance costs and taxes) assumed by the lessee are part of the price of the *lease*." And again it is said: "Of course, it is possible that the lessee will pay for the bungalow and get a bill of sale to it as provided in paragraph 10 of the Lease Agreement long before the expiration of the 99 year period but the obligation to pay $\frac{1}{38}$ of the maintenance cost and of the taxes, etc., *is still a continuing obligation*. The plaintiff's ownership of the bungalow would not end at the expira-

tion of the 99 years but *her right to keep it on the land* as personal property would end at that time, the same as a person's right to sever from the real estate the leased neon sign at the expiration of his lease on the building." (Emphasis added.)

[7] To admit, as they do, that by the agreements under consideration appellant was granted and acquired, the "right to keep it (the bungalow) on the land" for a period of 99 years is necessarily to concede that the agreement constitutes a lease of the land upon which it is erected, for a lease is nothing other than an instrument by which one is granted, upon stated terms and conditions, *the right to occupy a parcel of land to the exclusion of the grantor*. *Morris v. Iden*, 23 Cal.App. 388, 393, 138 P. 120; *Williams v. Miller*, 68 Cal. 290, 293, 9 P. 166; *Tiedeman Real Property*, Sec. 538; *Howard v. Manning*, 79 Okl. 165, 192 P. 358, 360, 12 A.L.R. 819, 821.

[8] While in the foregoing discussion we have undertaken to point out that lessee's obligation to pay a proportionate part of the maintenance cost of and taxes upon the entire tract of land of which the "leased premises" are a part, answers to the description of rent, it may be noted that reservation of rent is not an essential requirement of a lease. *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392, 394; *Willcox v. Bostick*, 57 S.C. 151, 35 S.E. 496, 497.

Moreover, as is made evident by a cursory reading of the agreements, the word "building" is used therein in contradistinction to the term "leased premises". The property demised ("leased premises") is a "building unit" designated by number and reference to the copy of the plot plan appearing upon the reverse side of the agreements whereon it is delineated as a specific parcel of real property. Although not expressly so stated in the agreements, it is implicit therein that the "building" is to be constructed upon the particular parcel thus designated as constituting the "leased premises". The "building" becomes the sole property of the "lessee" upon payment of the purchase price thereof but the "leased premises" (the building unit) never became her property; lessee's sole right with respect thereto be-

ing to use and occupy the same to the exclusion of the owner (lessor) for the term of the lease unless sooner terminated by reason of her default in the performance of her obligations thereunder. Significant also is the provision whereby lessee is obligated to pay $\frac{1}{8}$ s of the "real estate taxes" assessed "against the *entire parcel embracing the leased premises*". The expression "leased premises" as used in this connection cannot reasonably be construed as referring to the bungalow alone, not only because, as previously noted, it is not leased, but also because, being personal property (as respondents themselves strenuously insist), it may not be said to be embraced by "the entire parcel" of real property constituting Bonaire Village. As employed here the meaning of the word "embrace" would appear to be "to include as parts of a whole". Webster's New International Dictionary, 2d Ed. While the property demised, the "building unit"—a parcel of real property—is undoubtedly embraced by the larger tract of which it forms a part, the bungalow (personal property) is no more embraced thereby or a part thereof than is the furniture and furnishings located therein. If upon any theory, however, it may be said that the term "leased premises" as used in the provision of the agreements in question comprehends the bungalow alone, it would necessarily follow that upon its removal by the lessee after it was fully paid for she would thereupon be released from the obligations thereby imposed of paying her proportionate share of the maintenance cost and real estate taxes; yet, as we have seen, counsel for respondents contend to the contrary. Nothing, we believe, more clearly demonstrates the unsoundness of their contention that the agreement in question constitutes nothing other than a lease of a bungalow.

[9,10] We confess our inability to perceive the relevancy of the discussion in respondents' brief whereby they seemingly labor the point that leases are chattels real—personalty and not realty. Civil Code, § 765. No one, of course, would undertake to dispute this elementary proposition but, while leaseholds are thus classified, they are none the less *estates in real property*. Civ.Code, § 761; Callahan v. Martin, 3

Cal.2d 110, 118, 43 P.2d 788, 101 A.L.R. 871; People v. Gallinger, supra, 37 Cal. App.2d 261, 262, 99 P.2d 597. A 999 year lease no less than one for a term of one year is personalty—a chattel real, but each is a "lease of land". Inasmuch as the statute under consideration expressly includes *leases* of subdivided land, it is of no moment that such leases are, in law, regarded as a class of personal property rather than realty.

[11] We have no doubt that the draftsman of the lease agreement, for reasons not too difficult to discern, strove valiantly to bring forth a document which, in legal effect, would operate as an agreement for the erection and sale of a bungalow with the right in the purchaser (for a consideration independent of the price to be paid for the building) to maintain the same upon a designated parcel of real property for 99 years, and yet would not, in contemplation of law, constitute a lease of the land upon which it was to stand for this prolonged period. His efforts, however, proved unavailing for inevitably the result of his labors were precisely that which he so studiously sought to avoid. Looking through form to substance, we experience no difficulty in ascertaining its true character, namely, that which in fact was intended and understood by both parties—a lease of real property for a term of 99 years.

Respondents having failed to comply with the provisions of the statute referred to, all of the agreements (five in number) are illegal and void, and appellant is entitled to recover the monies paid by her under all of such illegal and void agreements. Murphy v. San Gabriel Mfg. Co., 99 Cal.App.2d 365, 368, 222 P.2d 85. This makes unnecessary the consideration of appellant's further contention that the agreements constitute securities within the meaning of the Corporate Securities Act.

The judgment is reversed and the cause remanded with directions to the court below to ascertain the amount of monies paid by appellant to respondents under all five of the aforesaid agreements in issue, and thereupon to render judgment in favor of appellant for such amount, with interest thereon from May 25, 1949.

WHITE, P. J., and DORAN, J., concur.

116 Cal.App.2d 698

Ex parte SUSMAN.**Cr. 866.**

District Court of Appeal,
Fourth District, California.

March 13, 1953.

Proceeding in habeas corpus to secure release from extradition. The District Court of Appeal, Griffin, J., held that where California Law made provision for criminal enforcement of duty of support and also made provision for release from extradition of person criminally charged with non-support, but New York law did not have such provisions, father indicted in New York for abandonment of children without means of support and in destitute condition would not be relieved from extradition demanded by Governor of New York by father's having complied with order of California Court, requiring him to pay weekly support to children named in indictment.

Alternative writ discharged, peremptory writ denied, petitioner remanded.

Extradition ⇐29

Where California law made provision for criminal enforcement of duty of support and also made provision for relief from extradition of person criminally charged with nonsupport, but New York law did not have such provisions, father indicted in New York for abandonment of children would not be relieved from extradition demanded by Governor of New York by father's having complied with order of California Court requiring him to pay weekly support to children named in indictment. Code Civ.Proc. §§ 1650 et seq., 1651, 1660, 1661, 1670 et seq.; McK.Unconsol.Laws N.Y. § 2111 et seq., § 2118.

Harold D. Cornell, San Diego, for petitioner.

James Don Keller, Dist. Atty., by Olney R. Thorn, Deputy Dist. Atty., San Diego, for respondent.

GRIFFIN, Justice.

The petition of Sidney Susman shows that in the State of New York, in October, 1952, a Grand Jury indictment was returned against him for "abandonment of

children without means of support and in a destitute condition", a felony under the laws of that state. It is charged that the abandonment took place in the year 1950. The Governor of the State of New York issued an extradition warrant. It was presented to the Governor of this State who, in February, 1953, authorized the extradition of defendant. While in custody under said warrant, petitioner presented to the Superior Court in San Diego County, where he now resides with his present wife and child, a petition for writ of habeas corpus. A hearing was duly had thereon and it was there shown that previously, on February 4, 1953, petitioner had submitted to the jurisdiction of that court under a claim of right given by section 1661 of the Code of Civil Procedure of this state, and that on February 5th that court issued its order requiring him, among other things, to pay \$35 per week for the support of the two children named in the felony indictment. It was conceded that defendant fully complied with said order. In the habeas corpus proceeding it was contended that by reason of his compliance with said order, petitioner was, under section 1661, supra, relieved of extradition. After hearing, the court denied the petition for the writ and granted him a five-day stay of execution pending an application to this court for such a writ. An alternative writ was issued out of this court and bail was fixed at \$1000.

These facts were stipulated to by counsel for the respective parties and it was agreed that the transcript and proceedings had before the Superior Court and facts therein related may be presented as a part of the petition and return in this subsequent application for a writ of habeas corpus in this court. It was further agreed that the entire matter might be submitted forthwith without argument and on the record before us.

Counsel for petitioner relies principally upon the provisions of section 1650 et seq., C.C.P. known as the Reciprocal Enforcement of Support Law, Stats.1951, Vol. 1, chap. 694, p. 1906, effective the 91st day after June 23, 1951, wherein it is recited that the purposes of this law, Sec. 1651,

C.C.P. "are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto." See, also, prefatory note in Uniform Laws Annotated, 9A Miscellaneous Acts, 1952 Cumulative Pocket Part page 39, as to the purposes of such a law.

As will be noted, this act provides for a method of *civil* enforcement of duty of support of any person, Sec. 1670 et seq., C.C.P., with which civil duty we are not here concerned and for "criminal enforcement" of such duty. Sec. 1660, C.C.P. recites that the Governor of this state (California) may demand from the Governor of any other state (in the instant case New York) the surrender of any person found in such other state (New York) who is charged in this state (California) with the crime of failing to provide for the support of any person in this State and (b) the Governor of this state (California) may surrender on demand by the Governor of any other state (New York) any person found in this state (California) who is charged in such other state (New York) with the crime of failing to provide for the support of a person in such other state (New York).

Section 1661, C.C.P. then provides that an obligor contemplated by section 1660 who submits to the jurisdiction of the court of such other state (New York), and complies with the (New York) court's order of support (as determined by it) shall be relieved of extradition for desertion or nonsupport entered in the courts of this state (California) during the period of such compliance.

This section does not purport to interfere with what may be done by another state (New York) and, in the absence of a similar reciprocal provision adopted by another state, it does not provide for any relief from extradition in connection with desertion and nonsupport orders entered in such other state.

It is therefore clear that if conditions in the instant case were reversed and petitioner here had been charged in California with the offense and was found in New York and had submitted to the jurisdic-

tion of that court and obtained an order for support and complied therewith, he would be relieved of extradition for desertion or nonsupport entered in the courts of this state, during the period of such compliance.

The only question is whether New York adopted a similar reciprocal provision to section 1661, C.C.P. in reference to being relieved of extradition. If so, the writ should be granted since it has been stipulated that petitioner has fully complied with the order for payment of support issued in this state. Otherwise, the writ must be denied.

Several states, such as Colorado and Massachusetts, in adopting the reciprocal enforcement of support law, omitted this provision, and other states have included it. See Statutory Note following Sec. 6 of the 1950 Act, 9A U.L.A. supra, 1952, Pocket Part p. 46. New York is not there listed as having adopted the Reciprocal Enforcement of Support Act, as approved by the National Conference of Commissioners on Uniform State Laws in 1950, but it appears that it did, in 1949, adopt the Uniform Support of Dependents Law of New York, Chap. 807, Laws of 1949, from which the Reciprocal Enforcement of Support Law, in reference to civil proceedings or enforcement, was patterned, and which is sufficiently similar to that act in this respect to permit reciprocity between those states which have adopted their law.

An examination of that law, McKinney's Consolidated Laws of New York Annotated, Book 65, Part 1, Unconsolidated Laws, § 2111 et seq., discloses that the act adopted by the State of New York makes no provision for criminal enforcement, as does the Reciprocal Enforcement of Support Law adopted by this state, and it has no provision similar to sections 1660 and 1661 of our Code of Civil Procedure pertaining to the right of extradition or that a person criminally charged with nonsupport may be relieved of extradition. The laws of that state recite that the purpose of that act is to secure support in *civil* proceedings, prescribes the jurisdiction and powers of the court in this respect, and prescribes the procedure which is similar

to the procedure prescribed by the support law of this state in respect to civil enforcement under chapter 3, Title 10a, Part 3, sec. 1670 et seq., C.C.P. *Bellanca v. Bellanca*, Dom.Rel.Ct., 1950, 99 N.Y.S.2d 507; *Hodges v. Hodges*, Dom.Rel.Ct., 108 N.Y.S.2d 286; *Vincenza v. Vincenza*, 197 Misc. 1027, 98 N.Y.S.2d 470.

It should also be noted that section 2118 of the New York Act specifically provides that "This act shall be construed to furnish an additional or alternative *civil* remedy and shall in no way affect or impair any other remedy, civil or criminal, provided in any other statute * * *." (Italics ours.)

It therefore appears that the New York statute makes no provision in its Uniform Support of Dependents Law in respect to criminal enforcement or the relieving of extradition, as provided in our sec. 1661, C.C.P. Accordingly, there being no reciprocal legislation in this respect, the writ must be denied.

Alternative writ discharged, peremptory writ denied, and petitioner remanded.

BARNARD, P. J., and MUSSELL, J., concur.



116 Cal.App.2d 705

**GROSS v. MAYTEX KNITTING MILLS
OF CALIFORNIA, Inc. et al.**

Civ. 19383.

District Court of Appeal, Second District,
Division 1, California.

March 16, 1953.

As Modified on Denial of Rehearing
April 6, 1953.

Hearing Denied June 4, 1953.

Action against employer for breach of employment contract which required plaintiff to establish national sales force and which entitled him to commissions on all sales he made within an exclusive territory. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment for defendant, and plaintiff appealed. The District Court

of Appeal, Drapeau, J., held, inter alia, that the pleading raised an issue as to plaintiff's right to commissions during a certain period and exclusion of evidence on such issue and instruction to effect that commissions were not involved was prejudicial error.

Reversed and remanded with directions.

1. Master and Servant ⇨80(5)

Complaint alleging employer's breach of employment contract and further alleging that employee was entitled to commissions on sales made during certain period and praying for accounting sufficiently alleged that employee was entitled to commissions on sales during such period to warrant introduction of evidence on such issue.

2. Master and Servant ⇨3(2)

Portion of employment contract requiring employee to set up national sales force was divisible from portion regarding commissions payable to employee on sales.

3. Contracts ⇨171(1)

A "severable contract" is one the nature and purpose of which is susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, or intended by parties as being dependent.

See publication Words and Phrases, for other judicial constructions and definitions of "Severable Contract".

4. Appeal and Error ⇨1056(1), 1064(1)

Master and Servant ⇨40(2), 44

In action against employer for alleged breach of divisible employment contract which required employee to set up national sales force and which entitled him to commissions on sales, even if employee's discharge for failure to set up national sales force were warranted, it was prejudicial error to exclude evidence relating to commissions and to charge that question of commissions was not involved.

5. Appeal and Error ⇨1050(2)

In action against employer for alleged breach of employment contract which required employee to set up national sales force and which entitled him to commissions on sales, admission, over objection of irrelevancy, of telegram, authored by

plaintiff under another name, requesting employer's competitor to have named salesman, who was representing both competitors without permission to do so, contact signer of telegram with defendant's product was not prejudicial error, notwithstanding that defendant had testified that he had no knowledge of telegram at time of plaintiff's discharge.

Nathan L. Schoichet, Los Angeles, for appellant.

Harold Rubins, Los Angeles, for respondents.

DRAPEAU, Justice.

This is an appeal by plaintiff from a judgment in favor of defendants based on a verdict of the jury in an action for damages for breach of a contract of employment.

The record on appeal includes an engrossed settled statement summarizing the oral testimony in lieu of a reporter's transcript.

The record discloses that Maytex Knitting Mills had been engaged in the manufacture of underwear in Los Angeles for two years, when it decided to close out that line and start manufacturing ladies T-shirts and blouses. As a result, in the latter part of February, 1950, the company was not in production and had no sales force. Respondent Mayo, president of the company, was looking for a sales manager and appellant was recommended to him for the position. The two men met and respondent Mayo told appellant that Maytex needed national distribution of its product in order to stay in business, and that this should be accomplished quickly.

On March 12, 1950, the parties executed an agreement employing appellant as sales manager. He was to receive \$100 per week for three months and \$200 thereafter. The agreement ran from April 1, 1950 to December 31, 1951, with an option in appellant to renew for another two years if the gross sales reached \$250,000 in the period from July 1, 1950 to June 30, 1951.

By the end of May, 1950, the old company's inventory had been disposed of and orders for the new line of blouses were received early in April. In the meanwhile, nothing had been done by appellant toward setting up a national sales organization.

In July, respondent Mayo became dissatisfied with appellant's performance and asked for a new agreement in which appellant's earnings would be based on the amount of sales, thus giving him greater incentive to produce. Appellant was reluctant to give up his salary of \$200 per week, but agreed in order to "keep peace in the family" and because he could make more money on a commission basis.

The new agreement was for a two year term, and when it was executed on July 17, 1950, both parties were represented by their attorneys.

By its terms, appellant was employed as sales manager in charge of all sales. He in turn agreed to assume his duties as such and "to devote his best efforts and energies in organizing and directing the sales activities of Maytex, including the setting up and direction of a national sales organization", with full authority to direct and supervise, "hire and fire" all sales personnel.

In addition he was given exclusive selling rights of all Maytex products in the California territory, and was required "to devote his best efforts and energies consistent with his other duties hereunder in selling Maytex products in the California territory."

For these services Maytex agreed to pay appellant a commission equal to 7% of sales in the California territory, plus one-half of one per cent on all sales made by Maytex. Against this appellant was allowed a weekly salary and a drawing account. Maytex agreed to pay all of his local, traveling and entertainment expenses and to render monthly accountings, payment of compensation to be made simultaneously.

The contract contained an option in respondents to terminate it upon thirty days notice in the event comissionable sales were less than \$100,000 in the ensuing six

months, or were less than \$200,000 for the year ending July 16, 1951.

On July 27, 1950, the agreement was modified with respect to traveling expenses, and in August appellant agreed to a reduction in his commissions on sales to certain stores.

On September 11, 1950, appellant was discharged. This was confirmed by letter of September 13, 1950, signed by respondent Mayo, giving as reasons for the discharge appellant's failure and refusal to carry out the terms of the agreement, and to obey the reasonable instructions of said respondent. The last paragraph reads: "You are hereby directed to cease acting on behalf of Maytex at once, and to return all sample garments retained by you. Any commissions due you from Maytex will be paid promptly when the amount of said commissions is determined by our auditor."

In response to this, appellant's counsel directed a letter to Maytex on September 20, 1950, which contained, among other things, the following: "May I also point out that there are now commissions due under the contract which have not been paid, and demand is herewith made upon you to pay these commissions forthwith." This letter was admitted in evidence by stipulation. Thereafter, on motion of respondents, the trial court set aside the stipulation and withdrew the document from evidence. Appellant reoffered it but respondents' objection that it was incompetent, irrelevant, immaterial and hearsay was sustained. Respondents' objection to appellant's offer of proof on the same general grounds was also sustained and the offer was rejected.

There was evidence to the effect that appellant did some selling but made no effort to set up a national sales force. When urged to do so, said he was a salesman and interested only in sales made in California for which he received a higher commission than for other sales. He stated that if Mayo wanted a national organization he should set it up himself. In this connection, appellant produced a letter of inquiry from a prospective salesman in Seattle which he said he discussed with Mayo, but

that the latter refused to do anything about it. Respondent denied he ever saw or discussed this letter with appellant.

Appellant testified that on September 11, 1950, he received a complaint that some one had sold the same garment to two stores in Los Angeles and that it was being featured in the windows of one store to the displeasure of the other. He said he told Mayo: "Jack, you just can't do that." They then got into a heated argument during the course of which Mayo told him he was fired. On cross-examination, appellant admitted that the two stores in question were his accounts and if any one sold the same garment to both, he must have done so. In his deposition, appellant stated he did not remember any of the conversation culminating in his discharge. On cross-examination he testified that about ten days before trial he discussed the case with his attorney, who told him he would have to remember that conversation. He then "racked his brain" and remembered it.

Respondent Mayo's version of the same incident was as follows: He said he upbraided appellant for refusing to call on certain accounts and for failure to get the national organization set up. Appellant replied that under the contract he was not a sales manager, but a "free agent", and that he was only interested in his 7% commissions on California sales. Further that he was not working for Mayo but for the corporation, and would not take Mayo's orders unless they suited him and were to his advantage; that if Mayo did not stop annoying him about national sales, he would punch him in the nose. Mayo then told appellant if he did not follow his orders he was fired. Appellant replied that he "would sue Mayo for everything he had and stormed out of the office." This testimony was corroborated by the witnesses Stanley and Dassin, employees of Mayo.

All through the trial, the evidence on the various issues was sharply conflicting. At the conclusion, special interrogatories were answered by the jury as follows:

"1. Did the plaintiff discharge his duties as salesman and salesmanager during the period July 17, 1950, to

September 11, 1950, under his contract? *No.*

"2. Did defendants unreasonably and without sufficient justification, discharge plaintiff from his employment on September 11, 1950? *No.*"

It is here urged that the trial court "committed prejudicial and reversible error of law by its rulings and orders on the admission and exclusion of certain evidence on motions made to conform to proof and in connection with the instructions given to the jury and instructions refused and rejected."

Appellant first urges error by the trial court in excluding evidence relating to commissions actually earned by him prior to his discharge.

He particularly directs attention to the letter of September 20 (Exhibit 4) hereinbefore mentioned. Also to four letters exchanged between counsel after the start of this action concerning a check for \$356.78, dated December 19, 1950, purporting to be in payment of commissions due appellant from September 1, to September 11, 1950. (Exhibit 27 for identification.)

This evidence was offered on the theory that appellant was entitled to commissions on California sales for the two-month period even though it was assumed that he had not performed those terms of the agreement respecting a national sales force.

The trial court sustained respondents' objection to its introduction on the grounds (1) that this issue was not raised by the pleadings; and (2) that the contract was "entire" in the sense that appellant must have substantially performed all duties required of him before he became entitled to compensation.

The complaint alleges the agreement, performance of all covenants by appellant from July 17, to September 11, 1950, when he was "wrongfully and unlawfully discharged", and thereafter prevented by respondents from further performance, although he offered in good faith to resume and to continue to perform his duties under the contract. And it is further alleged that appellant is entitled to commissions on sales made for the entire period covered by the

contract, to wit: July 17, 1950 to July 16, 1952; that an accounting is necessary to ascertain such commissions; that appellant has estimated the over-all volume of sales for that period to be in excess of \$600,000; and that by reason of respondents' breach of contract, appellant has been damaged in the loss of commissions for the said period of the contract in the sum of \$38,000.

The complaint prays for an accounting of all Maytex sales made during the period of the written employment contract and for a judgment for \$38,000, "less any sums actually paid on account of commissions, as and for commissions due to plaintiff under the terms of the employment agreement."

[1] From the foregoing it is clear that the complaint sufficiently alleges that appellant is entitled to commissions on sales made in the period prior to discharge. In addition to his duties as a salesmanager, appellant had exclusive selling rights of all Maytex products in California. And it is conceded that he made some sales between July 17 and September 11, 1950. Moreover, the letter of discharge offers payment of "any commissions due you" when determined by the company's auditor.

The contract provides "Commissions based on sales as herein provided shall be payable to Gross, irrespective of the date of payment to Maytex or other selling commissions thereof which may be incurred by Maytex.

"Commissions earned by Gross shall be accounted for at the end of each month on the 10th day following the end of each month and payment made simultaneously with the accounting which is rendered. In making such payments Maytex shall deduct therefrom the salaries paid out to Gross and the advances made to Gross under the terms hereof."

Appellant "testified that at the time of his discharge he had received on account of commissions the sum of \$1,000 less Social Security and withholdings, and that he received no other or further compensation from defendants."

[2] Assuming that the discharge was justified under the evidence because of failure to set up a national sales force, as contemplated by the contract, that provision is divisible from those respecting commissions payable on sales.

[3] As stated in 6 Cal.Jur. 322, sec. 191: " * * * a severable contract has been defined to be one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor intended by the parties that they shall be."

[4] It follows that it was prejudicial error for the trial court to exclude from consideration by the jury the evidence tending to prove the issue of earned commissions.

In the circumstances it was likewise error to give the jury instruction No. 30, to wit:

"You are instructed that in this action plaintiff does not claim that there are any commissions due him for orders received by him before his discharge. If in fact plaintiff does have a claim for commissions due him for orders received by him before his discharge, you are not to consider such claim in connection with determining plaintiff's right in this action as such a claim, if any, is not involved here."

In view of the conclusions reached herein, appellant's requested instruction No. 5A respecting commissions earned before discharge might well have been given, with some modifications.

[5] Appellant claims error in admitting in evidence over his objection a Western Union telegram dated August 14, 1950, directed to Westwood Knitting Mills, Los Angeles, to wit:

"Mr. Dassin contact me immediately with your Maytex Knitting Mills line of Jersey blouses. Opening new store

first of October Regards Lowry Dept. Stores."

Mr. Dassin had known appellant when they were both employed by Westwood Knitting Mills. He testified that before he agreed to handle the Maytex line he talked to appellant who told him it was not necessary to consult with Westwood because the two lines were not competing. Respondent Mayo testified that appellant refused to call on certain stores and consented to have Dassin do so. Later Dassin received an order for Maytex and when appellant saw it on August 14, he became very angry and left the plant. Respondent further stated that Dassin showed him the telegram in question and told him that Westwood had discharged him. Mayo also testified that when he discharged appellant he did not know that he had sent the telegram and that it was not an element of appellant's discharge.

Appellant denied any knowledge of the telegram but when shown a copy of it on cross-examination, he admitted that he wrote it in anger and then decided not to send it; that he left it on a table in his apartment, where his wife found it and sent it. Mrs. Gross was not presented as a witness at the trial.

Appellant's objection to the admission of the telegram in evidence on the ground it was irrelevant and outside the issues of the case, was overruled.

This was proper. Having admitted that he wrote the telegram, it is not seemly for appellant to claim that its admission was prejudicial.

For the reasons stated, the judgment is reversed. The cause is remanded for a new trial on the single issue of the amount of accrued or earned commissions on sales, if any, made in the period prior to plaintiff's discharge, and with directions to enter judgment accordingly.

WHITE, P. J., and DORAN, J., concur.

116 Cal.App.2d 641

HARLESS v. WINTER et al.**HARLESS v. KIPP et al. (ten cases).****HARLESS v. CITY OF SAN DIEGO et al.**
(two cases).**SIPE v. CITY OF SAN DIEGO et al.****HARLESS v. CARTER et al. (four cases).****HARLESS v. EAGLE INVESTMENT CO.**
et al. (three cases).**HARLESS v. MILLS et al.****HARLESS v. STARKE et al.****HARLESS v. MICHIGAN MORTGAGE CO.**
et al.**HARLESS et al. v. PURDY et al. (two cases).****HARLESS v. SEDLACK et al.****Civ. Nos. 4533 to 4537, 4540 to 4550, 4553,**
4554, 4556 to 4561, 4563, 4564 and 4597.District Court of Appeal, Fourth District,
California.

March 11, 1953.

Rehearing Denied April 9, 1953.

Hearing Denied May 7, 1953.

Actions by plaintiff, as owner of unenforced street improvement bonds, against owners of tax deeds, for partition of realty allegedly subject to lien of such bonds. The Superior Court, San Diego County, William A. Glen, J., entered judgments for defendants, and plaintiff appealed. The District Court of Appeal, Russell, J., held that statute raising presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, operated to extinguish plaintiff's lien rights of foreclosure and parity under bonds, which were issued prior to 1930, where plaintiff failed to assert her rights within statutory period after due notice, precluding partition actions, and that presumption of extinguishment of liens was not overcome by evidence of their nonpayment or non-discharge of record.

Judgments affirmed.

1. Partition

Statutory remedy of partition as a means of enforcing improvement bond liens is in addition to other remedies existing at time of adoption, and amendment setting forth remedy conferred no substantive rights and did not guarantee perpetual

enforceability of any unenclosed liens existing at that time. Code Civ.Proc. § 752.

2. Partition

Remedy of partition as a means of enforcing improvement bond liens, created solely by statute and dependent upon statute alone, was subject to abolishment by legislature. Code Civ.Proc. § 752.

3. Municipal Corporations**Partition**

Statute raising presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, operated to extinguish lien rights of foreclosure and parity of holder of bonds issued prior to 1930, who failed to assert her rights within statutory period after due notice, precluding 1949 partition action against holders of tax deeds, and presumption of extinguishment of liens was not overcome by evidence of their nonpayment of nondischarge of record. Civ.Code, § 2911; Code Civ.Proc. §§ 330, 752.

John F. Bender, Compton and Gizella M. Allen, Los Angeles, for appellant.

Solon S. Kipp and W. E. Starke, San Diego, for respondent.

J. F. DuPaul, City Atty. of the city of San Diego and Robert T. Sjogren, Deputy City Atty., for respondent City of San Diego.

Hillyer & Hillyer, San Diego, for plaintiff in intervention and respondent, Stephen M. Kew, in action No. 4542.

MUSSELL, Justice.

Each of these listed actions in partition, under Section 752 of the Code of Civil Procedure, was brought by plaintiff as owner of unenclosed street improvement bonds issued by the City Treasurer of San Diego pursuant to the Improvement Act of 1911, Streets and Highways Code, § 5000 et seq. The complaint in each case was filed in 1949. It is stipulated by the parties that insofar as the law is concerned, the facts in each and all of the above actions are identical. More than four years had ex-

pired after the due date of said bonds or the last installment due thereon or of the last principal coupon attached thereto prior to the filing of plaintiff's complaint in partition and prior to January 1, 1947. Defendants are owners of tax deeds, all acquired from the State of California pursuant to Chapter 7, Part 6, Division 1 of the Revenue and Taxation Code and each of said deeds was issued prior to January 1, 1947.

The trial court found that the liens of said bonds and each of them terminated as of January 1, 1947, under the provisions of Section 2911 of the Civil Code of the State of California and that under the terms of said section, the liens of said bonds and each of them are conclusively presumed extinguished. Judgment was entered for defendants and plaintiff appeals.

Plaintiff contends that under the facts of these cases the provisions of Section 2911 of the Civil Code do not constitute a complete extinguishment of plaintiff's bonds on January 1, 1947; that the presumption set forth therein is dilutable, not conclusive, and that sufficient evidence was introduced to overcome the presumptions.

Defendants contend that they are the owners in fee and entitled to the possession of the various parcels of real property, free and clear of any purported claim of plaintiff; that her claim came too late; that having filed her actions for the first time in 1949, two years after the legislature decreed an end to this type of litigation on said bonds, she failed to carry the burden and prove her claims; and that she has no lien which she can enforce. Defendants' contentions must be sustained.

Prior to its amendment in 1945, Section 2911 of the Civil Code read as follows:

"A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

At the 1945 session of the Legislature, the section was amended to read as follows:

"A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, either:

"1. An action can be brought upon the principal obligation, or

"2. A treasurer, street superintendent or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent such assessment and which assessment is secured by a lien upon said real property; whichever is later.

"Anything to the contrary notwithstanding, any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished at the expiration of four years after the due date of such assessment or the last installment thereof, or four years after the date the lien attaches, or on January 1, 1947, whichever is later, or in the event bonds were or shall be issued to represent such assessment, the lien shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates."

At the same session the Legislature added section 330 to the Code of Civil Procedure, under the title headed "Time of Commencing Civil Actions", which section reads as follows:

"In all cases in which there is now vested or there shall hereafter be vested in a treasurer, street superintendent, or other public official the power to sell at public auction, after demand upon him by the holder of any public improvement bond, any lot or parcel of land upon which exists or which shall hereafter exist a lien to secure the payment of a public improvement assessment represented by said bond, and the act or law establishing such power fails to prescribe the time within which

such official may act, said official may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to January 1, 1947, whichever is later, but not thereafter. This section is not intended to extend, enlarge or revive any power of sale which has heretofore been lost by reason of lapse of time or otherwise."

In *Rombotis v. Fink*, 89 Cal.App.2d 378, at page 384, 201 P.2d 588, at page 591, the effect of these amendments was discussed and it was there said;

"The 1945 enactments of the Legislature, * * *, disclose a complete revisory plan with reference to the duration and extinction of assessment liens. In addition to the enactment of sections 330 and 2911 above quoted, the Legislature amended the Assessment Bond Refunding Act of 1933, St.1933, p. 1915, the Improvement Act of 1911, St.1911, p. 730, the Street Improvement Act of 1913, St.1913, p. 954, the Street Opening Act of 1903, St.1903, p. 376, the Street Opening Bond acts of 1911 and 1921 and the Street Opening Act of 1889, St.1889, p. 70, to provide, generally, that the lien of bonds or assessments should expire four years from the date of the last installment, whereas theretofore these acts provided variously that the lien should continue 'until paid', 'fully paid', or provided no duration period. It also amended section 329 of the Code of Civil Procedure to provide a two-year limitation on liens arising under street improvement proceedings taken under other than state laws. In the amendments to the various improvement acts no reference is made to liens already in existence, but in sections 329 and 330 of the Code of Civil Procedure, and in section 2911 of the Civil Code, the Legislature made express and specific provision for the extinction of such liens. These enactments reflect a clear purpose to provide a definite statute of limitations as to all liens arising under special assessments. They constitute a

'revision of the entire subject', within the rule set forth in *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 176, 74 P.2d 252, 260: '* * * In *Sponogle v. Curnow*, 136 Cal. 580, 584, 69 P. 255, 256, the rule is briefly stated as follows: "Although an act, or part of an act, may not be repeated expressly or by necessary implication, still a revision of the whole subject-matter covering said act would supersede all such portions as were omitted from the revisory act." * * *

"It is plain from its comprehensive enactments that the Legislature intended to and did provide a definite statute of limitations and a definite period of time upon the expiration of which street improvement liens would be not only unenforceable by foreclosure but also would be presumed to have been extinguished; and further that the Legislature intended its enactments to apply retrospectively, giving the holders of liens which had theretofore attached either four years or until January 1, 1947, whichever was later, in which to take action. The legislation took effect September 15, 1945, thus giving the holders of old liens 15½ months in which to act."

Section 752 of the Code of Civil Procedure, under which these actions are brought, reads as follows:

"(When and by whom action may be brought for partition of realty.) When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, or when real property is subject to a life estate with remainder over, an action may be brought by one or more of such persons, or, where property is subject to a life estate with remainder over, by the life tenant, or where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the holder of such lien, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a

part thereof, if it appears that a partition can not be made without great prejudice to the parties."

[1,2] In *Sipe v. Correa*, 38 Cal.2d 131, 134, 238 P.2d 989, the court, in discussing this section, held that the remedy of partition as a means of enforcing improvement bond liens, first provided in 1943 by amendment of Section 752 of the Code of Civil Procedure, was in addition to other remedies previously and then existing; that this 1943 amendment conferred no substantive rights, and did not guarantee the perpetual enforceability of any unenforced liens existing at that time. As a remedy created solely by statute, and dependent upon the statute alone, it was subject to abolishment by the Legislature. (Citing cases.) As we read this section, § 752, Code Civ.Proc., a right to bring an action in partition is given to one who has a lien on a parity with that on which the owner's title is based, and where, as here, plaintiff filed her actions in 1949, she had no lien which could be enforced or foreclosed by reason of the provisions of Section 2911 of the Civil Code and Section 330 of the Code of Civil Procedure. She had no lien on a parity with that of the defendants, or otherwise.

Plaintiff argues that the title conveyed to the defendants by the State was subject to the parity of her bonds and that the parity principle operated to sustain the availability of her partition action. Citing *Elbert, Ltd. v. Nolan*, 32 Cal.2d 610, 197 P.2d 537. However, in *Scheas v. Robertson*, 38 Cal.2d 119, 238 P.2d 982, the rule in the *Elbert* case that the bond lien continued to exist so as to support an action for partition although it could not be enforced through foreclosure proceedings by reason of the running of the statute of limitations was held to be inapplicable and was declared to be changed by the complete revisory plan of the 1945 legislation. Stats.1945, Chap. 360, Sec. 1; Chap. 361, Sec. 1. It was there held:

"* * * (1) sale by the state to a purchaser of realty which the state had acquired at a sale for delinquent taxes passes its title to the purchaser and eliminates the right of redemption; (2) the amendment of Civil Code section 2911 in 1945 established an abso-

lute limitation of four years after the due date of the bond or the last installment thereof or the last principal coupon attached thereto or until January 1, 1947, whichever is later, for the enforcement of the lien of bonds issued under the Improvement Act of 1911, and is a valid statute of limitations; (3) notwithstanding the fact that the Improvement Act of 1911 and the contract under which the bond was issued stated that the lien of the bond was to continue until the bond was paid, the amendment of 1945 satisfied the requirements of due process and did not impair the obligation of a contract; (4) the amendment of 1945 when applicable operates to prevent the holder of a street improvement bond issued under the Improvement Act of 1911 from enforcing his lien in any manner, whether the remedy pursued be a suit for partition or foreclosure; (5) the lien of a street improvement bond is presumed to have been extinguished at the expiration of the time stated in Civil Code section 2911, and one who purchases the property after such time has expired need not ascertain whether any lien securing such bond was in fact extinguished but may rely on the presumption." *Elbert, Ltd. v. City of Long Beach*, 108 Cal.App.2d 463, 464, 239 P.2d 4, 5.

[3] In the instant case, it is our conclusion that plaintiff had lost her lien rights of foreclosure and parity by reason of her failure to exercise such rights prior to January 1, 1947. The record shows that plaintiff's bonds were all issued prior to 1930 and that the present actions were not filed until 1949. The 1945 enactments gave plaintiff a reasonable time thereafter in which to protect her liens and such enactments were within the power of the Legislature. Plaintiff's liens were extinguished by her conduct in failing to assert her rights within the statutory period, after due notice. *Scheas v. Robertson*, supra, 38 Cal.2d 125-126, 238 P.2d 985-986.

Plaintiff argues that Section 2911 of the Civil Code merely creates a disputable presumption that her bonds were extinguished

and that the evidence produced by her showing that the bonds were unpaid and had not been discharged of record was sufficient to overcome the presumption. However, the record shows that plaintiff failed to produce evidence that she made a valid demand upon the city treasurer for a foreclosure during the times permitted; that she failed to produce evidence that a foreclosure action was filed or that she attempted to file such action during the times allowed under Section 6610 of the Streets and Highways Code; that she failed to produce evidence that she filed or attempted to file a partition action on or before December 31, 1946; that she failed to take advantage of the reasonable time limit prescribed in Section 2911 of the Civil Code and failed to plead and prove facts which would relieve her from the effects of the statute of limitations. The presumption of extinguishment of the liens was not overcome by evidence of their nonpayment or nondischarge of record. No equitable reason was shown excusing plaintiff's delay.

The judgment in each case is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



HARLESS v. GREGORY et al.

HARLESS v. KIPP et al. (two cases).

HARLESS v. CARTER et al.

LUBERCO, Ltd. v. MILLS et al.

Civ. Nos. 4538, 4539, 4551, 4552 and 4562.*

District Court of Appeal, Fourth District,
California.

March 11, 1953.

Rehearing Denied April 9, 1953.

Hearing Granted May 7, 1953.

Dismissed as to Nos. 4538, 4539, 4562
July 17, 1953.

Actions by owner of unforeclosed street improvement bonds, for partition of realty allegedly subject to lien of such bonds. The
*Subsequent opinion 267 P.2d 447.

Superior Court, San Diego County, William A. Glen, J., entered judgments for defendants, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that statute making presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, conclusive in favor of bona fide purchasers thereafter, operated to extinguish plaintiff's lien rights under bonds issued prior to 1930, where plaintiff took no steps to preserve such rights before expiration of statutory period, precluding partition actions against holders of tax deeds, who were entitled to conclusive presumption that plaintiff's liens had been extinguished upon expiration of statutory period.

Judgments affirmed.

1. Constitutional Law ⇨290(7)

Municipal Corporations ⇨408(2)

The 1945 enactment providing that liens to secure payment of public improvement assessments would be presumed extinguished after four years from date of assessment or last installment thereof, or four years after date lien attached, or on January 1, 1947, whichever was later, as applied to assessment bonds and liens in existence prior to effective date of legislation, satisfies requirements of due process of law. Civ.Code, § 2911.

2. Municipal Corporations ⇨519(5)

Partition ⇨26

Statute making presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, conclusive in favor of bona fide purchasers for value thereafter, operated to extinguish lien rights of holder of unforeclosed bonds, issued prior to 1930, who took no steps to preserve her rights prior to January 1, 1947, precluding her partition action against holders of tax deeds issued after such date, who were entitled to conclusive presumption that bond holders liens had been extinguished upon expiration of statutory period. Civ.Code, § 2911; Code Civ.Proc. § 752.

3. Municipal Corporations ⇨519(5)

The 1945 legislation raising presumption that liens of street improvement bonds

are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, and making such presumption conclusive in favor of bona fide purchasers after such date, embraced a complete re-visory plan with reference to duration and extinction of assessment liens, and provided a definite statute of limitations and a definite period of time after which liens would be presumed to have been extinguished. Civ.Code, § 2911.

John F. Bender, Compton and Gizella M. Allen, Los Angeles, for appellant.

W. E. Starke and Solon S. Kipp, San Diego, for respondents.

MUSSELL, Justice.

It is stipulated by the parties that insofar as the law is concerned, the facts in each and all of the above entitled matters are identical. Each of said cases is a partition action brought pursuant to Section 752 of the Code of Civil Procedure in respect to real property in San Diego county.

Plaintiff is the owner of unencumbered street improvement bonds, all issued prior to 1930 by the city treasurer of the city of San Diego pursuant to the Improvement Act of 1911. Streets and Highways Code, § 5000 et seq. More than four years had expired after the due date of said bonds or of the last installment due thereon of the last principal coupon attached thereto prior to the filing of plaintiff's complaints in partition and prior to January 1, 1947.

The defendants are owners of tax deeds acquired from the State of California pursuant to Chapter 7, Part 6, Division 1, Revenue and Taxation Code. Each of said tax deeds was issued subsequent to January 1, 1947, and these actions for partition were all filed in 1949.

The trial court found that the liens of plaintiff's bonds and each of them terminated after January 1, 1947, under the provisions of Section 2911 of the Civil Code of the State of California; that under the terms of said section, the liens of said bonds and each of them are conclusively presumed

extinguished and that defendants purchased the property as set forth in the complaint as bona fide purchasers under date of January 7, 1947. From the judgments for defendants which followed, plaintiff appeals.

Defendants contend that they are bona fide purchasers for value; that whether they are bona fide purchasers or not, the liens of plaintiff's bonds terminated as of January 1, 1947; that the court properly entered judgment against plaintiff. Plaintiff's contentions are (1) That the conclusive presumption clause contained in Section 2911 of the Civil Code as to the extinguishment of plaintiff's bonds, under the facts in these cases, is unconstitutional as violating the due process clause of the United States Constitution and (2) That the case of *Sipe v. Correa*, 38 Cal.2d 131, 238 P.2d 989, supports plaintiff's position. We conclude that plaintiff's contentions cannot be sustained.

In 1945 Section 2911 of the Civil Code was amended to read as follows:

"A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, either:

"1. An action can be brought upon the principal obligation, or

"2. A treasurer, street superintendent or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent such assessment and which assessment is secured by a lien upon said real property; whichever is later.

"Anything to the contrary notwithstanding, any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished at the expiration of four years after the due date of such assessment or the last installment thereof, or four years after the date the lien attaches, or on January 1, 1947, whichever is later, or in the event bonds were or shall be issued to represent such assessment, the lien

shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates."

[1] In *Scheas v. Robertson*, 38 Cal.2d 119, 126, 238 P.2d 982, the court held that these 1945 enactments come within the legislative prerogative and are not constitutionally objectionable. The validity of Section 2911 of the Civil Code, as amended in 1945, which raises the presumption of the extinguishment of assessment liens not enforced within the established period of limitations was fully considered and established in the cases of *Scheas v. Robertson*, supra; *Sipe v. Correa*, 38 Cal.2d 131, 238 P.2d 989, and *Anger v. Borden*, 38 Cal.2d 136, 238 P.2d 976. In *Sipe v. Correa*, supra [38 Cal.2d 131, 238 P.2d 991], cited by plaintiff, it was held that:

"Plaintiff had no vested right in the remedy of partition as a means of enforcing the lien of his bonds issued in 1928 and 1931. That remedy was first provided in 1943 by amendment of section 752 of the Code of Civil Procedure, and was in addition to other remedies previously and then existing. This 1943 amendment conferred no substantive rights, and did not guarantee the perpetual enforceability of any unenclosed liens existing at that time. As a remedy created solely by statute, and dependent upon the statute alone, it was subject to abolishment by the legislature. *Callet v. Alioto*, 210 Cal. 65, 67-68, 290 P. 438, and cases cited; *Coombes v. Franklin*, 213 Cal. 164, 166, 1 P.2d 992 [4 P.2d 157]; cf. *Carpenter v. Pacific Mutual Life Insurance Co.*, 10 Cal.2d 307, 335, 74 P.2d 761. Therefore, the fact that plaintiff could not pursue the remedy of partition as against the state during the years it held title to the property will not sus-

tain a constitutional objection of lack of due process.

"In any event, plaintiff could have preserved his right to seek partition against the ultimate purchaser by tax deed from the state if he had taken proper steps to perfect his liens and carry them into title before the expiration of the time limits specified in the 1945 legislation creating a 15-½ months period of grace. September 15, 1945, to January 1, 1947. After default on the bonds, and during the period the state held title to the property, plaintiff, by reason of the parity existing between the bond and tax liens, could have demanded that the county treasurer sell the property. Sts. & Hys. Code, sec. 6500 et seq.; *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Hornbeck*, 216 Cal. 730, 732, 17 P.2d 143. Then if plaintiff or some other person had bought the property at such sale, the liens of the bonds would have been carried into title to establish a tenancy in common with the state, as holder of the tax title, under the parity principle declared in *Monheit v. Cigna*, 28 Cal.2d 19, 27, 168 P.2d 965, 167 A. L.R. 995. As such tenant in common, the plaintiff or other purchaser would have avoided the conclusive presumption of extinction of liens as provided in the 1945 legislation, and would have been in a position to seek partition when the property was acquired from the state by a private purchaser such as defendants *Correa*."

[2, 3] In the instant cases, while plaintiff could not bring an action for partition against the State during the years the State held title to the property, she could have preserved her rights by demanding, after default on the bonds and while the State held title to the property, that the city treasurer sell the property and also could have foreclosed the liens on the bonds against the former owners' rights of redemption within four years after maturity of the bonds. She failed to thus preserve her rights and by the provisions of Section 2911 of the Civil Code her bond liens were

extinguished and terminated after January 1, 1947. Plaintiff then had no lien rights on a parity with defendants since they were bona fide purchasers. *Elbert, Ltd. v. City of Long Beach*, 108 Cal.App.2d 463, 465, 239 P.2d 4; *City of Los Angeles v. Ganahl*, 108 Cal.App.2d 460, 462, 239 P.2d 1. The 1945 legislation embraced a "complete revisory plan with reference to the duration and extinction of assessment liens" and provided "a definite statute of limitations and a definite period of time upon the expiration of which street improvement liens would be not only unenforceable by foreclosure but also would be presumed to have been extinguished", *Rombotis v. Fink*, 89 Cal.App.2d 378, 384, 201 P.2d 588, 591, and when, as here, defendants' tax deeds were issued subsequent to January 1, 1947, defendants were entitled to the conclusive presumption that plaintiff's liens had been extinguished upon the expiration of the statutory period.

Judgments affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



116 Cal.App.2d 911

HARLESS v. GREENE et al.

CITY OF NATIONAL CITY v.

HARLESS et al.

Civ. 4598.

District Court of Appeal, Fourth District,
California.

March 11, 1953.

Action by owner of unforeclosed street improvement bond, against holder of tax deed and claimants under record owners, for partition of realty allegedly subject to lien of the bond. The tax deed holder filed cross complaint. The Superior Court, San Diego County entered judgment against plaintiff, and she appealed. The District Court of Appeals, Mussell, J., held that statute raising

presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, operated to extinguish plaintiff's lien rights under bond issued in 1928, where plaintiff failed to assert her rights within statutory period after due notice, and that the presumption of extinguishment of lien was not overcome by evidence of its nonpayment and nondischarge of record.

Judgment affirmed and cause remanded for determination of defendants' claims.

Municipal Corporations ⇨519(5), 521

Partition ⇨26

Statute raising presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, operated to extinguish lien rights of holder of bond issued in 1928, who failed to assert her rights within statutory period after due notice, precluding her partition action against holders of tax deeds and claimants under record owners, and presumption of extinguishment of lien was not overcome by evidence of its nonpayment or nondischarge of record.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for appellant Betty Harless.

Edwin M. Campbell, National City, for appellant City of National City.

Solon S. Kipp and W. E. Starke, San Diego, for respondent Edward R. Greene.

MUSSELL, Justice.

This is an action for partition of real property in San Diego county, filed on March 13, 1950, and was brought pursuant to the provisions of Section 752 of the Code of Civil Procedure. Plaintiff is the owner of a unforeclosed street improvement bond issued by the City of National City on December 7, 1928, pursuant to the Improvement Act of 1911. Streets and Highways Code, § 5000 et seq. More than four years had expired after the due date of plaintiff's bond or of the last installment due thereon of the last principal coupon attached thereto prior to January 1, 1947.

Defendant National City claims title by virtue of a tax deed issued by the tax collector of National City on June 29, 1945. Defendants Edward R. Greene and Georgianna L. Greene claim to have obtained title to the property involved by deed from the record owners thereof. The City of National City filed a cross-complaint alleging ownership and possession of the property and sought a decree that all adverse claims of plaintiff and cross-defendants be determined and that it be declared that cross-defendants had no estate or interest in the property.

The trial court found that the lien of plaintiff's improvement bond terminated as of January 1, 1947, under the provisions of Section 2911 of the Civil Code of the State of California, rendered judgment against the plaintiff and decreed that the Greenses are the owners of the property involved, subject to the liens for taxes of the defendant National City. The claims of the city against defendant Edward R. Greene were not determined.

It is stipulated by the parties that the facts in the above entitled matter and all the law pertaining thereto is identical to the facts and law involved in the case of *Harless v. Winter*, Cal.App., 254 P.2d 168, and that following the decision herein, the respective claims of Edward R. Greene and the City of National City be referred back to the Superior Court for "readjudication".

In *Harless v. Winter*, supra, this court passed upon the questions here involved and reference is hereby made to that decision and the cases therein cited. We there held that plaintiff's liens were extinguished by the provisions of Section 2911 of the Civil Code and that the presumption of extinguishment of plaintiff's liens was not overcome by evidence of their nonpayment and nondischarge of record.

The judgment as entered herein is affirmed and the cause remanded to the trial court for determination of the claims of defendants Greene and the City of National City in accordance with the stipulation of the parties.

BARNARD, P. J., and GRIFFIN, J., concur.

PEOPLE v. ZANES.

Cr. 2844.

District Court of Appeal, First District,
Division 2, California.

March 20, 1953.

Rehearing Denied April 4, 1953.

Defendant was convicted in the Superior Court, Contra Costa County, Norman A. Gregg, J., of receiving, holding or forwarding money to be bet on a horse race, and defendant appealed. The District Court of Appeal, Dooling, J., held that jury was justified in finding that there had been no entrapment.

Affirmed.

1. Gaming $\S$ 98(3)

Evidence was sufficient to sustain conviction for knowingly receiving, holding or forwarding money to bet on a horse race. Pen.Code, $\S$ 337a, subd. 3.

2. Criminal Law $\S$ 556

Fact that prosecution introduced statement made by defendant to officer in which defendant declared that he did not know contents of papers, which contained money and instructions for betting money on horses, and which defendant received and delivered to alleged bookmaker, did not require acquittal of defendant on charge of receiving, holding or forwarding money to be bet on a horse race, where there was evidence that defendant did know contents of papers. Pen.Code, $\S$ 337a, subd. 3.

3. Criminal Law $\S$ 37

Where defendant would have committed criminal act in any event, creation by officer of opportunity for defendant to commit crime is not an "entrapment".

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

4. Criminal Law $\S$ 37

Where investigator for police department went to defendant's place of business with marked money, and investigator sat in booth with a stranger, and each wrote names of certain horses, which were running that day, on sheet of paper, put some paper money in the paper, and rolled the paper up, and then they went over to bar and stranger handed his roll of paper to defendant, and investigator then handed

his roll to defendant, jury was justified in finding that there was no "entrapment" in prosecution for receiving, holding, or forwarding money to bet on a horse race. Pen.Code, § 337a, subd. 3.

5. Gaming ☞102

In prosecution for receiving, holding, or forwarding money to be bet on a horse race, instructions were not objectionable, on ground that jury might have been misled into finding defendant guilty without finding that he knowingly received and transmitted the money. Pen.Code, § 337a, subd. 3

John F. O'Sullivan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen. and Leo J. Vander Lans, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of violating subd. 3 of sec. 337a Penal Code, receiving, holding or forwarding money to be bet on a horse race. He was acquitted of violating subd. 2 (keeping or occupying a room for betting purposes) and subd. 4 (placing or recording a bet).

Appellant operated a bar and restaurant. Ray Higgins had worked for appellant as a bartender and had been discharged by him because appellant heard that Higgins was "fooling around with horses". Higgins and John Cook frequented appellant's place of business. A written statement signed by appellant was introduced into evidence which contained the statement: "I hear people say that Cook and Ray Higgins take bets on horses, but I never see them do it."

An investigator for the police department entered appellant's place of business. He had \$8 in marked paper currency with him. He sat in a booth with a stranger to him. Each of the two wrote the names of certain horses which were running that day on a sheet of paper, put some paper money in the paper and rolled it up. They then went to the bar and the other man handed

his roll of paper to appellant and said: "Here, take this." The investigator said: "Will you take mine too" and handed it to him. Appellant took the two packets and put them in the cash register. About two minutes later Higgins entered and walked behind the bar, whereupon appellant opened the cash register and handed Higgins the two packets. Higgins went into the kitchen and shortly thereafter Higgins, Cook and appellant were arrested. Cook had the marked money on his person. There was testimony from a police officer that after his arrest appellant stated "that he would receive bets from people and give them to Mr. Higgins and sometimes Mr. Higgins would give him envelopes back to give to some of the people * * * sometimes he would receive money wrapped in a piece of paper and give to—would give to Ray Higgins and sometimes * * * Ray would give him envelopes to give to other people." The money given to appellant was rolled in the pieces of paper so that it could only be seen by looking into the ends. Appellant on the trial denied all knowledge that the rolls of paper contained money or records of bets.

[1] Appellant attacks the sufficiency of the evidence to support a finding that he knowingly received, held or forwarded money to be bet on a horse race. The circumstances above recited are sufficient to support such an inference. Appellant's admission that he had in the past received bets in the form of money wrapped in paper, to give to Ray Higgins, coupled with the fact that he accepted the two packets on that day and delivered them to Higgins although according to the investigator's testimony Higgins' name was not mentioned, together with the other facts in evidence, would reasonably support the inference that appellant knew that he was receiving money to be delivered to Higgins to bet on a horse race. The case in this respect is stronger than *People v. King*, 111 Cal.App.2d 201, 244 P.2d 20; *People v. Coppla*, 100 Cal.App.2d 766, 224 P.2d 828; *People v. Simon*, 66 Cal.App.2d 860, 153 P.2d 420; and *People v. Rabalet*, 28 Cal. App.2d 480, 82 P.2d 707, which are relied on by appellant.

[2] The prosecution introduced a statement made by appellant to an officer in which appellant declared that he did not know the contents of the papers which he received and delivered to Higgins. Appellant claims that the state having introduced this statement is bound by it. The rule is not so broad as shown by *People v. Coppla*, supra, 100 Cal.App.2d 766, 224 P.2d 828, cited by appellant. The court in that case said 100 Cal.App.2d at page 769, 224 P.2d at page 830: "The prosecution having presented as a part of its case the statement of the defendant that he did not know what the sealed envelopes contained, is bound by that evidence *in the absence of proof to the contrary.*" (Emphasis ours.) The qualification which we have emphasized in this quotation is satisfied in this case as we have pointed out above. *People v. Marks*, 111 Cal.App.2d 357, 359, 244 P.2d 771.

[3,4] Appellant's claim of entrapment will not stand up under the settled rule that where the defendant would have committed the criminal act in any event the creation of the opportunity to commit the crime by the officer is not an entrapment. *People v. Makovsky*, 3 Cal.2d 366, 44 P.2d 536; *People v. Crawford*, 105 Cal.App.2d 530, 234 P.2d 181. The question of entrapment was submitted to the jury on instructions which correctly delimited the doctrine and the evidence supports the jury's finding against appellant on this issue.

Finally appellant complains that the jury was not properly instructed on knowledge as an element of the offense. An instruction was given in the language of sec. 20, Pen.Code: "In every crime * * * there must exist a union, or joint operation of act and intent, or criminal negligence." The words "criminal negligence" would have been better omitted. The court further instructed in the language of sec. 337a,

subd. 3 which omits any reference to knowledge. However we are satisfied that the jury in this particular case could not have been misled into believing that appellant could be convicted if he took and transmitted the packets to Higgins without knowledge that they contained money to be wagered on horses. The question of knowledge or lack of it was the subject of much conflicting testimony, appellant testifying flatly that he did not know what the packets contained; and in instructing on the defense of entrapment the court stated: "If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose * * * the defendant is not criminally liable * * *."

"It is important in considering the defense of entrapment to ascertain whether the acts charged * * * were the result of the intent of some other person to place the accused in the position where he might be charged with the offense, in which event the defendant may not be convicted or whether the defendant, acting in pursuance of his own intent, committed the acts, such other person merely affording him the opportunity of doing so, in which latter event the defense of entrapment would not relieve the defendant from responsibility."

[5] Other similar instructions on entrapment were given also stressing the necessity of the intent to commit the crime on the defendant's part. In view of these instructions it is not conceivable that the jury could have been misled into finding appellant guilty without finding that he knowingly received and transmitted money to be wagered on horse races.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

116 Cal.App.2d 802

PEOPLE v. TAYLOR.**Cr. 4882.**

District Court of Appeal, Second District,
Division 2, California.

March 20, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of grand theft, and he appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding of guilty on each of five counts.

Judgments and orders affirmed, except as to count II.

1. Larceny ☞14(1)

To constitute theft by trick or device there must be a taking, an asportation of the thing taken, the thing taken and carried away must be the property of another, and the taking and carrying away must be with an intent, without claim or pretense of right or justification, to deprive the owner of his property wholly and permanently.

2. Larceny ☞65

Evidence was sufficient to sustain conviction of defendant on five counts of grand theft by taking and carrying away the check of another with intent to deprive true owner of such property permanently and without any rightful claim or justification.

3. Larceny ☞70(1)

In prosecution for grand theft, instructions defining embezzlement, obtaining property by false pretenses, and larceny by trick and device, was not insufficient on ground that it told jury it should find defendant guilty of theft by trick and device without instructing it on quantum of proof necessary.

4. Criminal Law ☞780(1)

In prosecution of defendant for grand theft, wherein it appeared that defendant had entered into agreement with traffic consultant whereby consultant would receive 50% of sums obtained on contracts procured for certain association, and that defendant had procured checks on representations that deposit was prerequisite to application with Interstate Commerce Com-

mission for recovery of overpayment of freight charges, and checks were turned over to association and defendant received one half the amount, evidence did not warrant instruction that traffic consultant was an accomplice whose testimony must be corroborated, and refusal of such instruction was not error.

5. Criminal Law ☞800(2)

In prosecution for grand theft, committed by trick or device, failure of court to define for jury the words "fraud", "artifice", "trick" and "device", was not error, since words were in common usage and of common knowledge.

6. Criminal Law ☞800(2)

It is unnecessary to define for the jury every word found in a statute describing a crime, particularly where the words are in common use.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

William W. Larsen, Los Angeles, for appellant.

McCOMB, Justice.

From a judgment of guilty on six counts of grand theft after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

The evidence being viewed in the light most favorable to the people (respondent) discloses that defendant entered into an agreement with A. E. Norrbom, a transportation consultant doing business as the West Coast Traffic Association, whereby Mr. Norrbom would receive fifty per cent of all sums obtained on contracts which defendant procured for the West Coast Traffic Association; after entering into such agreement defendant represented to (a) Mr. Schaefer of the Julius V. Madsen Company, (b) Mr. Hamilton of the Earle C. Anthony Company, (c) Mr. Spriggs of the R. E. Spriggs Company, (d) Mr. Lund of the General Distributing Company, and (e) Mr. Chudacoff of the Associated Brewers Distributing Company that he could

recover from the Interstate Commerce Commission sums which, he stated, they had overpaid to common carriers on freight charges. He stated to the aforementioned gentlemen that it was necessary for him to make a deposit with the Interstate Commerce Commission at the time he filed an application for the refund.

Defendant received from (a) Mr. Schaefer, \$300, (b) Mr. Hamilton, \$2400, (c) Mr. Spriggs, \$300, (d) Mr. Lund, \$300, and (e) Mr. Chudacoff, \$3000. The checks representing the foregoing sums were turned over to the West Coast Traffic Association and defendant in each instance received half of the sum represented by such checks.

As a matter of fact in making application to the Interstate Commerce Commission it was not necessary to make any deposit with the commission and none was made by defendant, nor did defendant obtain any refunds from the commission or return to any of the parties the money which he had received from them. None of the above named gentlemen would have given the respective sums to defendant but for the fact they believed it was necessary to make a deposit with the Interstate Commerce Commission in order to obtain a refund on the proposed overcharges.

Respondent concedes there is not substantial evidence to sustain the verdict of guilty on Count II of the information. Therefore the judgment, which is predicated on Count II will be reversed.

Questions: First: Was there substantial evidence to sustain the finding of guilty on each of the five counts mentioned above?

[1] *Yes.* Witnesses gave direct testimony on each and every fact set forth above. It is settled that to constitute theft by trick or device there must be (1) a taking, (2) an asportation of the thing taken, (3) the thing taken and carried away must be the property of another, and (4) the taking and carrying away must be with an intent, without claim or pretense of right or justification, to deprive the owner of his property wholly

and permanently. (*People v. Edwards*, 72 Cal.App. 102, 112 et seq., 236 P. 944.)

[2] The foregoing evidence sustains the trial court's finding that in each case defendant (1) took a check from each of the parties mentioned which (2) he carried away, (3) it not being his property, but the property of another, and (4) he had the intent to deprive the true owner of such property permanently and without any rightful claim or justification to such property.

Second: *Did the trial court commit prejudicial error in failing to instruct the jury on the quantum of proof necessary for the conviction of theft on false pretenses?*

[3] *No.* The trial court instructed the jury as follows:

"Sometimes it is difficult to determine which, if any, of three forms of theft the facts of a case show was committed, because while the distinction between them is real, the evidence may be susceptible of different reasonable interpretations. Those three forms of theft are: 1. Embezzlement; 2. Obtaining property by false pretense; and 3. Larceny by trick and device.

"When one receives the possession of property lawfully by virtue of the fact that it is entrusted to him, and thereafter he violates his trust and fraudulently converts the property to his own use or to a use not authorized by the owner, his theft is called embezzlement.

"When one knowingly and with design uses some fraudulent representation or pretense as a means of obtaining property from another, who, in parting with it, intends to transfer title as well as possession to the person who so obtains possession, the theft is called obtaining property by false pretense.

"When one obtains possession of the property of another by some trick or device, intending to convert it to his own use, and to permanently deprive the owner of it, and the owner, al-

though parting with possession to such person, does not intend to transfer his title to that person, the theft is called larceny by trick and device.

"If you should find that the defendant committed any of the three kinds of theft just mentioned, you should return a verdict of guilty, and it will not be necessary or proper for you to state in your verdict which of the three forms of theft was committed."

In addition the jury was given the definition of embezzlement, a statement of what constitutes theft by obtaining property through false pretenses and the definition of larceny by trick and device.

There is no merit in defendant's contention that the instructions quoted above, plus the statement of what constitutes the obtaining of property by trick and device, told the jury it could find defendant guilty of such theft without instructing it on the quantum of proof necessary. The only reasonable view that can be taken of the evidence is that each man intended to pass possession of his check or the money represented thereby to defendant but did not intend to pass title thereto to him. The check or money represented thereby was given to defendant to be used by him as a deposit with the Interstate Commerce Commission in a proceeding for recovery of specified overcharges to be prosecuted for the benefit of each business man, and the check or the money was to be returned if the proceeding ended in failure of recovery. None of the men would have given defendant his check if he had known that no part of it was to be used as such deposit. The offenses through trick and device shown by the evidence required no corroboration. (*People v. McCabe*, 60 Cal. App.2d 492, 497, 141 P.2d 54.)

The jury was properly instructed:

"* * * If such owner parts with the possession of the property intending that it shall be used for or applied to a specific purpose, and the person receiving the property, at the time it is received, feloniously intends to convert it to his own use and steal it and not to apply the same to the use or

purpose for which it was received, knowing that the owner parted with it only for such specific use or purpose, then the owner of the property, in legal contemplation, does not part with his title to the property. When property is thus unlawfully taken, the crime is that of larceny by trick and device."

The jury was also instructed that to constitute the offense of obtaining property by false pretenses the owner must intend to divest himself of title thereto. It is clear that the jury was not misled by the foregoing instructions.

Third: *Did the trial court commit prejudicial error in failing to instruct the jury on the necessity for evidence corroborating the testimony of an accomplice?*

[4] No. Defendant's contention that Mr. Norrbom was an accomplice of defendant fails to find any support in the evidence. The uncontradicted evidence discloses that defendant lied to Mr. Norrbom, and Mr. Norrbom had no knowledge of defendant's fraudulent practices until after defendant's victims had been deprived of their property wrongfully by him and had made complaint to Mr. Norrbom.

Fourth: *Did the trial court err in failing to define for the jury the words "fraud", "artifice", "trick" and "device"?*

[5,6] No. It is unnecessary to define for a jury every word found in a statute describing a crime, particularly where such words are in common use. In the present case the words "fraud", "artifice", "trick" and "device" are words in common usage and common knowledge. Therefore it was unnecessary for the trial court to give any instruction defining their meaning. (*People v. Ahsbahs*, 77 Cal.App. 2d 244, 249 ff., 175 P.2d 33; *People v. Brown*, 114 Cal.App.2d 52, 249 P.2d 595.)

We have been materially aided in the disposition of this case on appeal by the splendid brief prepared on behalf of the People by Deputy Attorney General Elizabeth Miller.

The judgment and order denying a motion for a new trial predicated upon Count

II of the information is reversed. The judgments and orders as to other counts in the information are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.



113 Cal.App.2d 713

PEOPLE v. ESTRELLA et al.

Cr. 4902.

District Court of Appeal, Second District,
Division 1, California.

March 16, 1953.

An accused was convicted in the Superior Court of Los Angeles County, Kenneth C. Newell, J., of burglary of men's clothing from a store and he appealed from the judgment and from an order denying a motion for new trial. The District Court of Appeal, Doran, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law ⌋683(1)

In prosecution for burglary of men's clothing from a store, prosecution, on rebuttal, was improperly permitted to introduce evidence to effect that defendant had admitted use of narcotics, as against contention that such evidence was admissible in rebuttal of defendant's testimony that he was a hard worker who was supporting a family, earning \$10 to \$20 a day.

2. Criminal Law ⌋1169(1)

Improper admission of evidence in prosecution for burglary of men's clothing from store did not justify reversal of conviction where verdict was supported by abundant substantial evidence and different result could not reasonably be expected should a new trial be ordered.

3. Criminal Law ⌋1170½(5)

In prosecution for burglary of men's clothing from a store, action of trial court in excluding as immaterial a question asked

prosecuting witness on cross-examination as to whether primary purpose of witness in visiting jail was to identify certain people was not error requiring reversal of conviction where defendant had opportunity to go into matter of identification and to test credibility of witness.

4. Witnesses ⌋267

Extent to which a cross-examination may be carried in criminal prosecution rests largely in discretion of court.

5. Witnesses ⌋268(1)

In prosecution for burglary of men's clothing from a store, trial court did not abuse discretion in refusing to permit defendant on cross-examination of officer to show that arrest of defendant's wife was used as an instrument to apply pressure to defendant.

6. Criminal Law ⌋699

In criminal prosecution trial court has duty to curb propensities of attorneys to overstep bounds of propriety and to make certain that members of jury are not led astray by improper statement of attorneys.

7. Criminal Law ⌋1171(6)

In prosecution for burglary of men's clothing from store, record did not show that defendant was prejudiced by action of prosecutor during course of trial and in argument to jury in stressing "parole" and "San Quentin" in effort to influence jury to think that defendant was type of man to commit crime charged.

8. Burglary ⌋41(1)

In prosecution for burglary of men's clothing from a store, evidence justified conviction.

Cletus J. Hanifin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The appellant, charged jointly with Richard Chavez Estrella and Alex Amadril Vasquez, was convicted of burglary of Wood-

ruff's Mens Store in Alhambra. The burglary involved theft of 89 tropical worsted suits and 22 pairs of shoes from a warehouse, of the approximate value on a cost basis, of \$1,200, the loss being discovered by the proprietor on December 17, 1951, at about 11:30 a. m. The warehouse door, although closed, was not locked, during the daytime, and the goods in question were just inside the door. The defendant Vasquez pleaded guilty; Estrella, who pleaded not guilty, was tried with appellant Martinez and convicted. The appellant pleaded not guilty and admitted a prior conviction.

The first time the defendant Martinez was seen by Mr. Woodruff, the proprietor, was on December 21, 1951, about 11:30 a. m. when appellant was observed standing near a green Pontiac sedan not far from the warehouse, talking to two men in the automobile. About the same time, Horace Whipple, an employee, likewise saw Martinez standing beside the green Pontiac; defendant Vasquez was seated behind the steering wheel, and Estrella was walking from the vicinity of the warehouse door towards the alley. Two other employees, Mrs. Freda Koontz, a part time saleslady, and Curtiss Ellis, a salesman and buyer, had seen Martinez and the green Pontiac near the warehouse, on December 17, 1951.

Stolen articles were found in Estrella's bedroom, at Vasquez' residence, and in Martinez' possession. Part of the merchandise was recovered from the Central Market where it had been disposed of. The defendants were identified at the Police Station by the proprietor and others. Martinez denied being implicated in the burglary; claimed that stolen shoes were a present from Vasquez, and that "he got the suit from Vasquez". The other defendants attempted to exonerate Martinez and Estrella testified that Martinez was not present at the Woodruff store. There was testimony by police officers to the effect that the defendants had admitted being involved in the burglary; this conversation was denied by defendants. The green sedan was owned by Estrella's wife who was arrested but later released.

The appellant testified to employment as a "swamper", unloading fruits and vege-

tables at the Union Terminal Market, earning \$20 or less per day; appellant was married and supporting a family. Martinez denied ever having been at the Woodruff store. Appellant likewise denied having any conversation with officers to the effect that "the reason he was denying his part in the burglary was because he was on parole and would have to go up for two years". Officer Schofield testified that "We asked the defendant Martinez how many shots or caps per day he was required to keep him fixed, and he stated between six or eight. I asked him how much they were per cap. He said five dollars. * * * A cap "is a small capsule full of some form of narcotics that is used for administration by hypodermic needle". There was testimony by Bailiff Jack Barnes that the defendant Vasquez had stated in the courtroom that "If I would tell the truth, all three of us would go to jail".

Appellant assigns error in permitting the prosecution, on rebuttal, to introduce evidence to the effect that appellant had admitted the use of narcotics. Appellant contends that not only was such evidence improper on rebuttal, but was introduced for the purpose of prejudicing the jury against the appellant by showing "other offenses wholly unconnected with the offense charged". Respondent's answer to this is that such proof was admissible on rebuttal of Martinez' testimony "that he was a hard-working man who was supporting a family", earning ten to twenty dollars a day; such evidence showing that appellant was using thirty to forty dollars worth of narcotics per day, and thus furnishing a motive for the burglary, committed for the purpose of obtaining necessary money to buy narcotics.

[1] *People v. O'Brand*, 92 Cal.App.2d 752, 207 P.2d 1083, 1085, cited as authority for the admission of such evidence, is inapplicable to the present situation. In the *O'Brand* case, where defendant was charged with attempted burglary of a drug store, evidence in respect to the defendant's use of narcotics was held admissible to establish a motive for the attempted burglary. In the present case appellant was accused of burglary of men's clothing, a subject having nothing to do with the use of narcotics.

Only by a strained interpretation can the O'Brand case be deemed authority for admission of evidence of appellant's habits in reference to the use of narcotics. In the language of that opinion, "the general rule forbids the admission of evidence of other crimes and degrading practices unrelated to any issue on trial".

[2] Although there was error in the admission of evidence of appellant's use of narcotics, such error cannot be deemed prejudicial in the instant case. If the evidence connecting Martinez with the burglary had been slight, the error in question might well be prejudicial, but such is not the case. The record discloses abundant, substantial evidence to support the verdict, and should a new trial be ordered, no different result could reasonably be expected. In this state of the record, the admission of such evidence cannot justify a reversal.

The appellant complains of the trial court's failure "to give any instruction relating to receiving oral admissions with caution, citing Section 2061(4) of the Code of Civil Procedure which provides that the jury shall "be instructed by the court on all proper occasions: * * * 4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution". Appellant's brief concedes that "defendant did not offer such instruction", but cites *People v. Bemis*, 33 Cal.2d 395, 202 P.2d 82, 85, stating that "it cannot be assumed that the jury will have in mind the considerations that may affect the weight or credibility of the testimony of an accomplice or the evidence of the oral admissions of a party".

While the record herein discloses testimony in reference to conversations and oral admissions which were controverted by the appellant, and no instruction given concerning the manner in which such admissions were to be considered, the error cannot be deemed prejudicial. As said in respondent's brief, the decision was in no wise dependent on such admissions, and was adequately supported by other substantial evidence, "such as the possession by the defendant of some of the stolen merchan-

dise, and the testimony of four witnesses that the defendant was in the vicinity of the burglarized store on the day of the burglary and four days later".

[3] It is likewise contended that there was error "in limiting the cross-examination by appellant of the prosecuting witness, *Clinton V. Woodruff* * * * for the purpose of testing the powers of observation and the memory of such witness". The witness was asked whether "when you came to the jail that your primary purpose was identifying certain people", which question was excluded on the ground that the purpose of coming to the jail was immaterial. Woodruff was later called as a witness by the appellant and examined in reference to the identification, although it is asserted that this later examination "was forced on the defense", by the curtailment of previous cross-examination. No reversible error is apparent in reference to this matter. It does not appear that appellant suffered any injury being accorded full opportunity to go into the matter of identification and to test the credibility of the witness.

[4,5] The trial court is alleged to have erred "in refusing to permit defendant to question evidence as to the voluntary character of statements and implied admissions as affecting admissibility of the alleged confession and statements of the defendant". Officer Miller, the witness under examination, testified that the statement by appellant was made freely and voluntarily. On cross-examination there was an effort to show that "the arrest of appellant's wife was used as an instrument to apply pressure to the defendant", which evidence was objected to as not proper cross-examination. As said in respondent's brief, quoting from *People v. Monson*, 102 Cal.App.2d 308, 313, 227 P.2d 521, 524, "The extent to which a cross-examination may be carried rests largely in the discretion of the court". In the instant case the record discloses no abuse of discretion and no resulting prejudice to appellant's rights.

The appellant alleges prejudicial error by reason of "the repeated and gross misconduct of the District Attorney during

the course of the trial and in his argument to the jury" and contends that "the admonitions of the trial court did not remove or overcome the prejudicial effect of said misconduct". Specifically, appellant calls attention to the fact that "The prosecutor was not content to show that defendant had been once previously convicted in impeachment * * * but continued the subject stressing 'parole' and 'San Quentin' seeking to degrade appellant and influence the jury to think that appellant was the type of man to commit the crime charged". Also stressed is the prosecutor's repeated reference to "narcotics", and an assertion that the defendants "apparently sought to make their mustaches look alike" to conceal identity.

[6, 7] It may well be that the conduct of the District Attorney in this case was, in some of the instances mentioned not what it should have been. In the heat of trial and zeal of prosecution it is not uncommon for attorneys to overstep the bounds of propriety. It is always the duty of the trial court to curb such propensities and to make certain that members of the jury are not led astray by improper statements. Appellant herein, apparently, does not claim that the trial court neglected this duty, but rather that the prejudicial effect was so great that nothing could cure it. Unless appellant has suffered some prejudice from the prosecutor's conduct, it cannot be deemed reversible error, and in the instant case such prejudice is not apparent.

[8] The appellant's argument that "The verdict is contrary to and unsupported by the evidence and contrary to law", as hereinbefore indicated, is untenable. Part of the stolen merchandise was found in appellant's possession, and the jury saw fit to disbelieve the defendant's explanation that the goods had been innocently received. Testimony as to the presence of Martinez at the scene of the burglary further connected this defendant with the crime. In no sense can the verdict be deemed unsupported. And for the reasons hereinbefore mentioned no reversible error was committed in the denial of appellant's motion for a new trial.

The judgment and order denying a new trial are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 724

SIMMER v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15342.

District Court of Appeal, First District,
Division 1, California.

March 17, 1953.

Action for personal injuries sustained when defendant's bus commenced movement while plaintiff, who was apparently intoxicated, was walking along side of bus with his hands thereon, purportedly preparatory to boarding bus. The Superior Court, City and County of San Francisco, entered judgment on verdict for defendant, and plaintiff appealed. The District Court of Appeal, Bray, J., held that evidence was such that last clear chance instruction should have been given.

Judgment reversed.

1. Negligence ⇐83.1

Where plaintiff has been negligent and as result thereof is in position of danger from which he cannot escape by exercise of ordinary care, and defendant has knowledge that plaintiff is in such situation, and knows, or in exercise of ordinary care should know, that plaintiff cannot escape and defendant has last clear chance to avoid accident by exercising ordinary care, but fails to exercise same, and accident and injuries to plaintiff are proximate result, the last clear chance doctrine is applicable.

2. Negligence ⇐138(4)

Question whether last clear chance doctrine is applicable is not dependent upon testimony of defendant alone, but instruction thereon is required to be given if there is any evidence in case which would justify application of doctrine.

3. Automobiles ⇨246(58)

In action for injuries to pedestrian when defendant's bus commenced movement while pedestrian was walking along side it, apparently preparatory to boarding it, evidence warranted giving of plaintiff's requested instruction on last clear chance, and its refusal constituted error.

4. Negligence ⇨83.11

The rule that an intoxicated person is held to the same standard of care as an ordinary, prudent, sober person, does not prevent the application of the last clear chance doctrine, but defendant seeing such person in position of danger in which he has negligently placed himself, and knowing him to be intoxicated, must consider that condition as well as his position in determining whether that person is aware of his danger or is able to use ordinary care to extricate himself therefrom.

Ben K. Lerer, San Francisco, Fred Leuenberger, San Francisco, for appellant.

Dion R. Holm, City Atty., City & County of San Francisco and Edward F. Dullea, Deputy City Atty., San Francisco, for respondent.

BRAY, Justice.

In an action for personal injuries, plaintiff appeals from a judgment for defendant based upon a jury verdict.

Question Presented.

Should the court, as requested, have instructed on last clear chance?

Evidence.

One Eaton was the operator of a trackless trolley bus belonging to defendant's municipal railway. As the bus approached the intersection of Hayes and Fillmore Streets, Eaton saw plaintiff at the near corner standing on the sidewalk. Eaton testified plaintiff was drunk. (Plaintiff testified that he had had only one drink of whiskey and the proverbial "couple of beers.") Eaton stopped the bus "because—anyone around the loading zone I thought might possibly want a bus." No one got on or off. Eaton opened the door and

waited two or three seconds. He looked back and plaintiff seemed to be staggering around at the rear end of the bus, "four or five feet away from" it "in towards the sidewalk." Eaton, figuring that plaintiff did not want the bus, closed the bus and left. In this particular locale Eaton "had occasion to see many people who were staggering, and he just looked like a typical man who was under the influence of liquor * * *." Eaton did not learn of the accident until he returned to the car barn.

Plaintiff testified that the bus came to a stop about two feet from the curb. He stepped off the curb and started to walk alongside the bus towards its front door. When he was about two feet from the door, it closed. Plaintiff "was scared, so I held my hand this way [evidently against the side of the bus], and I fell down, and after that I don't know nothing." While his testimony is not clear, apparently he testified that he placed both hands against the side of the bus just as it started up.

Sally Ramirez, aged 14, was an eyewitness. She testified that after the bus stopped, plaintiff walked alongside the bus holding on to it "sort of" with both hands. The operator looked back "and I guess he didn't see him or something and he just closed the doors and left." The testimony of Sally and another witness indicated that plaintiff was drunk. Plaintiff received serious injury to his right hand, wrist and forearm.

Last Clear Chance.

[1] Plaintiff offered correct instructions on last clear chance. The court refused to give them. The rule of last clear chance is well stated as follows: "The elements of the last clear chance rule are '(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situa-

tion, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.' *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.2d 915." *Selinsky v. Olsen*, 38 Cal.2d 102, 104, 237 P.2d 645, 646.

[2,3] Under *Eaton's* testimony the rule might not apply. According to him plaintiff was not in a position of peril. He was four or five feet away from the rear of the bus near the sidewalk in a position of safety. But the application of the doctrine of last clear chance does not depend upon the operator's testimony alone. It is required to be given if there is any evidence in the case which would justify its application. *Galbraith v. Thompson*, 108 Cal.App.2d 617, 239 P.2d 468; *Selinsky v. Olsen*, supra, 38 Cal.2d 102, 237 P.2d 645. The rule of *Dalley v. Williams*, 73 Cal.App.2d 427, 436, 166 P.2d 595, 600, to the effect that a person cannot "be held liable, under the last clear chance rule, upon the theory that he would have discovered the peril but for remissness on his part" does not apply. Here, Sally testified that when the operator looked back and when he closed the doors plaintiff was not near the sidewalk five feet away from the bus but walking alongside the bus holding on with both hands. Thus, the jury could have believed that the operator saw plaintiff, whom he believed was drunk, staggering alongside the bus holding on with both hands, and yet started the bus. In such position plaintiff was in a position of peril and in his drunken condition might not have been able to extricate himself when the bus, to which he was holding, started up. At least the jury could have determined that it was obvious to *Eaton* that plaintiff was not aware of his danger. Certainly if the operator saw plaintiff in the position Sally placed him when the doors closed (and the operator testified he saw plaintiff when he closed the doors) *Eaton* had the last clear chance to avoid the accident by simply not starting the bus, and thereby not removing the support upon which plaintiff was leaning. As was the case in *Simon v. City & County of San Francisco*, 79 Cal.App.2d 590, 180 P.2d 393,

there was evidence that plaintiff's intoxication placed him in a position from which he could not escape, or of which he obviously was not aware, and the operator had the last clear chance to avoid the accident. In our case he needed merely to delay the starting up of the bus. Where there is such evidence a plaintiff is entitled to an instruction on last clear chance. While it is true, plaintiff himself could have avoided the accident by merely removing his hands from the bus and staggering in the opposite direction, it was for the jury to determine whether the operator, knowing his condition, could reasonably expect him to do so, or could reasonably expect him to realize his peril. In the *Simon* case, supra, the intoxicated plaintiff was observed by the motorman staggering some five feet away from the tracks. The plaintiff there, too, could have avoided the accident had he not staggered the last five feet towards, instead of away from, the tracks. Yet the situation was one held to require the giving of last clear chance instructions.

[4] While the evidence did not compel such a conclusion, it reasonably would support a conclusion that all of the elements of the doctrine hereinbefore mentioned were present in this case. The trial judge stated in a brief opinion, "Though intoxicated, plaintiff is held to the same standard of care as an ordinary, prudent, sober person." This is the rule stated in *Emery v. Los Angeles Ry. Corp.*, 61 Cal.App.2d 455, 143 P.2d 112, and *Drury v. Hagerstrom*, 68 Cal.App.2d 742, 157 P.2d 878. That rule, however, does not prevent the application of the last clear chance doctrine. Rather, it supports it. That doctrine can only be applied when the plaintiff has been negligent, that is, did not use the standard of care that an ordinary prudent, sober person would have used. As in *Simon v. City & County of San Francisco*, supra, 79 Cal. App.2d 590, 180 P.2d 393, "The defendants perhaps proved too much, at least as far as the last clear chance doctrine is concerned." 79 Cal.App.2d at page 601, 180 P.2d at page 400. The operator seeing plaintiff in a position of danger in which he has negligently placed himself, and knowing him to be intoxicated, must con-

sider that condition as well as his position in determining whether plaintiff is aware of his danger or able to use ordinary care to extricate himself therefrom. "* * * although intoxication may be contributory negligence, whether it is a bar depends upon whether such negligence is the immediate or the remote cause, or whether the negligence of the defendant was the sole proximate cause under the last clear chance doctrine, and that such questions should have been submitted to the jury." *Simon v. City & County of San Francisco*, supra, 79 Cal.App.2d 590, 602, 180 P.2d 393, 400. For other discussions of this subject see *Coakley v. Ajuria*, 209 Cal. 745, 752, 290 P. 33, and the well-known early case of *Robinson v. Pioche, Bayerque & Co.*, 5

Cal. 460, 461, stating that a drunken man is as much entitled to a safe street as a sober one, "and much more in need of it." See also *Haerdter v. Johnson*, 92 Cal.App. 2d 547, 553, 207 P.2d 855, where the court stated, in effect, that were it not for the fact that in the *Simon* case, supra, the evidence showed the plaintiff to be drunk, the last clear chance doctrine probably would not have been applicable.

The failure to instruct on the doctrine, under the peculiar facts of this case, requires a reversal.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

40 Cal.2d 492

CAL-DAK CO. v. SAV-ON DRUGS, Inc.
L. A. 22168.

Supreme Court of California, in Bank.
March 17, 1953.

Action to enjoin sale of plaintiff's products for less than retail price fixed by plaintiff in agreements with jobbers and to recover damages. The Superior Court, Los Angeles County, entered order denying a preliminary injunction and plaintiff appealed. The Supreme Court, Carter, J., held that under 1952 amendment of Miller-Tydings amendment to Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1, 41 et seq., 45, such agreements were enforceable by injunction against retailer who was not a party to agreements, regardless of whether interstate commerce was involved.

Order reversed and cause remanded for further proceedings.

Prior opinion 242 P.2d 333.

1. Trade-Marks and Trade-Names and Unfair Competition ⇨68(2.18)

Offering clothes baskets for sale at retail under their trade-name for less than retail price fixed by manufacturer in agreements with jobbers constituted a violation of Fair Trade Act and actionable unfair competition, even though retailer was not a party to contracts between manufacturer and jobbers. Business and Professions Code, §§ 16900 et seq., 16902, 16904.

2. Trade-Marks and Trade-Names and Unfair Competition ⇨68(2.18)

Under 1952 amendment of Miller-Tydings amendment to Sherman Anti-Trust Act and California Fair Trade Act, contracts between manufacturer and jobbers, fixing retail price of clothes baskets sold under trade-name, were enforceable by injunction against retailer who was not a party to such contracts, regardless of whether interstate commerce was involved. Business and Professions Code, §§ 16900 et seq., 16902, 16904; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Federal Trade Commission Act, §§ 1 et seq., 5, 15 U.S.C.A. §§ 41 et seq., 45.

3. Appeal and Error ⇨1108

Injunction ⇨132

Preliminary injunction is aimed at preventing future conduct likely to occur dur-

ing pendency of action and right to such relief must be determined as of date of decision by appellate court.

4. Injunction ⇨146

Preliminary injunction should not issue in absence of showing that defendant intends to do acts charged during pendency of action, where defendant denies such intent.

5. Appeal and Error ⇨1177(6)

Where preliminary injunction against retail sale of plaintiff's products for less than retail price fixed by plaintiff in agreements with jobbers was denied solely on ground that, since interstate commerce was involved, no injunction would lie, without determining whether defendant threatened to continue its acts during pendency of action, and thereafter federal statute was amended so as to permit enforcement of price-fixing agreements under State Fair Trade Act, order denying injunction should be reversed and case remanded for appropriate proceedings in view of change in the law. Business and Professions Code, §§ 16200 et seq., 16902, 16904; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Federal Trade Commission Act, §§ 1 et seq., 5, 15 U.S.C.A. §§ 41 et seq., 45.

6. Appeal and Error ⇨874(2)

Whether sale of plaintiff's products at retail for less than retail price fixed by plaintiff in agreements with jobbers affected interstate commerce and hence was improper prior to 1952 amendment of Miller-Tydings amendment to Sherman Anti-Trust Act and question of damages sustained by reason of such improper conduct were not before court on appeal from order denying a preliminary injunction. Business and Professions Code, §§ 16900 et seq., 16902, 16904; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Federal Trade Commission Act, §§ 1 et seq., 5, 15 U.S.C.A. §§ 41 et seq., 45.

7. Trade-Marks and Trade-Names and Unfair Competition ⇨95(1)

Whether sale of plaintiff's products at retail for less than retail price fixed by plaintiff in agreements with jobbers affected interstate commerce and hence was improper prior to 1952 amendment of

Miller-Tydings amendment to Sherman Anti-Trust Act was a mixed question of law and fact which should be determined on trial of action for injunction and damages and not on bare allegations in pleadings. Business and Professions Code, §§ 16900 et seq., 16902, 16904; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Federal Trade Commission Act, §§ 1 et seq., 5, 15 U.S.C.A. §§ 41 et seq., 45.

Landels & Weigel, O'Connor & O'Connor, Los Angeles, and Stanley A. Weigel, San Francisco, for appellant.

Wright, Wright, Green & Wright, Loyd Wright and Herschel B. Green, Los Angeles, for respondent.

CARTER, Justice.

Plaintiff appeals from an order denying its application for a preliminary injunction in an action seeking injunctive relief and damages.

Plaintiff is a California corporation engaged in the manufacture and sale of clothes baskets under the trade name "Sav-Ur-Bak Clothes Basket." Defendant is a California corporation engaged in this state

in the operation of retail drug stores. Defendant bought some of the clothes baskets from plaintiff's jobber in this state and has offered them for sale at retail in its stores at prices below the retail price fixed by plaintiff in agreements with its jobbers. Plaintiff commenced this action asking for an injunction and alleged that it had suffered damages because of defendant's conduct. Its application for a preliminary injunction was denied.

[1] It is clear according to plaintiff's complaint that defendant acts in offering the baskets for sale below the price fixed is a violation of the Fair Trade Act, Bus. & Prof. Code, § 16900 et seq., for thereunder a contract relating to the resale of a commodity which bears a trade mark may provide that the buyer will not resell except at the price stipulated by the vendor.¹ And the violation of the contract is unfair competition and actionable even though the violator is not a party to the contract—did not sign it.² Defendant is not a party to the contract between plaintiff and its jobber.

Defendant, however, invokes the Sherman Anti-Trust Act, 15 U.S.C.A. § 1, as invalidating such contracts and urges that the Miller-Tydings amendment to that act³

1. "(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

"(b) Such provisions in any contract imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court." Bus. & Prof. Code, § 16902.

2. "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." Bus. & Prof. Code, § 16904.
3. "Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by

purporting to exempt such contracts from the Sherman Act does not extend to non-signers as interpreted by the United States Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L.Ed. 1035. It was held in that case that where interstate commerce is involved such contracts violate the Sherman Act and that the Miller-Tydings amendment thereto, while exempting the parties to the contract from the Sherman Act, does not extend to non-signers of the contract. Hence the state Fair Trade Act embracing nonsigners can have no application where interstate commerce is involved. The sole issue presented on the application for a preliminary injunction was, therefore, whether interstate commerce was involved, thus making the federal statutes applicable.

On this question, as above shown, the baskets were manufactured in California by plaintiff, a California corporation, and were sold by plaintiff to its jobber in this state and its jobber sold and delivered them to defendant, who offers them for retail sale, all in this state. There are additional factors, however, as appears from defendant's answer where it is alleged: "* * * plaintiff's said clothes baskets are sold by jobbers throughout the United States. That said jobbers own and operate their establishments within and with-

out the State of California. That a great majority of plaintiff's said clothes baskets are sold to Jewel Tea Company in Chicago, Illinois. That the said Jewel Tea Company sells plaintiff's said clothes baskets throughout the United States. That plaintiff maintains an office and is conducting business in the City of Chicago, State of Illinois. That in the purchase of materials used by plaintiff in the manufacture of its clothes baskets outside the State of California, the shipment by plaintiff of its said clothes baskets to its office and place of business in Chicago, Illinois, the shipment by plaintiff of said clothes baskets to jobbers in Illinois and in other states and in the transaction of business in its Chicago office, plaintiff has been since 1937 and is now continuously engaged in interstate commerce."

[2, 3] The application for a preliminary injunction was denied on August 10, 1951. This appeal was taken from the order of denial. Thereafter Congress amended, approved July 19, 1952, the Miller-Tydings amendment to the Sherman Act to exempt from the latter, state laws such as ours giving validity to price fixing contracts and making them binding on non-signers; it in effect nullifies the *Schwegmann* case.⁴ It is not disputed that under

others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 15 U.S.C.A. § 1.

their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and *to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto*. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce. * * *

"(2) Nothing contained in this act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which

4. "That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate

the 1952 law non-signers are bound by our state Fair Trade Act, *supra*, and thus thereunder a preliminary injunction could have been properly granted regardless of whether or not interstate commerce is involved. This is true because a preliminary injunction (here we have an order denying such an injunction) is aimed at preventing future conduct—conduct after the issuance of the injunction and likely to occur during the pendency of the action. "Relief by injunction operates in futuro, and the right to it must be determined as of the date of decision by an appellate court." *American Fruit Growers v. Parker*, 22 Cal. 2d 513, 515, 140 P.2d 23, 24; also *Bautista v. Jones*, 25 Cal.2d 746, 754, 155 P.2d 343; *Thompson v. City of Los Angeles*, 82 Cal. App.2d 45; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal.2d 489, 45 P.2d 972; *Brophy v. Employers Retirement System*, 71 Cal.App.2d 455, 162 P.2d 939; *Diederichsen v. Sutch*, 47 Cal.App.2d 646, 118 P.2d 863.

[4, 5] Defendant asserts, however, that it does not intend to do the acts charged during the pendency of the action and there is nothing to show it does; hence a preliminary injunction is not proper. The application for the injunction was made and decided upon the verified pleadings of the

parties and while plaintiff alleged that defendant threatened to and would continue his improper conduct, that was denied by defendant and the parties rested their cases and the trial court based its denial of the injunction solely on the ground that, as interstate commerce was involved, no injunction would lie in any event under the Sherman Act, the Miller-Tydings amendment and the Schwegmann case, which as we have seen is no longer the crucial issue. The trial court has never passed on the question of whether defendant threatened to continue its acts during the pendency of the action. Hence the appropriate procedure is to reverse the order denying the preliminary injunction and remand the case to the trial court for such proceedings as are proper in the light of the 1952 change in the law.

[6, 7] There still remains in the case the question of the damages claimed by plaintiff by reason of defendant's alleged improper conduct prior to the 1952 change in the law, which, as above noted, requires the determination as to whether or not interstate commerce was involved, because if it was, defendant's conduct would not have been improper. Those questions are not before the court at this time, however, because we are considering an appeal from

is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements *whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition*

and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." (Emphasis added.) Pub.Law 542, 82nd Congress, Ch. 745, 2d session, 15 U.S.C.A. § 45.

an order denying a preliminary injunction. Moreover, inasmuch as the issue of whether interstate commerce is involved is a mixed factual and legal question, it would be more appropriate to determine this issue on the trial of the action rather than on the bare allegations in the pleadings.

The order is reversed and the cause is remanded to the trial court for further proceedings as may be proper, giving consideration to the 1952 change in the law.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.



40 Cal.2d 483

PEOPLE v. ROBERTS.

Cr. 5398.

Supreme Court of California, in Bank.
March 13, 1953.

Rehearing Denied April 8, 1953.

Narcotics prosecution. The Superior Court, San Francisco County, rendered judgment of conviction and denied defendant's new trial motion and defendant appealed. The Supreme Court, Schauer, J., held that evidence sustained conviction for conspiracy and for sale of heroin, but that possession and transportation of narcotics was merely incident to sale, and counts relating to possession and transportation would be reversed.

Affirmed in part, reversed in part, and order denying new trial affirmed.

Prior opinion, 248 P.2d 790.

1. Indictment and Information ⇨108

Information which charged conspiracy to violate Section 11500 of Health and Safety Code relating to narcotics was not insufficient for not specifying particular portion or portions of that section claimed to have been violated, particularly where notice of particular circumstances of offense was given in transcript of evidence before committing magistrate, and defendant was entitled to such transcript. Health and Safety Code, § 11500; Pen.Code, §§ 870, 925, 952.

2. Indictment and Information ⇨111(1)

Information charging that accused unlawfully transported, sold, furnished, or gave away heroin and had had heroin in his possession was not insufficient for failing to negative statutory exceptions permitting possession or sale of heroin, since word "unlawfully" precluded idea that possession had been lawful. Health and Safety Code, § 11500.

3. Conspiracy ⇨47

Evidence sustained conviction for conspiracy to violate statute prohibiting possession, sale, transportation, furnishing, giving away or administering narcotics by unauthorized person. Health and Safety Code, § 11500.

4. Criminal Law ⇨308

If evidence is susceptible of two constructions or interpretations, each of which appears to be reasonable, and one of which points to guilt of defendant, and other to defendant's innocence, jury has duty to adopt interpretation which will admit of defendant's innocence and reject that which points to defendant's guilt.

5. Criminal Law ⇨1159(2)

Rule that interpretation of evidence which will admit of defendant's innocence should be adopted and interpretation which points to defendant's guilt should be rejected is to be applied by trier of fact and not appellate court.

6. Criminal Law ⇨37

Where an accused has a pre-existing criminal intent, fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment.

7. Criminal Law ⇨569

In prosecution for unlawful possession and sale of heroin in which it appeared that informer took officer to alleged dope peddler and peddler allegedly secured dope from accused, evidence warranted inference that defendant was not persuaded or lured, but that he willingly committed offense charged against him and assumed chance of apprehension. Health and Safety Code, § 11500.

8. Criminal Law Ⓒ424(4)

In prosecution for unlawful possession and sale of heroin, statement made by co-conspirator after arrest that he had known defendant, and had delivered packages for him for compensation on various occasions was admissible against co-conspirator for tending to prove that co-conspirator had, in fact, associated with and worked for defendant and for tending to impeach subsequent testimony of co-conspirator that he had never spoken with defendant prior to bringing instant charges, but such evidence was inadmissible as to defendant. Health and Safety Code, § 11500.

9. Criminal Law Ⓒ423(1)

A confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise.

10. Criminal Law Ⓒ730(3)

In prosecution for unlawful possession and sale of narcotics, prosecuting attorney's question as to whether accused was known as peddler of narcotics was not prejudicial and ground for reversal, where trial court sustained accused's objection, and where there was no request that jury be instructed to disregard question, and asking question appeared to be mere inadvertence. Health and Safety Code, § 11500

11. Criminal Law Ⓒ388

Exclusion of evidence of experiment involving attempt to show ability or inability of witness to identify persons in automobile traveling at a speed of twenty miles per hour from varying distances was a proper exercise of trial court's discretion, where trial court had discretion to determine whether conditions of experiment and conditions existing at time of alleged offense were sufficiently similar and whether evidence of experiment would aid rather than confuse jury.

12. Criminal Law Ⓒ29

Co-operative acts constituting but one offense when committed by same person at same time, when combined, charge but one crime, and but one punishment can be inflicted.

13. Criminal Law Ⓒ984

In prosecution for conspiracy to violate Section 11500 of Health and Safety Code relating to narcotics, and for unlawfully transporting, selling, furnishing and giving away and possessing heroin, transporting and possessing heroin were merely incident to sale, and defendant could be punished only for conspiracy and for unlawful sale. Health and Safety Code, § 11500.

Mancuso, Herron & Winn, Davis & Colvin and James T. Davis, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Wallace G. Colthurst, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Oliver Roberts (appellant herein) and Jackson Syas (who did not appeal) were charged in four counts, respectively, with (1) conspiracy to violate section 11500 of the Health and Safety Code, and three violations of that section, namely, illegally (2) transporting, (3) selling, furnishing and giving away, and (4) possessing heroin. It was alleged that each offense took place "on or about" April 3, 1951. A jury found both defendants guilty of each count, and the trial court denied defendant Roberts' motion for new trial. We have concluded that the judgment should be affirmed as to counts (1) and (3) and reversed as to counts (2) and (4), and that the order denying a new trial should be affirmed.

Sufficiency of the Information

Section 11500 of the Health and Safety Code declares that "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician * * *."

[1] Roberts contends that count (1) of the information is insufficient because it does not specify which particular act

(possessing, transporting, etc.) denounced by section 11500 was the object of the conspiracy. It is only required that the pleading be "in any words sufficient to give the accused notice of the offense of which he is accused." (Pen.Code, § 952.) Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate (or the grand jury); defendant is entitled to such transcript under section 870 (or section 925) of the Penal Code. (People v. Pierce (1939), 14 Cal.2d 639, 645, 96 P.2d 784; People v. Codina (1947), 30 Cal.2d 356, 358-359, 181 P.2d 881; People v. Yant (1938), 26 Cal. App.2d 725, 730, 80 P.2d 506.) Roberts' argument that he could not determine, either from the information or from the transcript of the preliminary hearing, whether the object of the charged conspiracy was the selling of heroin, or the giving away of the drug, or the transporting of it, is not well taken. The information alleges a single conspiracy with the object of accomplishing one or more types of violation of section 11500, and there was evidence which tends to show that several objects of this single conspiracy were accomplished.

[2] Roberts urges that counts (2), (3), and (4) of the information are defective because they do not allege that defendants were not within the exceptions contained in section 11500. It is not necessary to expressly negative such exceptions. (People v. Pierce (1939), *supra*, at page 643 of 14 Cal.2d, at pages 785, 786 of 96 P.2d.) "If the accused person is *unlawfully* possessed of a narcotic drug, it follows that he does not hold a physician's prescription therefor." (People v. Bill (1934), 140 Cal.App. 389, 393, 35 P.2d 645.)

Sufficiency of the Evidence

[3] On the night of April 2, 1951, police officer Duarte, who was engaged in undercover narcotics work, parked his car in the Fillmore district and an informer brought defendant Syas to the car. The officer asked Syas if he could obtain some "stuff"; Syas replied that he could and that \$50 was the price of "a spoon of H

[heroin]." At Syas' direction the officer drove to another place in the Fillmore district. The officer gave Syas \$50. Syas left the car and met an unidentified man; the officer saw them talking and moving their hands; Syas returned to the car with heroin.

On April 3 a similar sale of heroin to Duarte took place; on this occasion defendant Roberts drove Syas to the place where the sale was made and remained in his car while Syas got out, handed the heroin to Duarte, and took Duarte's money. Syas went to Roberts' car with the money and spoke with Roberts. Roberts then drove away, while Syas and Duarte went to the home of the informer.

On April 26 a sale of cocaine was made under circumstances similar to those of the previous sales of heroin; on this occasion one Briscoe, rather than Syas, acted as "go between"; Briscoe directed the officer to park at a certain place, left the car, was then seen with defendant Roberts, returned to the officer's car, and sold him the drug.

After his arrest Roberts was questioned by a narcotics inspector. The inspector told him that he was charged with the sale of narcotics on April 3. Roberts denied having sold narcotics on that date, but when he was asked whether he made his living by selling narcotics he remained silent. The inspector "asked him if he had ever been with the defendant Jackson Syas or Hardin Briscoe on this evening, and he said, yes, he had, and he had been with many others on that evening."

The foregoing evidence is sufficient to permit the inference that Roberts and Syas were members of a conspiracy engaged in unlawful traffic in drugs and that the heroin which was sold by Syas on April 3 was transported and furnished by Roberts.

[4, 5] Roberts' arguments as to the evidence go to its weight rather than its sufficiency. It is true, as he points out, that the evidence against him is entirely circumstantial. But the jury were correctly instructed that "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to

you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." It is the trier of fact, not the appellate court, which must apply this rule. (People v. Green (1939), 13 Cal.2d 37, 42, 87 P.2d 821; People v. Hills (1947), 30 Cal. 2d 694, 701, 185 P.2d 11.)

Conduct of Officer Duarte

As is shown by the foregoing summary of the evidence, Duarte, through the help of the informer, made contact with Syas and asked Syas to sell him drugs. The evidence also shows that on the nights of April 2 and 3, after he had purchased the heroin, Duarte went with Syas to the latter's home, where Syas, his wife, and the informer "took a fix" (an injection) of the heroin. This was done pursuant to an arrangement between Syas and the informer, both narcotic addicts. Officer Duarte testified that he had no prior knowledge of such arrangement and that when it was carried out "there was nothing I could do about it, being if I did I would just expose myself as a police officer."

[6, 7] Roberts urges that the foregoing shows that Duarte acted as agent provocateur and that without his planning and instigation the crimes would never have been committed. In this Roberts is mistaken. "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a preexisting criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment [citations]. * * * The jury was warranted in inferring that appellant was not *persuaded or lured*, but that he willingly committed the offense charged against him and assumed the chance of apprehension." (People v. Schwartz (1952), 109 Cal.App. 2d 450, 455, 240 P.2d 1024; see People v. Jackson (1951), 106 Cal.App.2d 114, 125, 234 P.2d 766.)

Extrajudicial Statements of Syas

[8, 9] The People introduced evidence, both during their case in chief and on rebuttal, that Syas, questioned after his arrest, stated that he had known defendant Roberts and delivered packages for him for compensation on various occasions, including the nights of April 2 and 3, but did not know what was in the packages. Syas testified that he did not meet Roberts on the nights in question and that while he knew Roberts' name he had never spoken with him prior to the bringing of the present charges. The evidence of Syas' contradictory extrajudicial statements was admissible against him both because it tended to prove that he had in fact associated with and worked for Roberts and because it tended to impeach Syas. (People v. Southack (1952), 39 Cal.2d 578, 584, 248 P.2d 12.) Such evidence, however, would be inadmissible hearsay as to Roberts. (People v. Gilliland (1940), 39 Cal.App.2d 250, 262, 103 P.2d 179; Fiswick v. United States (1946), 329 U.S. 211, 217, 67 S. Ct. 224, 91 L.Ed. 196 ["confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. * * * [A conspirator's] admissions were therefore not admissible against his erstwhile fellow-conspirators"].)

The record does not support Roberts' contention that the rule last quoted was violated during his trial. In addition to the fact that his own counsel appears to have been capable, well prepared and ever alert to protect the appellant's interests it is gratifying to note that both the prosecuting attorney and the trial judge, particularly in this respect, appear to have been commendably alert and conscientious in the performance of their respective duties, which of course included as to each of them the duty of seeing to it that the trial was in all respects fair to the defendants as well as to the People. Both the prosecuting attorney and the trial judge repeatedly stated to the jury during the trial that extrajudicial statements of one defendant were offered, admitted, and could be considered only against him, not against

the other defendant, and the closing charge to the jury included such an instruction.

Asserted Misconduct of Prosecuting Attorney

[10] Roberts contends that the prosecuting attorney was guilty of misconduct in asking him, on cross-examination, "You're commonly known in the Fillmore as a peddler of narcotics, are you not?" Defense counsel promptly objected to the question and the objection was sustained. There was no request that the jury be instructed to disregard the question. As indicated above, throughout the trial there appears to have been an atmosphere of fairness which was contributed to by the trial judge and by both counsel. We find nothing in the record to indicate that the asking of the question was anything more than an inadvertence. It should not have been asked but in the circumstances we do not believe that asking the question was prejudicial or can possibly be considered to constitute ground for reversal.

Exclusion of Evidence of Experiment

[11] According to Duarte's testimony, the sale of heroin on April 3, when defendant Roberts drove Syas to the place where the transaction was consummated, took place at about 9 o'clock in the evening, at Laguna and Ellis Streets. In an effort to impeach Duarte, Roberts sought to introduce the testimony of an investigator concerning "an experiment that was conducted at 9:00 in the evening [in the month of October, 1951] on the corner of Laguna and Ellis Streets with three automobiles involved, traveling at the speed of 20 miles an hour, persons in the cars, and the ability or the inability of a person to identify them, and at what distances they could identify them. * * * I believe his testimony would be this was impossible for him to do." The last quoted language is from defendants' offer of proof. After colloquy among court and counsel as to whether it could be shown that the conditions under which the experiment was conducted were substantially similar to those at the time to which Duarte's testimony referred, the trial court refused to admit evidence of the experiment. Defendant urges that this ruling was prejudicially erroneous.

A principal ground of the People's objection to the proffered evidence was that there was no showing that the light was similar on the evening of April 3 and on the evening of the experiment in October. Also, according to the offer of proof, the car which took the role of Roberts' car during the experiment was not the same model as the one which Roberts had driven on April 3. It was within the discretion of the trial judge to determine whether the conditions of the experiment and the conditions of April 3 to which Duarte testified were sufficiently similar that the evidence of the experiment would aid rather than confuse the jury. (People v. Parker (1935), 4 Cal.App.2d 421, 424, 40 P.2d 836. Cf. People v. Dyer (1938), 11 Cal.2d 317, 321, 79 P.2d 1071, with People v. Hadley (1917), 175 Cal. 118, 122, 165 P. 442.)

Multiple Convictions Based on One Indivisible Transaction

[12, 13] The information charges and there is evidence that on April 3 defendant Roberts transported, furnished, and possessed heroin. Each of these acts is denounced by section 11500 of the Health and Safety Code. The three acts are charged and adjudged as separate crimes. However, "co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted." (People v. Clemett (1929), 208 Cal. 142, 144, 280 P. 681; see also People v. Knowles (1950), 35 Cal.2d 175, 187, 217 P.2d 1.) The present case resembles the Clemett case in that the only possession and transportation of heroin shown were those necessarily incident to its sale. And as in the Clemett case (at page 150 of 208 Cal., at page 684 of 280 P.) the error can be corrected by this court.

For the reasons above stated the judgment is affirmed as to counts (1) and (3) and reversed as to counts (2) and (4), and the order denying a new trial is affirmed.

GIBSON, C. J., and SHENK, ED-MONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

40 Cal.2d 564

LOWE v. STATE BAR.**L. A. 22434.**

Supreme Court of California, in Bank.

March 27, 1953.

Disciplinary proceeding. The Supreme Court, *Per Curiam*, held that breach of fiduciary relationship that binds an attorney to the most conscientious fidelity to interests of his client is gross negligence.

Order in accordance with opinion.

Cartër, J., dissented.

Attorney and Client **44(1)**

Breach of fiduciary relationship that binds attorney to most conscientious fidelity to interests of his client is gross negligence, as respects disciplinary action. Business and Professions Code, §§ 6067, 6068(d), 6103, 6106, 6128(a).

John W. Preston, Los Angeles, for petitioner.

Richard C. Heaton, Ventura, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

The petitioner, Irwin M. Lowe, seeks a review of a recommendation of the Board of Governors of the State Bar that he be disbarred from the practice of the law. The Board of Governors approved and adopted findings of fact of a Local Administrative Committee, which on these findings had recommended that the petitioner be suspended from the practice of law for a period of two years.

The events leading up to this proceeding against the petitioner began in July, 1948. For several years prior to that time he had represented Joe Diaz and Pilar Vargas in their legal matters. The two were brothers-in-law and partners in a restaurant business. They were of Mexican extraction and were uneducated. They had difficulty in understanding the English language and the legal aspects of business transactions. In July, 1948, they delivered to the petitioner a check for \$750 made payable to him with instructions that it was to be used for the purchase of the interest

of a minor nephew of Pilar Vargas in the estate of Refugio Vargas, the deceased father of Pilar and grandfather of the minor. The petitioner promptly deposited the proceeds of the check in his trust account in the Oxnard Branch of the Security-First National Bank of Los Angeles. He thereafter entered into negotiations with the proper representatives of the minor for the purchase of the latter's interest in the estate which consisted entirely of real property. The parties were unable to agree upon a satisfactory price. During the period of negotiations they found that there was a cloud on the title. They were unable to agree upon who should bear the costs of approximately \$250 necessary to clear title. The petitioner failed to reach an agreement with the representatives of the minor, although negotiations continued for more than three years.

During the period of negotiations there were a great many deposits in and withdrawals from the petitioner's trust account. The balance varied over a wide range, and on numerous occasions it fell below \$750, the amount entrusted to the petitioner by his clients. The petitioner's bank statement shows that in many instances checks were charged against the trust account leaving balances of less than \$750, and in some of these instances the account was completely overdrawn. The petitioner admits that he was promptly informed of these overdrawals. A bank official testified that upon notification of an overdrawal the petitioner was always prompt in replenishing the account. The findings of fact recite that the petitioner "Wilfully and knowingly caused said trust funds to be withdrawn from said trust account and to be used for purposes other than those for which they were entrusted to respondent, without the knowledge or consent of respondent's said clients." Upon the admitted facts this finding cannot rightfully be controverted but the further finding that "in so misappropriating said trust funds respondent did not intend permanently to deprive said clients thereof", is also amply supported by the record.

The conduct described above formed the basis of the first act of misconduct set

forth in the notice to show cause. Upon the findings quoted both the Local Administrative Committee and the Board of Governors concluded that the petitioner was guilty of professional misconduct consisting of the violation of his duties as an attorney at law and that his conduct involved moral turpitude. §§ 6067, 6103, 6106 of the Business and Professions Code.

As a second act of misconduct the notice to show cause charged that the petitioner made a false statement under oath in the Superior Court of the County of Ventura. In a proceeding in that court for an accounting by the administratrix of the estate of Refugio Vargas and at a time when the petitioner was not present in court the administratrix stated that the petitioner held certain funds for the estate. The record indicates that the administratrix apparently had reference to the \$750 held by the petitioner for the purchase of the minor's interest, and that she erroneously thought the \$750 had been paid into or on behalf of the estate. She, like the other members of the family, was uneducated and ignorant of business and legal transactions. She was not represented by counsel at the time of her statement. A citation was issued ordering the petitioner's presence at a continued hearing to be held on the morning of September 17, 1951. The citation was not served, but on that morning the petitioner informally learned that he should appear and he promptly did so. He contends that he was not fully aware of the reason he had been ordered to appear and that he knew only that the proceeding was one for an accounting of the assets, rents, issues and profits of an estate with which he was not connected. There is evidence in the record of that proceeding that the petitioner's two clients were under the impression that the purchase of the property interest had been consummated. However, the record furnishes no basis for a reasonable belief of this nature and the testimony of the two clients, derived through a Mexican interpreter, is conflicting and confusing. It is apparent that they did not understand the nature of their transaction although they

apparently had been kept informed of its development.

Under these circumstances the petitioner stated, in answer to inquiries by the court, that he did not have or had not had any money in the amount of approximately \$750 that was to go to the representatives of a minor child for the purpose of purchasing the interest of the minor in the estate of Refugio Vargas. He later explained to the court that it did not occur to him that the court had reference to money he held for the purchase of the minor's interest if an agreement could be reached and that until an agreement was reached the money was not held for the purchase of the minor's interest.

Although the Local Administrative Committee and the Board of Governors found that the petitioner's statement was not true, they further found that "when respondent [petitioner here] made said statement he mistakenly believed the Court desired to know whether respondent had in his possession, or had ever had, any funds of said estate or of said minor; and respondent intended by said statement to inform the Court that he did not have and had never had any funds of said estate or of said minor. That the information which respondent then and there intended to state to said Court was true." This amounts to a finding of an incorrect statement made without intent to deceive, and properly should be considered as a vindication of the misconduct charged in the notice to show cause in connection thereto.

At the same hearing the petitioner made the following statements to the court in answer to its inquiries:

"The Court: Have you ever used any of this money at any time under any circumstances or conditions for your own?"

"The Petitioner: No. It is in a trust account fund, separate and apart from my own funds.

"The Court: And at all times since the date this money was deposited, which was on apparently the 31st day of July, 1948, there has been in ex-

cess of \$750.00 in that trust account, is that true?

"The Petitioner: That is correct."

The true condition of the account during the period the petitioner held the \$750 has been stated. The petitioner admits that the statement last recited was incorrect. He stated that it was made before he had an opportunity to refer to all of his books and records and that he had requested a continuance for this purpose. The findings state that the above testimony "was false in that said trust account had been overdrawn four times between July 31, 1948 and September 17, 1951 and in that said trust account had contained balances of less than \$750.00 at numerous times between July 31, 1948 and September 17, 1951."

The Local Administrative Committee and the Board of Governors concluded that by the false statements in regard to the trust account the petitioner was guilty of professional misconduct in violation of his oath of office and his duties as an attorney, §§ 6067, 6068(d), 6103, 6106, 6128(a) of the State Bar Act, and that such conduct involved moral turpitude.

From a review of the record it is evident that the petitioner did what he was charged with having done. He does not question the findings with reference to what took place. He does challenge the severity of the discipline recommended by the Board of Governors and the sufficiency of the evidence to support the findings as to his state of mind in connection with depleting his trust account below the sum of \$750, and in stating to the court that the account had never fallen below that amount.

The petitioner attempts to excuse his failure to maintain \$750 in his trust account on the ground that withdrawals in excess of that amount were unintentional. The account should have shown a balance at all times of \$750 plus whatever other trust funds were deposited therein from time to time. While he insists that no improper withdrawals were made, and that there is no evidence that withdrawals from the account were for purposes other than those for which the account was intended to be used, he is unable to explain why the

account was depleted below the \$750. When asked to explain the reason for the recurring deficiencies to the Local Administrative Committee he stated, "Well, I have mulled over that and tried my best to figure it out. I don't know whether some funds of some other funds were not deposited in the proper account or whether—I just can't give you an answer to that. * * * I honestly don't know. * * * I kept records but they are so scattered. * * * I don't know—I honestly wish there was some way that I could discover for myself what has actually happened here. I honestly don't know. That is all." Statements of a similar nature were made to the Board of Governors.

The petitioner was the only one authorized to issue checks on the trust account, but he suggests that the condition of the account may have been due to the dishonesty of employees entrusted with sums of money to be deposited therein. He offered no evidence of the suggested dishonesty. By his own admission he continued to make overdrafts against the account after he was informed by the bank that the account was overdrawn. Upon notice of an overdraft he would deposit personal funds in the trust account but during the three-year period he never succeeded in correcting the deficiency in the account. The last overdrawal occurred in August, 1951, less than a month prior to his statement in court that the account had never been overdrawn.

The petitioner testified that he did not employ a bookkeeping system which would show a balance of funds he held in trust. He never knew, then, the level at which the trust account should have been maintained. Following his court appearance on September 17, he refunded the \$750 to Pilar Vargas and Joe Diaz. Thereafter, he states, he succeeded in balancing his trust account but is still unable to discover the reason for the deficiencies. He reported that it required "some \$2,000" of his personal funds to balance the account. He admits that the condition of the account indicated that he had commingled other trust funds with the \$750 here in question.

The record shows that the petitioner was guilty of an unjustified omission to safeguard his clients' funds. It has been held that "Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. [Citations.] It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability." *Clark v. State Bar*, 39 Cal.2d 161, 246 P.2d 1, 8; see also *Waterman v. State Bar*, 8 Cal.2d 17, 20, 63 P.2d 1133. In the present case the record justifies the conclusion that the petitioner's conduct in overdrawing his account constituted more than negligence and carelessness on his part.

While it is true that the petitioner was called upon to answer the court's inquiries on short notice and without an opportunity to study his records, he answered unequivocally and without qualification that there had been in excess of \$750 in his trust account at all times since the deposit therein. He stated before the Board of Governors that at the time he made his answer in court he couldn't remember in what year the \$750 had been deposited in his trust account, or when the trust account had been overdrawn in connection with the deposit. The deposit had been made more than three years previously; the last overdraft had occurred within the previous month and the petitioner admits that he had been informed on each occasion when he overdraw the account. The reasonable inference to be drawn from the admitted facts is that the petitioner knew, or was chargeable with knowledge, that the balance of his trust account had not been in excess of \$750 at all times that the amount supposedly remained therein.

The untrue statement to the court by the petitioner was made in a proceeding for an accounting in the matter of the estate of Refugio Vargas. This proceeding had nothing to do with the condition of the petitioner's trust account. Whether the statement was material or immaterial to the inquiry before the court it nevertheless is denounced by Section 6068(d) of the

State Bar Act and constituted professional misconduct if made with the intention of deceiving the court. It is doubtful whether it had any influence on the action of the court in the accounting proceeding then before it.

From the foregoing it is concluded that the record supports the finding that the petitioner was guilty of professional misconduct and was properly subjected to disciplinary action. But under all of the circumstances disbarment appears to be out of proportion to the seriousness of the offenses committed. The ends of justice would fully be met by the suspension recommended by the Local Administrative Committee.

It is therefore ordered that the petitioner be suspended from the practice of the law in this state for the period of two years, this order to become effective thirty days from the filing of this decision.

CARTER, Justice.

I dissent.

While I agree that petitioner was guilty of moral turpitude and should be disciplined for his conduct, I cannot agree that he should be suspended from practice for a period of two years. In my opinion, suspension from practice for a period of six months would be adequate under the facts disclosed by the record in this case.

Furthermore, I do not agree with the holding in the majority opinion that gross negligence of an attorney in handling his client's business warrants disciplinary action. In the absence of intentional wrongdoing, I do not believe it can fairly be said that an attorney has been guilty of conduct involving moral turpitude.

The record here clearly discloses that petitioner was guilty of conduct involving moral turpitude, although he apparently had no intention of defrauding his client, and no loss was suffered as a result of his misconduct.

For the foregoing reasons I would suspend the petitioner from practice for a period of six months.

40 Cal.2d 412

RUBIN v. AMERICAN SPORTSMEN TELEVISION EQUITY SOC. et al.**MIKE HIRSCH ENTERPRISES, Inc. v. AMERICAN SPORTSMEN TELEVISION EQUITY SOC. et al.**

L. A. 21803, 21847.

Supreme Court of California, in Bank.

March 10, 1953.

Rehearing Denied April 2, 1953.

Actions for injunctions against picketing of plaintiffs' wrestling arenas after plaintiffs' refusal to sign a labor agreement requiring them to book only wrestlers who are members of defendant society to perform in televised wrestling events. From orders of the Superior Court, Los Angeles County, W. Turney Fox, J., granting preliminary injunctions, defendants appealed. The Supreme Court, Shenk, J., held that the trial court did not abuse its discretion in determining the desirability of retaining the parties' status quo pending a hearing on the merits, in view of a serious doubt created by the facts presented as to whether defendant was a bona fide collective bargaining agent for wrestlers booked by plaintiffs in televised events, nor in concluding that plaintiffs were more likely to be injured by denial of preliminary injunctions than defendants were likely to sustain injuries by granting thereof.

Orders affirmed.

Carter and Traynor, JJ., dissented.

Prior opinion, Cal.App., 234 P.2d 188.

1. Labor Relations ⇐971

Where evidence in hearing on application for preliminary injunctions against picketing of plaintiffs' wrestling arenas after plaintiffs' refusal to sign agreement requiring them to book only members of defendant society to perform in televised wrestling events was neither clear nor conclusive as to whether such members were employees or independent contractors not covered by National Labor Management Relations Act, trial court was justified in concluding tentatively that relationship was entrepreneurial enterprise rather than employment, so as to entitle plaintiffs to preliminary injunctions. National Labor Relations Act, § 2(3), as amended by Labor Management Relations Act 1947, 29 U.S.C.A. § 152(3).

2. Labor Relations ⇐193

An incorporated society's attempt to qualify as labor organization under National Labor Management Relations Act did not settle question whether society was bona fide labor organization, entitled to represent members thereof as collective bargaining agent, in state court actions to enjoin society from picketing wrestling arenas of parties refusing to sign agreement requiring them to book only members of society to perform in televised wrestling events.

3. Labor Relations ⇐836

Concerted activity for an objective not reasonably related to any legitimate interest of organized labor may be enjoined under National Labor Management Relations Act.

4. Labor Relations ⇐962

On application for preliminary injunctions against picketing of plaintiffs' wrestling arenas after plaintiffs' refusal to sign agreement requiring them to book only members of defendant society to perform in televised wrestling events, trial court did not abuse its discretion in determining desirability of retaining parties' status quo pending hearing on merits, in view of serious doubt created by facts presented as to whether corporation was bona fide collective bargaining agent for such wrestlers nor in concluding that plaintiffs were more likely to be injured by denial of preliminary injunctions than defendants were likely to sustain injuries by granting thereof.

Richard A. Perkins, Los Angeles, and W. M. Freiburghouse, South Gate, for Appellants. John C. Stevenson and Lionel Richman, Los Angeles, as Amici Curiae on behalf of Appellants.

Cyril Moss, Hollywood and George Appell, Los Angeles, for respondent.

SHENK, Justice.

The appeals in these cases are by the defendants from preliminary injunction orders. The plaintiffs commenced the actions for injunctive relief against the same defendants to restrain picketing after the plaintiffs' refusal to sign a tendered labor

agreement on behalf of wrestlers performing in television events. Essentially similar circumstances are involved in each case. The hearing on the application for a preliminary injunction disclosed the following alleged and averred salient facts:

The plaintiffs are promoters of professional wrestling matches in Los Angeles county. They book the contestants and pay them for their activity as wrestlers. The wrestling events have been televised since April 1950 through the offices of a telecasting corporation which pays a compensation directly to the participants for television rights. The licensing and regulation of wrestling contests are under the jurisdiction of the State Athletic Commission.

The defendant American Sportsmen Television Equity Society, Inc., herein called Television Equity or the society, is a corporation organized in this state with its principal place of business in Los Angeles county. The individual defendants, at least one of whom is a wrestler, are officers and directors of the corporation. Television Equity is not affiliated with a labor organization although an unsuccessful attempt was made to affiliate with the American Federation of Labor. The society has filed with the United States Department of Labor copies of its constitution, by-laws, and certain reports and affidavits required by the Labor-Management Relations Act, 1947. These documents are not included in the record. The society has been certificated by the National Labor Relations Board as having complied with the requirements. Forms of application for membership in Television Equity and of a labor agreement, designated as a "Code of Fair Play", are in the record. To the plaintiffs' knowledge none of the booked wrestlers is a member of the organization.

In September and October of 1950 the defendants asked the plaintiffs to sign the labor agreement which would require them to book only wrestlers who are or would become members of Television Equity. The plaintiffs refused the request on the ground that the society was not a bona fide labor organization. Thereupon the defendants placed or threatened to place pickets at the entrances to the arenas.

The plaintiffs filed their complaints and obtained an order to show cause. The hearing was had on the verified complaints and on affidavits filed by the defendants. The appeals present for review the propriety of the action of the court pursuant to its discretionary power in ordering the preliminary injunction pending a hearing on the merits.

The matter of state jurisdiction is argued. Since the question of the defendants' claimed organizational and picketing rights concerns wrestlers whose contests are televised, it is assumed that the events are in interstate commerce. This involvement is also implied in the certification by the National Labor Relations Board of the society's compliance with requirements for the filing of reports and affidavits under the federal labor relations law. But there has not been any determination by that Board of the wrestlers' employment relation status.

Section 2 (3) of the National Labor Relations Act, July 5, 1935, 49 Stats. 449, 450, c. 372, as amended by the Labor Management Relations Act, 1947, 61 Stats. 137, 29 U.S.C.A. § 152(3), expressly excludes from coverage as an employee "any individual having the status of an independent contractor". The plaintiffs contend that the wrestlers are independent contractors and therefore not covered by the federal law. On the other hand the defendants seek a judicial determination that the wrestlers are "employees" because they receive from the plaintiffs some instruction relating to the kind of holds and maneuvers to be used to give color to the contest.

[1] The evidence in the record is neither clear nor conclusive that the wrestlers are employees and not independent contractors. Nor do the facts necessarily support a conclusive determination that the wrestlers have no employment relation with the plaintiffs. Cf. National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170. On the present showing the trial court was justified in coming to the tentative conclusion that the relationship falls into that characterized in the Hearst case as

"entrepreneurial enterprise", rather than into employment subject to the protections of the federal act. The present record suggests no obstruction to the free flow of commerce which would be served by employment coverage under the federal labor law. Contrary to the considerations involved in the Hearst case, the economic factors of the relation between the plaintiffs or the television corporation and the wrestlers do not bear more closely on employment than they do on independent contractual relationships. The factual problem involved because of exclusion of independent contractors from the federal act is not necessarily finally resolved by the issuance of the preliminary injunction. The question of the existence of the employment relationship is one which it is assumed will be determined on the trial of the action.

Assuming in accordance with the presently implied conclusion of the trial court that the wrestlers are independent contractors, the defendants nevertheless contend that Television Equity has the right to exercise power as a labor organization and to publicize the labor interest by picketing the arenas. They rely on *Bakery & Pastry Drivers & Helpers Local 802, etc. v. Wohl*, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178; *Riviello v. Journeymen Barbers, etc., Union*, 88 Cal.App.2d 499, 199 P.2d 400, cf. *Bautista v. Jones*, 25 Cal.2d 746, 155 P.2d 343, and similar cases.

The plaintiffs do not question the general principles involved in the cases relied upon, but contend that the defendant corporation is not a bona fide labor organization, that it does not have trade union status, that there is no legitimate labor interest involved, and that a color of labor interest has been assumed for the purpose of competing with the plaintiffs for control of the television rights of wrestlers in the Los Angeles area.

The principles relied on do not preclude careful scrutiny into the bona fides of the organization and its asserted right of representation. In fact the issues tendered would seem to require the court on the trial to investigate all of the surrounding circumstances. If the jurisdictional issue is

resolved by a determination that the wrestlers are independent contractors, judicial investigation of the bona fides of the defendant as a labor organization can take place only in the state forum.

[2] The attempt to qualify as a labor organization under the federal act does not settle the question here. See *International Brotherhood etc. v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995; *Building Service Employees International Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045; *Bautista v. Jones*, supra 25 Cal.2d 746, 155 P.2d 343. As clearly pointed out in those cases, the issues are not so much matters of constitutional right as they are problems presented to the state in the application of state policy in an endeavor to maintain peaceful labor-management equilibrium.

No simple test may be applied to determine the questions of the labor interest or of labor representation. As stated in *National Labor Relations Board v. Hearst Publications*, supra, 322 U.S. at page 134, 64 S.Ct. 851, 88 L.Ed. 1170, the wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test.

It is contended that independent contractors in certain circumstances may not assert a right to remain unorganized. The plaintiffs urge that the wrestlers have that right. They state that any competitive interest is for control between equal industrial combatants or lies solely within the ranks of the wrestlers on the question whether or not to unionize; that consequently no legitimate labor interest has been shown, and therefore no reasonable relation to collective bargaining has been offered by Television Equity on behalf of the wrestlers.

It appears from the defendants' affidavits that the purpose of Television Equity is to engage in collective bargaining concerning wages and other conditions of employment of various sports artists who engage or may be employed to appear in television programs; to advance the welfare of sports artists who appear in television programs of any nature, and to preserve their rights

of self-organization and their rights to bargain collectively including rights to engage in concerted activity for that purpose.

Television Equity became an unincorporated association early in 1949 and was organized as a corporation in August 1950. Its constitution and by-laws were filed with the Labor Department in September, 1949 and it was certificated on October 16, 1950, as having complied with report and affidavit filing requirements of the federal law. The membership application form designates Television Equity as the bargaining representative whether the purpose of bargaining relates to conditions in televised events or otherwise; but the averred corporate objectives and the contract offered to the plaintiffs concern the conditions relating to sports artists appearing in televised events. It is averred that the membership of the corporation at the time of hearing consisted of forty wrestlers working in the Los Angeles area. There is no statement as to whether the members appear in television programs.

[3,4] The record justifies the inference that labor status of Television Equity has been sought to facilitate its membership organization work in the Los Angeles area by the exercise of the coercive measures. The reasonable inferences from the facts support a conclusion that the defendants have not yet established the labor interest and the competition with organized labor which might secure Television Equity's position to demand recognition as the appropriate bargaining agent for televised wrestlers in the plaintiffs' arenas. The facts so far presented indicate a serious doubt as to the existence of the elements which would support the defendants' claim of bona fide collective bargaining agency on behalf of the wrestlers booked by the plaintiffs in televised events. Concerted activity for an objective which is not reasonably related to any legitimate interest of organized labor may be enjoined. *Building, etc., International Union v. Gazzam*, supra, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045. The doubt thus created supports a conclusion of the desirability to retain the status quo of the parties pending a hearing on the merits.

The trial court has so concluded by the issuance of the preliminary injunction orders. It did not abuse its discretion in making that determination, nor in concluding that as between the parties the plaintiffs were more likely to be injured by a denial of the requested temporary relief than that the defendants were likely to sustain injury by the granting of the preliminary injunction. *Riviello v. Journeymen Barbers, etc., Union*, supra, 88 Cal.App.2d 499, 510, 199 P.2d 400.

The orders are affirmed.

EDMONDS, SCHAUER, and SPENCE, JJ., concur.

GIBSON, C. J., concurs in the judgment.

CARTER, Justice.

I dissent.

I cannot agree with either the reasoning or the result reached in the majority opinion. I would write the opinion in this case as follows:

From their verified complaints and affidavits, viewed most favorably for plaintiffs, it appears that plaintiffs are promoters of professional wrestling matches in Long Beach and Ocean Park, respectively. Defendants are American Television Equity Society, and officers and directors of the society.

According to the affidavit of the society's president, it is a nonprofit corporation organized under the laws of California primarily for the purpose of acting as collective bargaining agent for its members in respect to improving conditions of employment of various "sports artists" who appear on television programs and to establish rules of fair play. In September, 1949, its predecessor, an unincorporated association, filed with the National Labor Relations Board an application for recognition as a labor organization under the National Labor Management Relations Act. Later it filed a similar application and was accorded recognition by the board as such an organization. Among its members are professional wrestlers licensed by the California State Athletic Commission. In its form of application for membership the

applicant states that he appoints the society as his bargaining agent. Plaintiffs allege in their complaints, however, that the society is not "an organization, or agency, or employee representation committee, or any local unit thereof, in which employees participate or exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment, or conditions of work, as provided in Section 1117 of the Labor Code of the State of California, * * * [S]aid Society, Inc. was organized for the purpose of compelling certain professional wrestlers in the State of California to become members of, or affiliated with, said defendant corporation so that defendants could and would receive a percentage of the money paid to said wrestlers for their television rights."

There is a dispute as to whether the wrestlers appearing in plaintiffs' arenas are their employees or independent contractors. The complaints allege that the relationship of employer-employee does not exist; that plaintiffs "book" the wrestlers for performances and have an agreement with a "certain" corporation under which the latter has the right to televise the matches, for which right the corporation pays the wrestlers; that plaintiffs exercise no control over the manner or method of performance by the wrestlers. Defendants' affidavits are to the contrary.

Further, it is alleged that none of the wrestlers performing in matches promoted by plaintiffs belong to the society. In September, 1949, defendants combined to injure plaintiffs' businesses, by claiming falsely that the society was a bona fide labor organization to safeguard the interests of employees, and that a labor dispute between plaintiffs and the society existed, when in fact its purpose was to compel wrestlers to become members of it so it could receive a percentage of the money paid them for television rights, and that no labor dispute exists. (This is denied by defendants.) To carry out its purpose of obtaining a percentage of the wrestlers' pay, defendants demanded that plaintiffs sign an agreement with the society that plaintiffs would use only wrestlers who are or will

become members of the society. Plaintiffs refused to agree and defendants have picketed and threaten to continue to picket their places of business to compel them to sign such an agreement. The pickets carried a sign stating "unfair to organized labor." As a result of the picketing, plaintiffs have lost and will continue to lose business. There is no labor dispute between plaintiffs and the wrestlers performing at their arenas. The preliminary injunctions enjoined the picketing.

The sharp conflict in the complaint and affidavits is apparent. The preliminary injunction was issued, however, and I must accept the view most favorable to plaintiffs, as the trial court is the judge of credibility and must resolve the conflicts. *Northwestern Pac. R. R. Co. v. Lumber & S. W. Union*, 31 Cal.2d 441, 443, 189 P.2d 277. Plainly, the foregoing matters alleged by plaintiffs are sufficient to establish that professional wrestlers are independent contractors rather than employees. It might seem to show also that the sole purpose of the society and of its picketing activity and demands is not to advance the working conditions of employees or of professional wrestlers as independent contractors. It is to compel them to be members of its organization in order that it may receive a percentage of the compensation which such wrestlers receive for consenting to the broadcast of the matches on television. If this is the only purpose or object of the society, it would appear to be lacking in lawful objective, it being merely a scheme whereby the society will profit from wrestlers without giving them anything in return. I do not know how the members of the society would share in the money so obtained, if at all, but if they share equally, then a portion of the compensation of each wrestler would be shared by all, resulting in wrestlers who commanded higher compensation sharing in part with those receiving less. The only other possibility that presents itself is that the officers of defendant Society would consume the profits in salaries paid to themselves, and that their activity in picketing or interfering with plaintiffs' businesses has as its object a "racket," that is, ex-

torting money from the wrestlers, or has no object at all, except that of hurting plaintiffs' businesses.

I do not think that such an interpretation of the complaint is reasonable, nor that the trial court so intended to construe it. It is not alleged that the foregoing purpose was the sole one in the latter part of the quotation from the complaint, and in the first part, it is alleged that the society is not an organization in which *employees* participate, which I construe to mean that wrestlers are independent contractors rather than employees and the members of the society consist of the former. In the same tenor it is also alleged that there is not a labor dispute between plaintiffs and the wrestlers performing in their arenas. But what constitutes a labor dispute is indecisive, that term being vague at the best. As will be seen from the discussion later herein the pertinent factors do not involve such indefinite phrases as "labor dispute," "independent contractors" and "labor organizations." The question is, whether the acts of defendants as such are justified because of the circumstances. I turn, therefore, to the detailed statement in the affidavit of the president of the society showing that it is in part organized to improve the working conditions of professional wrestlers, whether they be called employees or independent contractors, and to deal on behalf of its members with those who use their services, and to adopt rules of fair play among wrestlers, and that the picketing here was done to bring the wrestlers used by plaintiffs into its ranks. Thus there is a situation where independent contractors whose commodity for sale is services—wrestling—join in an association to improve their bargaining position with the buyer of their talents in order that they may obtain more advantageous working conditions and compensation. To that end they picket a prospective user of their services to compel the ones whose services he is using to join the association, and to deal with it in regard to compensation, working conditions and the selection of those who shall be participants in the exhibitions.

Preliminarily, it should be observed, plaintiffs' assert that there was no economic

relation between it and the wrestlers, because the wrestlers were paid by a "certain" television corporation for the right to televise the matches, hence there was no relationship between them and the wrestlers at all. Plaintiffs allege, however, that they "book" the wrestlers for the performances put on by them. Thus it would appear that they choose who shall perform, and as they are in the promotion business of exhibiting such matches, there is a direct connection between them and the wrestlers. Moreover, they also allege that *they* made a contract with a television corporation whereby *they* granted the right of television to the corporation for a compensation "mutually agreed upon." The wrestlers were not a party to the agreement. All that is alleged is that the corporation pays compensation to the wrestlers for television rights. It certainly cannot be said that bringing concerted action at the place where the matches are performed and televised, under these circumstances, is so remote that it is not justified, assuming the concerted activity is otherwise legitimate.

There is no basis for the injunction, inasmuch as the picketing is not for an unlawful object. The object thereof is to persuade the wrestlers engaged by plaintiffs to join the society and be represented by it and to have plaintiffs agree to engage wrestlers through the society. The fact that they are independent contractors or that there is not a labor dispute or the society is not a labor union in the sense that the wrestlers are not employees in the ordinary employer-employee relation, does not alter the case. They are offering their services—their labor—for sale and have a definite economic interest in banding together to more effectively negotiate prospective purchasers on questions of price, working conditions, etc. In those respects there is no substantial difference between an independent contractor and the one with whom he contracts and the employer-employee relation. In both cases the person is seeking a market for his personal services on the best terms obtainable, and in both the prospective user of those services is, generally speaking, an employer, a user and engager of personal services. The economic inter-

ests and positions are fundamentally the same. Indeed, the interference with plaintiffs' businesses may be privileged under a rule that: "One who purposely causes a third person not to enter into or continue a business relation with another in order to influence the other's policy in the conduct of his business is privileged, if (a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other and (b) the desired policy does not illegally restrain competition or otherwise violate a defined public policy and (c) the means employed are not improper." Rest., Torts, § 771.

Thus having common factors, cases in the labor relations field are pertinent. Peaceful picketing is lawful "if reasonably relevant to working conditions and collective bargaining" even though there is no dispute between the employer picketed and his employees, *C. S. Smith Metropolitan Market Co. v. Lyons*, 16 Cal.2d 389, 106 P.2d 414, as is picketing to compel independent contractors to join a union, there being an appropriate economic connection. *Emde v. San Joaquin County, etc., Council*, 23 Cal. 2d 146, 143 P.2d 20, 150 A.L.R. 916; *Rivello v. Journeymen Barbers, etc., Union*, 88 Cal.App.2d 499, 199 P.2d 400. And, in *Bautista v. Jones*, 25 Cal.2d 746, 155 P.2d 343, 345, this Court held valid an injunction granted to independent peddlers of milk to enjoin a milk drivers' union from preventing milk brokers from supplying them with milk, because the union would not permit the peddlers to join the union, but said:

"It [the right to work in independent business] is equally subject to peaceful, economic pressure by labor organizations seeking legitimate ends, such as conditions of work, collective rather than individual bargaining, seniority privileges and other methods of advancement, and the union or closed shop. See *McKay v. Retail Auto Salesmen's Local Union No. 1067*, 16 Cal. 2d 311, 106 P.2d 373; *C. S. Smith Metropolitan Market Co. v. Lyons*, 16 Cal.2d 389, 106 P.2d 414; *Shafer v. Registered Pharmacists Union*, 16 Cal. 2d 379, 106 P.2d 403; *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855.

"The business-worker operating in an industry or field in which he competes with organized workmen may likewise be subjected to the same means of persuasion as any other workman to join the union and conform to the conditions regulating union labor."

I am not relying upon any statute and none has been suggested which prohibits the conduct of defendants. Nor am I concerned with the recent decisions of the United States Supreme Court, such as *Building Service Employees Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045; *International Brotherhood, etc., Teamsters Union v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995 and *Hughes v. Superior Court*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985, where the state policy expressed by court decision or statute or the national policy expressed by Congress were found valid, although peaceful picketing was involved. Here there is no state policy, either by statute or court decision, which makes defendants' actions unlawful. On the contrary, in analogous fields, where the strict employer-employee relation exists, the policy is to permit such conduct.

It is urged that the banner "unfair to organized labor" carried by the pickets was false, because there was no labor dispute and the wrestlers are not employees; they are independent contractors. I have pointed out, however, that their position is substantially the same as organized labor. Moreover, that phrase "is not a falsification of facts and 'to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like "unfair" or "fascist" is not to falsify facts.' *Cafeteria Employees Union v. Angelos*, supra (320 U.S. 293, 64 S.Ct. [126] 127, [88 L.Ed. 58]); see, *Park & Tilford Import Corporation v. International, etc. of Teamsters*, supra [27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426]." In *re Blaney*, 30 Cal.2d 643, 649, 184 P.2d 892, 896.

I would, therefore, reverse the orders.

TRAYNOR, J., concurs.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

40 Cal.2d 546

**MALONE et al. v. SUPERIOR COURT, IN
AND FOR CITY AND COUNTY OF
SAN FRANCISCO et al.**

S. F. 18752.

Supreme Court of California, in Bank.

March 17, 1953.

Certiorari proceeding against Superior Court. The Supreme Court, Carter, J., held that member of the Democratic County Central Committee of the City and County of San Francisco was entitled to perpetuation of testimony to be used in proposed accounting action.

Portion of order of Superior Court annulled and portion affirmed.

Prior opinion 249 P.2d 324.

1. Depositions ⇨11, 58

Member of Democratic County Central Committee of the City and County of San Francisco was not entitled to court order directing perpetuation of testimony and order directing subpoena duces tecum to take testimony of illegal members of committee and to have certain documentary evidence produced by them for purpose of contemplated action to test their appointments, in view of decision of Supreme Court holding that they were not legal members of the committee. Code Civ. Proc. §§ 2083-2089; Election Code, § 2833.

2. Depositions ⇨11, 58

Member of the Democratic County Central Committee of the City and County of San Francisco was entitled to court order to directing perpetuation of testimony and order directing issuance of subpoena duces tecum of illegal members of committee and to have certain documentary evidence produced by them for purpose of showing allegedly illegal handling and expenditures of funds of committee, so that such evidence could be used in accounting action. Code Civ.Proc. §§ 2083-2089; Election Code, § 2833.

3. Associations ⇨18

Corporations ⇨320(7)

An officer of a non-profit corporation or unincorporated association may be sued by a member thereof for an accounting

where it is alleged that assets of organization are concealed and illegally expended.

4. Counties ⇨196(1)

Resident taxpayer under appropriate circumstances may maintain action against officer where there has been an illegal expenditure, waste or injury to public funds. Code Civ.Proc. § 526a.

5. Elections ⇨152

Where statutes conferring legal rights on members of a political party have been passed, courts have right to ascertain whether those rights have been violated, and decision of party tribunal on such question is of no binding effect.

6. Elections ⇨152

If primary elections have been established by law, a candidate cannot be divested by a political organization of rights derived from such election, since question is no longer solely a political one, but one of law of which courts must take cognizance.

7. Elections ⇨121(1)

Rights of members of a party committee elected at primary election conducted under public authority cannot be divested by a political organization.

8. Constitutional Law ⇨68(1)

Where civil and property rights rather than politics and political dogma are involved, courts will protect them.

William J. Dowling, Jr., San Francisco, for petitioners.

Delany, Fishgold, Werchick & Minudri, Manuel L. Furtado and Franklyn K. Brann, San Francisco, for respondents and real party in interest.

CARTER, Justice.

In this proceeding in certiorari it appears that on November 5, 1951, applicant Elmer Delany, filed in the Superior Court an "Application for Order Directing Testimonies and for Order Directing Subpoenae Duces Tecum" under sections 2083-2089 of the Code of Civil Procedure. No action is pending concerning the matters for which the testimony is sought; he seeks

to perpetuate the testimony for a contemplated action.

In his application, he made no statement as to his interest or position, but that sufficiently appears later. (He is a duly elected Member of the Democratic County Central Committee in San Francisco; see *Stout v. Democratic County Central Committee*, 40 Cal.2d 91, 251 P.2d 321. He alleged therein that he expects to be a party plaintiff in an action or actions to be brought, the adverse parties to which will be Malone, the Chairman of the Democratic County Central Committee, and Nolan, an appointed member of the Committee (apparently one of those additional members declared to be illegally appointed in *Stout v. Democratic County Central Committee*, supra, 40 Cal.2d 91, 251 P.2d 321; that the contemplated action or actions will involve the following issues:

"a. The illegal appointment and/or appointments of persons to the Democratic County Central Committee of the City and County of San Francisco.

"b. The illegality of certain appointive positions on said Democratic County Central Committee, and of the acts of said Democratic County Central Committee, in which said illegally appointed persons participated.

"c. The illegal conduct of the business, affairs and concerns of said Democratic County Central Committee.

"d. The illegal handling and expenditures of the funds of said Democratic County Central Committee.

"e. The calling and holding of illegal meetings of said Democratic County Central Committee.

"f. The calling and holding of putative meetings of said Democratic County Central Committee.

"g. The failure to call legal meetings of said Democratic County Central Committee * * *";

that the witnesses whose testimony is sought are Poheim the vice-chairman, Curley the secretary, Klein the treasurer and Byrne the financial secretary, of the Committee; that Malone will testify that he is

Chairman, has illegally appointed various persons to the Committee and allowed them to participate in its affairs and used them to block its business, has concealed Committee funds and expenditures and called illegal meetings of the Committee; that Poheim will testify he is vice-chairman and knows of illegal acts of Malone, was secretary, has the minutes and knows what occurred at illegal meetings; that Curley will testify that he is a secretary of the Committee and has notified illegal members of meetings and failed to notify legal members of the Committee, and has minutes of meetings; that Klein and Byrne will testify that they are acting treasurer and financial secretary, respectively, and as such have control and possession of the Committee's records which will show illegal expenditures which are concealed from the members; that Nolan will testify that he is an illegally appointed member of the Committee.

After the application was filed, it was ordered granted and the proposed witnesses moved to vacate the order. A determination of that motion was delayed for some time, and in the interval, the applicant filed an affidavit by Brann stating that applicant was a duly elected member of the Committee, the presence of illegally appointed persons at meetings, lack of notice of meetings, which was necessary for action in the nature of *quo warranto* or to enjoin the calling of meetings with such illegal members present; that the minutes of meetings are necessary to show the names of the additional members illegally appointed to the Committee and how it was done, all material on such members' title to office and the "financial affairs" of the Committee, which could be ascertained by a contemplated action for an accounting.

Thereafter the motion to vacate was denied. It is suggested that the Brann affidavit cannot be considered because it was not filed until after the order granting the application. It was, however, considered on the motion to vacate that order and we see no obstacle to considering it on the problem as a whole.

The proposed witnesses' main objection to the order granting the application is that

the showing in the application and affidavit were insufficient to justify it.

[1] One of the principal aims in a proposed action or actions for which it was sought to perpetuate testimony was the removal of the additional members appointed to the Committee under section 2833 of the Elections Code on the ground that the provision therefor was unconstitutional. That issue is now settled by our decision in *Stout v. Democratic County Central Committee*, supra, 40 Cal.2d 91, 251 P.2d 321 that the portion of section 2833 authorizing the County Central Committee of San Francisco to appoint, in addition to the duly elected members of the Committee, such additional members as it desired, was unconstitutional and that the additional appointees were not legal members of the Committee. At least "a" and "g" of the claimed issues (quoted *supra*) in a proposed action involve that question and there is no occasion to preserve testimony concerning it. Indeed, in applicant's petition for a hearing in this Court he states that the only issue involved is whether the additional members are lawfully holding the office.

There are indications, however, that another issue involved is the alleged concealment and mishandling of the funds of the Committee and the possibility of an action of accounting in connection therewith. Those things are charged as seen from the foregoing resumé of the application and the affidavit but the proposed witnesses assert that the showing is insufficient. Most of the discussion is devoted to the question of how much must be set forth in an application to examine witnesses to perpetuate their testimony for a future action or actions. The testimony of a witness may be taken and perpetuated. Code Civ. Proc. § 2083. The applicant who desires to take the testimony must present a verified petition to a judge of the superior court stating: "That the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; or,

"2. That the proof of some fact is necessary * * * any * * * matter which

may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

"3. The name of the witness to be examined, his place of residence, *and a general outline of the facts expected to be proved.*" Code Civ.Proc. § 2084. (Emphasis added.) The dispute involves the test as to the sufficiency of the general outline of the facts expected to be proved, whether it must show an actual or potential cause or right of action, see *Brown v. Superior Court*, 34 Cal.2d 559, 212 P.2d 878, but as in the *Brown* case that need not be decided because we think applicant has shown enough to indicate he would be entitled to some relief.

[2-4] We think there is sufficient showing that applicant would be entitled to some relief, namely, an accounting, inasmuch as it is charged that there has been a concealment of the financial affairs of the Committee and an illegal handling and expenditure of the Committee's funds. Such could be the basis for an action in accounting. An officer of a non-profit corporation or an unincorporated association may be sued by a member thereof for an accounting where it is claimed that assets of the organization are concealed and illegally expended. See *Gieske v. Anderson*, 77 Cal. 247, 19 P. 421; *Greenwood v. Building Trades Council*, 71 Cal.App. 159, 233 P. 823; *Hughes v. American Trust Co.*, 134 Cal.App. 485, 489, 25 P.2d 491; *Smetherham v. Laundry Workers' Union*, 44 Cal. App.2d 131, 111 P.2d 948; *Dingwall v. Amalgamated Ass'n, etc.*, 4 Cal.App. 565, 88 P. 597; *Florence v. Helms*, 136 Cal. 613, 69 P. 429; Cf. *Providence Baptist Church v. Superior Court*, 40 Cal.2d 55, 251 P.2d 10. Also a resident tax payer under appropriate circumstances may maintain an action against an officer where there is an illegal expenditure, waste or injury to public funds. See Code Civ.Proc. § 526a. Moreover, an officer, such as a member of the Committee, when especially interested in the question, may sue to protect the public's property. *O'Melveny v. Griffith*, 178 Cal. 1, 171 P. 934. Certainly a member of the Committee has a special interest in

the proper handling of the Committee's funds. It thus is not important whether we treat the Committee as analogous to an unincorporated association or as a public board the members of which are public officers. As to the latter, see discussion in *Stout v. Democratic County Central Committee*, supra, 40 Cal.2d 91, 251 P.2d 321. In either case an action such as for an accounting or similar relief would be available to the applicant.

[5-8] The prospective witnesses contend, however, that courts will not interfere with the affairs of political parties or committees and hence applicant could have no cause of action. 18 Am.Jur., Elections, §§ 143, 144. "Where, however, statutes conferring legal rights on members of a political party have been passed, the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such a question is of no binding effect. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization of rights derived from such election, the question being no longer solely a political one, but one of law of which the courts must take cognizance. The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority." 18 Am.Jur., supra, Elections, § 143. Certainly where civil and property rights rather than politics and political dogma are involved, the courts will protect them. See by analogy *religious societies, Providence Baptist Church v. Superior Court*, supra, 40 Cal.2d 55, 251 P.2d 10. *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal.2d 121, 245 P.2d 481; see also *Stout v. Democratic County Central Committee*, supra, 40 Cal.2d 91, 251 P.2d 321. Here we have only an issue of property rights—the funds of the committee—which does not purport to settle any political disputes or affairs.

That portion of the order for depositions and subpoenae duces tecum which covers the issue of the legality of the appointment of the additional members determined in *Stout v. Democratic County Central Committee*, supra, 40 Cal.2d 91, 251 P.2d 321,

together with all other issues raised, except those pertaining to the illegal expenditure and concealment of funds of the committee, are annulled. As to the illegal expenditure and concealment of funds, the order is affirmed. Each party to bear his own costs.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.



40 Cal.2d 503

FARBER v. OLKON et al.

L. A. 22536.

Supreme Court of California, in Bank.

March 17, 1953.

Action for broken legs sustained by mentally incompetent patient while undergoing electroshock treatment. The Superior Court, Los Angeles County, David Coleman, J., on defendants' motion for directed verdict, entered judgment for defendants, and plaintiff appealed. The Supreme Court, Schauer, J., held, *inter alia*, that evidence of negligence was insufficient for the jury.

Affirmed.

Carter, J., dissented.

Prior opinion, 246 P.2d 710.

1. Insane Persons ◊53

Where adult child is incompetent and has no legally appointed guardian, right to consent to medical treatment of child resides in parent who has legal responsibility to maintain the child. Civ.Code, § 206.

2. Assault and Battery ◊11

Institute, to which incompetent adult patient had been paroled, and attending physician were justified in proceeding with electrical shock treatments in reliance upon terms of parole, which required that proper treatment be given, and upon signed consent of patient's father to such treatment, and, therefore, institute and its staff were not liable to patient for injuries sustained during such treatment on ground that, in absence of consent of court appointed

guardian, such treatments constituted assault and battery. Welfare and Institutions Code, §§ 151.5, 154, 5700 et seq., 6726, 6559; Civ.Code, § 206.

3. Insane Persons ◊49

Statute prohibiting detainment in private mental institution of involuntary patient except upon certificate of doctor who has no financial interest in institution had no application where patient was paroled direct to such institution by Department of Institutions. Welfare and Institutions Code, §§ 151.5, 154, 5700 et seq., 6726, 6559.

4. Physicians and Surgeons ◊18(6)

Doctrine of *res ipsa loquitur* applies in medical malpractice cases only where layman is able to say as matter of common knowledge and observation, or from evidence can draw an inference, that consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.

5. Physicians and Surgeons ◊18(6)

In action by mentally incompetent adult for fractures sustained during electroshock treatment, evidence afforded no basis for invoking doctrine of *res ipsa loquitur*.

6. Physicians and Surgeons ◊18(9)

In action for broken legs sustained by mentally incompetent patient during administration of electroshock treatment, evidence of negligence of physician was insufficient for jury.

Fred Girard and Joseph D. Flaum, Los Angeles, for appellant.

Reed & Kirtland, David Sosson, Henry E. Kappler and Fred O. Reed, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiff, a mentally ill person appearing by guardian ad litem, appeals from an ad-

verse judgment entered upon a directed verdict in his action to recover damages from defendants for alleged bodily assault and negligence in administering an electroshock treatment to plaintiff. We have concluded that, contrary to plaintiff's contention, the trial court's determination that he was not entitled to the benefit of the doctrine of *res ipsa loquitur* was correct and that, although the evidence be viewed in the light most favorable to plaintiff and conflicts disregarded (see *Huffman v. Lindquist* (1951), 37 Cal.2d 465, 468-469, 234 P.2d 34; *Lashley v. Koerber, M. D.*, (1945), 26 Cal.2d 83, 84-85, 156 P.2d 441) defendants' motion for directed verdict was properly granted. It follows that the judgment should be affirmed.

Plaintiff was 31 years of age at the time of the treatment of which he here complains. He became mentally ill in August, 1936, at the age of 19, and since then has continued to suffer from chronic schizophrenia with hebephrenic and paranoid features with progressive mental deterioration. After being cared for at his father's direction in various homes, and sanitariums he was, in 1944, committed to Camarillo State Hospital, hereinafter termed Camarillo, which is under the supervision of the Department of Mental Hygiene¹, Welf. & Inst. Code, § 154, hereinafter termed the Department. He remained at Camarillo until August 8, 1947, when he was paroled to, and by Camarillo transported to, Los Angeles Neurological Institute,² hereinafter termed the Institute, under the father's agreement that he would care for and maintain plaintiff and, upon request, cause plaintiff's return to Camarillo at the father's own expense. Three days later, August 11, 1947, the father, with permission of the Institute, took plaintiff for an automobile ride, but failed to return plaintiff there to until August 29, 1948. In the meantime

1. Also known as the Department of Institutions, Welf. & Inst. Code, § 151.5.

2. Los Angeles Neurological Institute is the name under which the defendant Olkon-Wayne, Inc., a corporation, is alleged to have conducted its business, and David M. Olkon and George J. Wayne are alleged to have been employees of the

corporation. Dr. Wayne testified that both Dr. Olkon and he were directors of the corporation and of the Institute. Other persons named as defendants participated as nurses in giving the treatment alleged to have been negligently administered.

plaintiff had been kept for various periods at the father's home, in a sanitarium and in a hospital. At the hospital a brain operation known as a lobotomy was performed by Dr. Seletz on June 27, 1948, with the father's consent. (This lobotomy is mentioned here only as a relevant incident in plaintiff's medical history.)

The history given by Dr. Seletz states that the patient "has stereotyped behavior —will not answer questions. He has no discipline and continues to ramble in his speech * * * his thoughts are disjointed * * *. He refuses to use water to wash with since he states it is too costly. He will not bathe, and will not use the toilet * * *. He has had some 80 shock therapy treatments, both in private hospitals and at Camarillo State Hospital * * *." Following the lobotomy plaintiff was cared for in his father's home, but his condition gradually deteriorated, and he became more readily upset and disturbed. After consulting with Dr. Seletz, who suggested that following a lobotomy "sometimes they gave shock treatments," the father returned plaintiff to the Institute on the evening of August 29, 1948, and at that time discussed with defendant Dr. Wayne, who is one of the directors of the Institute, plaintiff's agitated and confused behavior and Dr. Seletz' suggestion of shock treatment, and "asked Dr. Wayne to see what he could do to help the boy." The father also signed a written consent to administration of the electric shock therapy.

Dr. Wayne, a licensed physician and surgeon who has specialized in psychiatry since 1940, had examined plaintiff when the latter had been admitted to the Institute in 1947 and was aware of his condition and the history of his treatment since then, including the lobotomy. Following further examination of plaintiff Dr. Wayne diagnosed his condition as the same as before, except worse, and on August 30, 1948, administered a shock treatment to him. Dr. Wayne testified that immediately after that treatment "there seemed to be evidence of a favorable response, and ordinarily we have found it good practice to skip a day in between each treatment * * * to

observe the reaction to the individual treatment * * *." Pursuant to this practice a second treatment was given to plaintiff on September 1, but between five and ten seconds after the current was applied and while plaintiff was in a convulsive state a snapping or "crunching" sound was heard by Dr. Wayne and the attending nurses. Dr. Wayne, suspecting fractures of the patient's bones, ordered X rays, and it was discovered that both femur bones had broken close to the heads. Plaintiff was thereupon taken to Temple Hospital for treatment of the fractures, and was kept in hospitals and at his father's home until March, 1949, when at the request of the Department the father returned him to Camarillo. Following the fractures, plaintiff's hips have become permanently deformed.

As grounds for reversal, plaintiff contends that as he was an incompetent without understanding and at the time of the shock treatment here involved had no court appointed guardian, the treatment was administered without any authorized consent thereto on plaintiff's behalf and therefore as a matter of law constituted an assault. Plaintiff further contends that the case should have gone to the jury on the issue of negligence, both under the doctrine of *res ipsa loquitur* and because the evidence allegedly would support a finding that defendants negligently failed to properly and adequately restrain plaintiff's body when the treatment was given.

Some 450 patients are paroled from Camarillo each month. In 1947 plaintiff's father requested that plaintiff be paroled. The request for parole was taken up at a meeting of the hospital's staff of physicians in April, 1947, and after considering the plaintiff's "hopeless mental condition" and unfortunate personal habits an "indefinite parole direct to licensed mental sanitarium" was recommended. The father upon being informed that "I should find a licensed place," made arrangements for plaintiff to be cared for at the Institute, which is a mental hospital licensed under sections 5700 et seq., of the Welfare and Institutions

Code and under Division XI³ of the Rules and Regulations of the Department (which were introduced into evidence). The father also signed the customary parole agreement or "bond" with the Medical Superintendent of Camarillo, which provides that the father "does hereby accept custody of said patient, with the understanding that he will continue under the jurisdiction of the Division of Extramural Care of the State Department of Institutions. It is further agreed to care for and maintain him and to see that he is promptly returned to the Hospital without any expense to the State in the event return is found necessary or advisable, or is recommended by the Division of Extramural Care." Plaintiff was thereupon, on August 8, 1947, "paroled to Los Angeles Neurological Institute" for an indefinite period and was taken to the Institute, as related hereinabove.

An officer of Camarillo testified that at the time plaintiff was paroled it was customary for parolees "to be furnished medical care by either a State licensed institution or the person to whom they were paroled," and that the Department "looked to the person to whom the patient was paroled to furnish the custodial care and also the medical care as they might require * * *"; that plaintiff "was paroled to the Los Angeles Neurological Institute and to no one else," and that both the Institute and the father had the responsibility to see that plaintiff had such medical care and maintenance as he might require. The witness further stated that the Department knew that the Institute was "a licensed mental hospital at the time * * *. And * * * a place where medical and psychiatric care could be furnished," and affirmed that as specified by Rule 10, of Division XI of the Department's Rules and Regulations "All patients who are confined or reside in [licensed, private] institutions, except those whose religious beliefs are in opposition to the re-

ceiving of medical attention, must be supervised and visited by a regularly licensed physician, and treatment must be outlined and shown in the records";⁴ that from the time plaintiff was paroled to the Institute in August, 1947, until the parole was terminated by the Department in March, 1949, there was "in accordance with the last agreement signed [by the father] at the time he [plaintiff] left [Camarillo]" no other place authorized to furnish medical care to plaintiff except the Institute.

The Superintendent of Camarillo "may grant a parole or leave of absence to a patient under general conditions prescribed by the Department". Welf. & Inst. Code, § 6726. The conditions prescribed by the Department are found in Rule 21 of Division III of its Rules and Regulations, and include provisions that the person and the place to which the patient shall be paroled must be specified, that the Department may transfer the patient from time to time as may seem most beneficial to the patient, and that "No person shall have the authority to change the conditions of any parole without full approval of the Department." Plaintiff does not suggest that the Superintendent did not exercise a proper discretion in paroling him to the Institute, nor that the 28 shock treatments which the record shows were administered to plaintiff by Camarillo were unauthorized (indeed, plaintiff concedes that the Superintendent is directed by section 6559 of the Welfare and Institutions Code to treat the patients), but it is contended that because plaintiff was an incompetent adult rather than a minor neither his father nor the Institute could lawfully consent to or administer such treatments and, hence, that the treatment administered by Dr. Wayne and the Institute, constituted an unlawful assault and battery.

[1, 2] In the first place, it is apparent from the testimony of the Camarillo officer

3. This Division deals with the establishing, licensing, inspecting, management, conduct, and personnel of private institutions for the care of insane and incompetent persons.

4. Rule 10 also provides that "Records of the reception and care of patients in pri-

vate institutions shall be kept with details as to all incidents, restraint, physical and mental treatment. These records shall be open to inspection by the Department of Institutions or any other authorized agent."

quoted hereinabove, as well as from the Department's Rules and Regulations, that when a patient is paroled it is contemplated and customary that he receive appropriate medical treatment in the licensed and inspected institution to which he is transferred, and that under the terms of the parole and the father's agreement here involved both the Institute and the father had the responsibility of seeing that plaintiff received necessary treatment. Moreover, a father is required under the law to care for and maintain an incompetent adult child. Civ.Code, § 206; see also *Anderson v. Anderson* (1899), 124 Cal. 48, 54-55, 56 P. 630, 57 P. 81. It also appears to be the general rule that "In case of an emergency a surgeon may operate on a [minor] child without waiting for authority from the parents * * * where it appears impracticable to secure it," but that in the absence of an emergency the parent of such a child may lawfully consent to the operation. (See 70 C.J.S., Physicians and Surgeons, § 48, p. 968.) We are of the view that where an adult child is incompetent and has no legally appointed guardian the right to consent to such treatment resides in the parent who has the legal responsibility to maintain such child. Under the circumstances here shown we are persuaded that the Institute and Dr. Wayne were justified in proceeding with the treatments in reliance both upon the terms of plaintiff's parole and upon the signed consent of the father, and that plaintiff's claim that such treatments constituted an unlawful assault or battery upon his body is without foundation. Cases relied upon by plaintiff (see *Markart v. Zeimer* (1924), 67 Cal.App. 363, 367, 227 P. 683; *Inderbitzen v. Lane Hospital* (1932), 124 Cal.App. 462, 467-468, 12 P.2d 744, 13 P.2d 905; *Valdez v. Percy* (1939), 35 Cal.App.2d 485, 491, 96 P.2d 142; *Estrada v. Orwitz* (1946), 75 Cal.App.2d 54, 170 P.2d 43; *Hively v. Higgs* (1927), 120 Or. 588, 253 P. 363, 53 A.L.R. 1052; *Pratt v. Davis* (1906), 224 Ill. 300, 79 N.E. 562, 7 L.R.A.,N.S., 609) involve situations where treatment was given or acts performed either without any authorized consent whatsoever or which went beyond the consent given, and are not controlling here.

[3] Section 5750 of the Welfare and Institutions Code, which prohibits the detainment in a private mental institution of an involuntary patient except upon the certificate of a doctor who has no financial interest in the institution, obviously does not apply where, as here, the patient is paroled direct to such institution by the Department of Institutions.

[4] It further appears that the doctrine of *res ipsa loquitur* may not be invoked by plaintiff. That doctrine applies in medical malpractice cases only where a layman is able to say as a matter of common knowledge and observation, or from the evidence can draw an inference, that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised (see *Engelking v. Carlson* (1939), 13 Cal.2d 216, 221, 88 P.2d 695), and it was in such situations that plaintiff was held entitled to the benefit of the doctrine in *Ybarra v. Spangard* (1944), 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, *Dierman v. Providence Hospital* (1947), 31 Cal.2d 290, 188 P.2d 12, and *Cavero v. Franklin, etc., Benevolent Soc.* (1950), 36 Cal.2d 301, 223 P.2d 471, upon which plaintiff here relies. Thus, in the *Ybarra* case, plaintiff while unconscious on an operating table received injuries to a healthy part of his body, not subject to treatment or within the area covered by the operation, from instrumentalities used in the treatment; in *Dierman* plaintiff was injured when an explosion occurred close to her face or in her respiratory tract while the surgeon was cauterizing a nose wound with a hot electric needle; and in *Cavero* the infant patient died while undergoing a tonsillectomy under the influence of a gas anesthetic, and the evidence of the medical experts *prima facie* established that "except for infected tonsils and adenoids and a slight temperature due to such infection, the child was normal and healthy," that the death was not due to any preexisting condition, and that death under such circumstances ordinarily does not occur when the operation is performed with due care and skill, i. e., in the absence of negligence; and, hence, it was held, in the absence of explanation by the defendant

an inference of negligence could be drawn by the trier of facts.

[5] By contrast the undisputed testimony of both defendant Dr. Wayne and the witness Dr. Thompson in the instant case established that electroshock treatment is designed to have "an effect upon the entire body. The entire body is actually thrown into a convulsive state, and the aim and hope, of course, is that this convulsion, and all of the biochemical changes that occur with this type of convulsion, will produce a helpful and beneficial effect upon the patient's mental condition"; that "the most frequent, the most usual and the most common hazard, which is germane, which is inherent in the method of treatment, is fractures. There are certain other hazards, and, indeed, there are some cases in which death has actually resulted, directly from the hazard germane to the treatment, but these are the calculated risks of the treatment * * *. [F]ractures occur as the result of muscle tension, whether it is in shock treatment or from stepping off of a curb * * * and in shock treatment there is muscle tension, which is a part of the treatment, and therefore * * * fracture becomes a calculated and even an expected risk of the treatment * * *. [T]here is a certain percentage of fractures which occurs notwithstanding any kind of precaution or care that can be taken to prevent it * * *. The area of fracture is completely unpredictable * * *. [T]he over-all incidence of fractures in shock treatment varies anywhere from perhaps one-half to about three and a half per cent. If one considers fractures of the spine * * * the incidence is" between 10 and 40 per cent. Dr. Wayne's "surmise * * * In retrospect" was that plaintiff's legs broke because "nutritional disturbances consequent upon long-standing mental illness affected bony structures"; the machine used in giving the treatment was a standard type, "one of the best; certainly one of the most expensive" and in good working order and "perfect condition"; when the "machine is out of order it becomes almost immediately apparent." Under such circumstances the trial court correctly concluded that the opinions of ex-

perts are required to evaluate the procedures and hazards of shock therapy in any particular case and that here neither does the expert testimony directly show (by the opinion of a competent witness to that effect) that there was any lack of due care or skill in the conduct of defendants, nor does the evidence show any combination of facts and expert opinion from which a layman can draw the inference that the consequences of the treatment administered to plaintiff were not such as ordinarily, i. e., normally, may follow if due care has been exercised. Accordingly, no basis for invoking the doctrine of *res ipsa loquitur* was established. The same conclusion upon similar facts was reached by the court in *Quinley v. Cocke* (1946), 183 Tenn. 428, 192 S.W.2d 992.

[6] Plaintiff's final contention—that defendants' own evidence would support a finding of negligence—is ingenious but utterly lacking in merit. The evidence relied upon is as follows: Dr. Wayne and three nurses testified at the trial that all three of such nurses assisted in restraining plaintiff during the treatment; there was no testimony that less than three nurses, or that any number of nurses other than three, participated in the treatment; there was, however, a conflict between the testimony referred to above as adduced at the trial and the testimony of Dr. Wayne and two of the nurses as originally given upon the taking of their depositions (subsequently corrected) as to the identity of one of the three participating nurses. Plaintiff argues that this original (later corrected and eliminated) conflict indicates that actually only two nurses assisted and that since Dr. Wayne thought it best to use three nurses it was negligent to use less than three. In drawing these factual inferences plaintiff strains too heavily a haul upon too thin a trace; it cannot support even an appellate court's appraisal of what could be substantial in a trial court.

Even if it were assumed that only two nurses rather than three were used in plaintiff's case, it would not appear that a reasonable standard of practice had been violated. The only evidence as to the standard of practice was supplied by defendants.

It is that "the whole matter of restraint * * * is in a state of great flux," with from one to five nurses being used by various practitioners, and that "There are some who restrain legs and some who do not restrain the legs at all. * * * For example, some therapists felt that an absolute minimum of restraint was the important thing; others have felt that an absolute maximum of restraint was the important thing, and there were all gradations in between." Dr. Wayne followed a middle course as he felt that "a mild to moderate amount of manual restraint should be used." "Under the practice * * * in the case where the one nurse was used to assist the doctor * * * the upper portion * * * of the anatomy would be restrained * * *, the lower extremities were allowed to move without any restraint."

Plaintiff stresses that Dr. Wayne testified that in plaintiff's case he used three nurses because he "felt that three nurses were necessary in order to properly restrain the plaintiff." In response to the question by plaintiff's counsel, "What dangers did you apprehend that these nurses might be able to relieve against or guard against in the way of restraint?" Dr. Wayne replied, "The specific danger would be too gross movement of the legs." Dr. Wayne further stated that "in accordance with the standard of practice in 1948, that danger was common knowledge to all practitioners," with the qualification that one group of practitioners believed "that there is danger of bone breakage and injury if restraint is used on too gross movements," that another group believed "that if restraint is not used there is danger of bone breakage and muscular injury," and that a third group of practitioners, with whom Dr. Wayne agreed, stood in between; that within the standards "individual patients require different amounts of restraint" and "under the standard" preferred by Dr. Wayne he "felt that George Farber required three nurses," disposed one at the extremities and two at the shoulders of the patient, but he did not believe "that with less than three nurses there was [more] danger of bone breakage * * * and the reason for it is that I use two and three nurses just as

frequently. In this particular case in question, I used three * * * I think it would have been possible to use two nurses, as I check matters before and since. In other words, a question of two or three here is not a crucial question * * *"

Furthermore, it is to be noted that all of the testimony on the subject is to the effect that two nurses were stationed at plaintiff's shoulders (one at each shoulder), and that a third nurse stood at plaintiff's feet holding his ankles. The testimony relied upon by plaintiff as constituting a conflict concerned the identity of one of the nurses standing at plaintiff's shoulders, and there is no suggestion in the record or evidence upon which an inference could be drawn by laymen that plaintiff's ankles were not under restraint during the treatment, or that the use of only one nurse instead of two at plaintiff's shoulders would have constituted a negligent contribution to the fracturing of his femurs.

Pathetic and heartrendingly grievous as is the plight of plaintiff—and his loyal father—there appears no basis whereby at law and in justice the defendants sued herein can be held to have violated a duty or to be accountable to plaintiff in damages. The fact that what was done with due care to help resulted instead in further hurt sets up no cause of action in tort.

The judgment is affirmed.

GIBSON, C. J., and SHENK, ED-MONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree with the majority that the doctrine of *res ipsa loquitur* may not be invoked by the plaintiff in this appalling case. If ever a situation existed where it was more applicable it has not been called to my attention. We have here a patient, mentally deficient, undergoing shock treatments to relieve that mental condition, emerging with both femur bones broken and a resulting permanent physical deformity.

In *Ybarra v. Spangard*, 25 Cal.2d 486, 489, 154 P.2d 687, 689, 162 A.L.R. 1258, this Court said: "The doctrine of *res ipsa*

loquitur has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' Prosser, Torts, p. 295. It is applied in a wide variety of situations, including cases of medical or dental treatment and hospital care. *Ales v. Ryan*, 8 Cal.2d 82, 64 P.2d 409; *Brown v. Shortlidge*, 98 Cal.App. 352, 277 P. 134; *Moore v. Steen*, 102 Cal.App. 723, 283 P. 833; *Armstrong v. Wallace*, 8 Cal.App.2d 429, 47 P.2d 740; *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 P. 436; *Vergeldt v. Hartzell*, 8 Cir., 1 F.2d 633; *Maki v. Murray Hospital*, 91 Mont. 251, 7 P.2d 228; *Whetstone v. Moravec*, 228 Iowa 352, 291 N.W. 425; see *Shain, Res Ipsa Loquitur*, 17 So.Cal.L. Rev. 187, 196.

"There is, however, some uncertainty as to the extent to which *res ipsa loquitur* may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, *with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that 'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.'* 9 Wigmore, Evidence, 3d Ed., § 2509, p. 382 * * *." (Emphasis added.)

In the *Ybarra* case, the plaintiff was to have an appendectomy. He emerged from the anesthetic with an injured shoulder

from which he developed a paralysis and atrophy of the muscles surrounding it. This case the majority seeks to distinguish on the ground that he received injury to a healthy part of his body not within the area to be covered by the operation. Does not that same fact prevail here? Plaintiff was to be treated for a mental condition and emerged with fractured femurs.

To say that the doctrine was applicable and an instruction thereon should have been given, is not to say that every time the doctrine is invoked, the person relying thereon is entitled to recover damages. All that the law requires is, that the defendant charged with negligence rebut the inference of negligence by giving a reasonable explanation of the cause of the injury. This is as it should be in a situation where the instrumentality causing the injury is within the exclusive control of the defendant, or his agents, and particularly so where, as here, a plaintiff was unconscious and, even had he not been mentally incompetent, completely unable to testify as to what occurred. As was said in the *Ybarra* case "the particular force and justice of the rule * * * consists in the circumstance that the chief evidence of the true cause, *whether culpable or innocent*, is practically accessible to him [the defendant] but inaccessible to the injured person." (Emphasis added.)

With respect to the confusion as to whether there had been two or three nurses holding plaintiff on the table during the shock treatment, I cannot refrain from noting with amusement, a quotation from the testimony of defendant, Dr. Wayne. He is reported as saying, in part, "I think it would have been possible to use two nurses, as I check matters before and since. *In other words, a question of two or three here is not a crucial question * * *.*" (Emphasis added.) Since when has it been necessary for a defendant to point out to a court and jury what is a crucial question in a case?

I am also amused at the statement in the majority opinion that "Pathetic and heart-rendingly grievous as is the plight of plaintiff—and his loyal father—there appears no basis whereby at law and in justice the

defendants sued herein can be held to have violated a duty or to be accountable to plaintiff in damages." As I have heretofore pointed out, invocation of the doctrine of *res ipsa loquitur* in a case such as this is not only proper, but the fair, just and equitable thing to do. And, had the doctrine been invoked, and an instruction given thereon, the heartbroken majority of this Court would merely have been declaring the law, not transgressing it.

I would reverse the judgment in the hope that justice might be done on a re-trial of the cause.



40 Cal.2d 516

DIMON v. DIMON.

S. F. 18118, 18359.

Supreme Court of California, in Bank.

March 17, 1953.

Divorced wife brought action against divorced husband to recover alimony and support for children, and divorced husband filed a cross-complaint to have trust established. The Superior Court of San Francisco County entered a judgment adverse to divorced husband, and he appealed. The Supreme Court, Shenk, J., held that wife could not recover alimony but that she had right to maintain action to recover for future support of children.

Judgment affirmed in part and reversed in part.

Traynor, J., dissented in part.

Prior opinion 244 P.2d 972.

1. Divorce ⚭321

Husband and Wife ⚭285½

The existence of the marital status is a prerequisite to the granting of alimony. Civ.Code, §§ 136, 137, 138, 139.

2. Divorce ⚭331

Divorced wife who obtained divorce in Connecticut based on constructive service only, could not recover alimony from divorced husband in action in California. Civ. Code, §§ 136, 137, 138, 139.

3. Divorce ⚭324

Divorced wife who has custody of minor children may bring an action against divorced husband for their future support. Pen.Code, § 270.

4. Divorce ⚭324

Though divorced wife may maintain action against divorced husband for future support of minor children of the marriage, she is not entitled to reimbursement for money paid out in support of children prior to court order directing divorced husband to maintain and support the children.

5. Courts ⚭7

An action against divorced husband for future support of minor children is a personal and transitory action and may be brought in any state where divorced husband can be found.

6. Divorce ⚭332

Where divorced wife obtained divorce in Connecticut based on constructive service only and was awarded custody of children, California court had jurisdiction of divorced wife's action against divorced husband for future support of the children.

7. Parent and Child ⚭3(3)

In action by divorced wife against divorced husband to recover for future support of children, evidence was insufficient to sustain finding that divorced husband was strong, healthy, and able-bodied and that without legitimate excuse he had willfully and deliberately abstained from reasonable efforts to obtain gainful employment.

8. Trusts ⚭372(3)

Evidence sustained finding that divorced wife did not hold realty in trust for divorced husband.

Johnson, Harmon & Henderson and Robert H. Johnson, San Francisco, for appellant.

Samuel L. Fendel and Gerald D. Marcus, San Francisco, for respondent.

SHENK, Justice.

This is an action by a former wife against her former husband to obtain past and future alimony for herself and past and future support for the children of the marriage previously terminated by a divorce in Connecticut. The defendant interposed a cross-complaint alleging that certain real and personal property is held by the plaintiff in trust for the defendant.

The trial court by judgment entered on the 25th of November, 1949, awarded the plaintiff \$1,950 for "alimony and support" for herself from the date of the Connecticut decree until her remarriage on August 31, 1948; also \$1,850 for the "support, care and maintenance" of the two minor children from date of that decree until the commencement of this action on August 4, 1947; also the sum of \$37.50 per month for the support of each child from the commencement of this action until majority. The judgment included an award of \$500 counsel fees and \$48.15 costs. On the cross-complaint the judgment was that the defendant take nothing. The defendant appealed from the judgment and the whole thereof. After the appeal was taken the court on the plaintiff's motion made an award of \$750 counsel fees, \$250 costs and \$37.50 per month for the support of the child who was still a minor during the pendency of the appeal. There is also an appeal from that order.

The parties were married in Oregon in 1926. In 1945 they separated. In March, 1946, the plaintiff wife obtained a divorce in Connecticut based on constructive service only. That decree awarded the custody of the two children to the plaintiff and purported to award alimony and child support to the plaintiff.

Both parties are non-residents of this state. The plaintiff and the children live in Oregon, and the defendant in Nevada. The suit was brought by the plaintiff suing in her own name and right to recover money she had paid out for past support of the children and herself, and for future alimony and support of the children. The children are not parties to the action. The plaintiff concedes that the "in personam" provisions of the Connecticut decree cannot be enforced, and the present action is not based on those provisions.

The primary question concerns the jurisdiction of California courts to enforce a support obligation of a non-resident former husband under the foregoing circumstances.

An examination of the law on the subject indicates merit in the defendant's contention that in this state a wife's right to re-

cover alimony or support for herself is limited to the period when the parties are husband and wife.

Section 136 of the Civil Code provides: "Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children * * *."

Section 137, as it existed at the time this action was commenced provided that, "When an action for divorce is pending" the court may require the payment of alimony or support. It also provided that "During the pendency of any such action" the court may require payments for alimony, costs, attorney's fees and support and maintenance.

Section 139 as it existed at the time of the commencement of this action provided that "Where a divorce is granted for an offense of the husband, the court may compel him to * * * make such suitable allowance to the wife for her support * * * as the court may deem just * * *."

[1,2] The language of these sections shows a consistent legislative purpose to confine the powers of the court to decree support in any form to the period when actions for divorce, annulment and separate maintenance are pending, including time on appeal and such further time as may be within the scope of the decree in the particular action. The amendments to Sections 137, 138 and 139 since this action was commenced, Stats.1951, vol. 2, p. 3910, do not change the provisions of these sections in matters here relevant. Primarily, the amendments broaden the provisions for separate maintenance where the marriage still exists. The language employed indicates a continued legislative purpose to limit the time during which application for alimony and support may be made. Our courts have consistently recognized that the existence of the marital status is a prerequisite to the granting of alimony. *Colbert v. Colbert*, 28 Cal.2d 276, 279, 169 P.2d 633; *Carbone v. Superior Court*, 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; *Talbot v. Talbot*, 218 Cal. 1, 2, 21 P.2d 110. The application for alimony has been held to be a

collateral proceeding or episode within the action for divorce, authorized for a particular purpose, but dependent for its maintenance upon the existence of the action. *Kellett v. Marvel*, 9 Cal.App.2d 629, 630-631, 51 P.2d 185; see also *Dunphy v. Dunphy*, 161 Cal. 87, 91, 118 P. 445; *Hite v. Hite*, 124 Cal. 389, 393, 57 P. 227, 45 L.R.A. 793; *Sharon v. Sharon*, 67 Cal. 185, 197, 7 P. 456, 635, 8 P. 709. In *Howell v. Howell*, 104 Cal. 45, 37 P. 770, it was held that the court had no jurisdiction to make an award for alimony to a wife who previously had obtained a final decree of divorce based on constructive service only. The court relied upon the provisions of the Civil Code referred to above to the effect that alimony could be decreed only "When an action for divorce is pending". Civ. Code, § 137. The case at bar is a close parallel to the *Howell* case, with the exception that in the present case the plaintiff's prior divorce decree was not issued by a court of this state and she seeks relief in a new and independent action. To permit her to prevail in this action would afford greater relief than would be available to her had she been a resident of this state and brought her original action here. The *Howell* decision has been followed in numerous cases, including *McClure v. McClure*, 4 Cal.2d 356, 359, 49 P.2d 584, 100 A.L.R. 1257; *Tolle v. Superior Court*, 10 Cal.2d 95, 97, 73 P.2d 607; *Puckett v. Puckett*, 21 Cal.2d 833, 841, 136 P.2d 1; *Calhoun v. Calhoun*, 70 Cal.App.2d 233, 237, 160 P.2d 923; *Patterson v. Patterson*, 82 Cal.App.2d 838, 842, 187 P.2d 113; *Hinson v. Hinson*, 100 Cal.App.2d 745, 746, 224 P.2d 405.

The plaintiff seeks to distinguish the *Howell* case on the ground that the action there was brought upon the prior divorce decree, whereas in the present case the action is one in equity, so called, and not dependent upon the provisions of the codes. It is claimed that the Superior Courts of this state have the same jurisdiction in equity possessed by the English Courts of Chancery unless prohibited by statute, *Tulare Irr. Dist. v. Superior Court*, 197 Cal. 649, 660, 242 P. 725; that although the code sections provide no authority for the

cause of action she has attempted to state, they do not prohibit such an action; that "For every wrong there is a remedy", Civ. Code, § 3523; that the powers of a court of equity should not be "confined by the rigid rules of law", and that "its powers should be so broad as to be capable of dealing with novel conditions." Citing *Bechtel v. Wier*, 152 Cal. 443, 446, 93 P. 75, 77, 15 L.R.A.,N.S., 549.

If the plaintiff's arguments are to prevail the provisions of the Civil Code which have been held to prohibit remedies similar to that which she seeks must be disregarded. However it is urged that the long-continued application of the code sections has placed California out of harmony with other states of the Union; that it permits the husband to desert his family and flee the matrimonial domicile to the haven which the laws of this state afford him; that the wife is put to the election either of never divorcing him in a jurisdiction where she cannot get personal service on him, or of sacrificing the right to alimony however necessitous her circumstances might be. The answer would seem to be that where she is, as here, the actor in the case she is put to the election of seeking a divorce in a jurisdiction where personal service on her husband may be obtained or of proceeding in a jurisdiction where subsequent awards of alimony are authorized, such as Massachusetts, *Annotated Laws of Massachusetts*, 1951, vol. 6, p. 484, and New Jersey, *New Jersey Revised Statutes* 1937, vol. 1, tit. 2, 2:50-36 et seq., p. 269, N.J.S.A. 2A:34, 13, 23 et seq. There are states wherein the courts have recognized that when a husband is the actor and has secured a divorce from an absent wife, the latter is permitted to claim alimony in a later suit. *Turner v. Turner*, 44 Ala. 437; *Davis v. Davis*, 70 Colo. 37, 197 P. 241; *Thurston v. Thurston*, 58 Minn. 279, 59 N.W. 1017; *Crawford v. Crawford*, 158 Miss. 382, 130 So. 688; *Cox v. Cox*, 19 Ohio St. 502; *Toncray v. Toncray*, 123 Tenn. 476, 131 S.W. 977, 34 L.R.A.,N.S., 1106. In *Hutton v. Dodge*, 58 Utah 228, 198 P. 165, the court allowed a wife to bring a subsequent action for alimony where, in the prior divorce action

on constructive service by the wife in that state, the decree specifically provided that it was subject to modification, as to alimony, at any time upon notice of motion by the plaintiff served upon the defendant within the state. Here the plaintiff would distinguish many of the cases, see *McFarlane v. McFarlane*, 43 Or. 477, 73 P. 203, 75 P. 139; *Hall v. Hall*, 141 Ga. 361, 80 S.E. 992; *Darby v. Darby*, 152 Tenn. 287, 277 S.W. 894, 42 A.L.R. 1379; *Kelley v. Kelley*, 317 Ill. 104, 147 N.E. 659; *Doeksen v. Doeksen*, 202 Iowa 489, 210 N.W. 545, *Staub v. Staub*, 170 Md. 202, 183 A. 605, which take a view contrary to her theory of relief on the same basis that she would distinguish *Howell v. Howell*, supra, 104 Cal. 45, 37 P. 770, 771, namely, that the wife in those cases attempted to reopen the divorce suit and modify that decree to provide for support rather than bring a new and independent action. However, the court in the *Howell* case stated that "After the judgment granting the divorce the plaintiff was no longer the wife of the defendant, and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment." This statement in effect has been repeated many times by the courts of this state.

It is concluded that at the time this action was brought there was no authority in this state supporting the plaintiff's right to pursue her claim for alimony, either past or future; and that appears to be our law at the present time. It may be of interest to note that in 1951 the Legislature enacted the Reciprocal Enforcement of Support Law, Stats.1951, vol. 1, p. 1906, Code Civ.Proc. § 1650 et seq. The purposes of that law are "to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto." Code Civ.Proc. § 1651. Briefly the act provides that a party entitled to support may file a complaint in the court of the county of her residence, naming as defendant the alleged obligor and giving his address in the state having reciprocal legislation. A certificate is transferred to a court in that state

which may obtain jurisdiction over the person of the defendant and conduct a hearing. Such a court may then enter an appropriate order commanding the defendant to pay into court the award in favor of the plaintiff. This act did not become effective until after the present action was commenced and it is not claimed that it comes within the provisions of the act. Any further extension of the duties of support is a legislative function. It was so recognized by the 1951 Legislature when it enlarged to some extent the relief theretofore not available under our existing statutes.

[3] There is a further question which involves the distinction between the plaintiff's alleged claim for support for herself, and support for her minor children. It is the law of this state that a divorced wife who has the custody of minor children may bring an action against the father for their support. *Dixon v. Dixon*, 216 Cal. 440, 14 P.2d 497; *Davies v. Fisher*, 34 Cal.App. 137, 166 P. 833. Penal Code section 270 provides for criminal liability of a father who fails to provide for his minor child; and he is not relieved from that liability "merely because the mother of such child is legally entitled to the custody of such child * * *." Since it applies to a "father of either a legitimate or illegitimate minor child", the existence of the marital status is not a prerequisite to liability. Civil Code section 138, as it existed at the time this action was brought, provided that "In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper * * *." Unlike the construction given to those sections of the Civil Code setting forth the rights of the wife to alimony and support, Civ.Code §§ 136, 137 and 139, this section has long been held to authorize an action for the support and maintenance of the minor children of a marriage although the marriage has been terminated by a divorce decree. *McKay v. Mc-*

Kay, 125 Cal. 65, 57 P. 677. Civil Code section 137.1, enacted in 1951 after the complaint herein was filed, provides: "When a father or mother has the duty to provide for the support, maintenance and education of the children of the father and mother and wilfully fails to provide for such support, * * * the father or mother, as the case may be * * * may maintain an action in the superior court against the mother or father * * * as the case may be, for the support, maintenance and education of said children." The effect of this provision does not appear to have been judicially declared. However, it is a legislative enactment of the case law as it existed at the time this action was commenced.

[4] While the plaintiff in this case may maintain an action for the support of the minor children of the marriage, no case has been referred to where an award for other than future support has been made. In McKay v. McKay, supra, 125 Cal. 65, 57 P. 677, the court decreed an award against the father for the maintenance and support of the minor children of a marriage previously terminated by divorce, but denied the wife's claim for reimbursement for money she had paid out in support of the children prior to any order of the court directing the father to maintain and support the children. The court stated, 125 Cal. at page 71, 57 P. at page 679: "The question of the father's liability for the care and support of his children after a decree of divorce, in which their custody has been awarded to the mother, has been frequently presented in actions brought therefor by strangers or by the mother, and courts have almost invariably held that an action against him to enforce such liability could not be maintained. [Citations.] * * * The jurisdiction which the court retains in the original case, either by express reservation in its decree, or which it has by authority of statute, to modify its judgment with reference to the custody and education of the children, or to make a new order in reference thereto, is not for the purpose of reimbursing her for any expenditures she may have voluntarily made in that behalf,

but to provide for such expenses as may be subsequently incurred by reason of the direction that may be given regarding such care and education."

[5,6] An action for the future support of minor children is a personal one. Being personal it is transitory. A transitory action may be brought in any state where the defendant can be found. 7 Cal.Jur. 596, and cases cited. There is therefore no good reason for denying jurisdiction to entertain this action insofar as it relates to the future support of the minor children. The trial court has that jurisdiction. The question then is whether it has been properly exercised.

The court found that at the times involved the defendant was a strong, healthy and able-bodied man; that "without justification or legitimate excuse", he has wilfully and deliberately abstained from reasonable efforts to obtain gainful employment, and that he has earned, and is capable of earning, from five hundred dollars to one thousand dollars per month.

[7] It is the defendant's contention that the foregoing findings are not supported by any substantial evidence in the record. With this contention we must agree. The undisputed evidence is that the defendant has no income and no assets; that he is and has been since the divorce in ill health and dependent on an aunt for support; that the only business in which he has been gainfully employed and experienced is the shipping business; that his employment in that business was lost to him without his fault, and that he has since sought employment without success. There is no evidence to contradict the defendant's statement that he has been and is in ill health, is dependent on an aunt for support, and is incapable of making a living. The finding is without sufficient evidentiary support.

[8] The defendant sought by cross-complaint to have it adjudged that certain real and personal property held in the plaintiff's name was possessed by her in trust for the defendant. In the main this property consisted of a country estate in Connecticut of approximately 156 acres,

including a 13-room home, an 8-room guest house, cabana house, three car garage, ten other garages, kennels, barns, a silo, shops, and other appurtenances and equipment. The property was alleged to have a value in excess of \$75,000. Admittedly all of it was purchased with money belonging to the defendant. After the parties separated the plaintiff continued to live at the family home and eventually disposed of all the property. At the time of the trial she still had \$12,000 of the proceeds of the sale of the property. It is the plaintiff's contention that she acquired the major portion of the property by gift from the defendant, and the remainder was necessarily sold to meet the defendant's obligations. It is the defendant's position that the parties never intended that transfers of the property to the plaintiff were to be absolute. On sharply conflicting but substantial evidence the trial court made findings in accordance with the plaintiff's contentions with respect to the question of the execution and finality of the gifts and the disposition of the other property involved. Upon these findings the trial court properly concluded that the defendant take nothing by his cross-complaint.

The judgment for the plaintiff on the cross-complaint is affirmed. In all other respects the judgment and the order are reversed; neither party to recover costs on appeal.

EDMONDS, CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice (concurring and dissenting).

These appeals from the judgment of November 25, 1949, and the order of September 15, 1950, bring into question six decisions of the trial court in favor of plaintiff: (1) judgment for \$1,950 as reimbursement for amounts spent for her own support after the Connecticut decree and before her remarriage; (2) judgment for \$1,850 as reimbursement for amounts spent for the support of the two minor children after the divorce decree and before commencement of this action; (3) judgment for \$37.-

50 per month for the support of each child from the commencement of the action until the child reaches majority; (4) judgment for \$500 counsel fees and \$48.15 costs incurred in the trial of the action; (5) judgment in favor of plaintiff on the cross-complaint; (6) order awarding plaintiff \$750 counsel fees, \$250 costs, and \$37.50 per month for child support, to enable her to defend the appeal and to support the child who was still a minor. The majority opinion affirms (5); the rest of the judgment and the order are reversed. One ground of reversal is that there is no evidence that defendant is able to make the payments ordered by the trial court. In addition, (1) is reversed on the ground that after dissolution of a marriage California does not allow a former wife an action for her support, past or future, and (2) is reversed on the ground that an action for reimbursement of past expenditures for child support will not lie.

In my opinion, the trial judge did not abuse his discretion in determining that defendant had the ability to pay the amounts awarded for suit money and child support. Under the circumstances of this case defendant can be required to reimburse his former wife for debts incurred on behalf of their children. I do not agree that dissolution of a marriage by an ex parte decree necessarily bars a subsequent action for support, but I agree that the record does not sustain the allowance for plaintiff's past expenditures for her own support. I agree that the judgment in favor of plaintiff on the cross-complaint should be affirmed. I would affirm the judgment and order except for that part of the judgment awarding plaintiff \$1,950 for her past support.

Defendant's ability to pay

The granting or denying of awards for suit money and child support rests largely in the discretion of the trial court; its decision will not be disturbed on appeal without a clear showing of an abuse of that discretion. *Baldwin v. Baldwin*, 28 Cal.2d 406, 413, 170 P.2d 670; *Dickens v. Dickens*, 82 Cal.App.2d 717, 722, 187 P.2d 91. In the present case plaintiff's need, the children's need, and the reasonableness of the amounts

awarded, were established by substantial evidence. An abuse of discretion is shown only if it is established as a matter of law that the trial judge could not reasonably conclude that defendant had the ability to meet the payments.

In determining the amount of the allowance under sections 137, 137.5, 138, and 139 of the Civil Code, the trial judge must take into account the defendant's ability to pay. *Sweeley v. Sweeley*, 28 Cal.2d 389, 394, 170 P.2d 469; *Arnold v. Arnold*, 215 Cal. 613, 615, 12 P.2d 435. The orders, however, need not be based upon the actual income of the husband. They may be based solely upon his ability to earn money by the use of reasonable effort. *Webber v. Webber*, 33 Cal.2d 153, 160, 199 P.2d 934; *Eidenmuller v. Eidenmuller*, 37 Cal. 364, 366; *McGann v. McGann*, 82 Cal.App.2d 382, 389-390, 186 P.2d 424. Thus, in *Tompkins v. Tompkins*, 83 Cal.App.2d 71, 187 P.2d 840, the court upheld an allowance of support against a husband who had not worked for many months, accepting the wife's contention that "a guilty party cannot avoid the responsibility for payment of alimony by the simple expedient of avoiding employment". 83 Cal.App.2d at page 79, 187 P.2d at page 845.

The record establishes that defendant had been employed as a steamship company executive for many years, earning from \$500 to \$1,000 per month. Since the divorce he has lived with his wealthy aunt in Nevada. He testified that he had no money or property and that his aunt paid all his bills and gave him pocket money. Defendant was 47 years old at the time of trial. When asked if he had made any efforts to get a job, he replied: "I had tried several times in New York. It is no easy thing to go in and get a job as president, the job that I had done; most companies have their own presidents." Defendant testified that he had high blood pressure and that his doctor had advised him not to work. The doctor was not called as a witness and defendant's testimony regarding his health

was not corroborated. Plaintiff testified that defendant's health had been good during their marriage. Defendant had an interest in the outcome of the case, and it was to his advantage to claim that he was unable to work. The trier of fact was entitled to disbelieve his testimony that he was in poor health. *Huth v. Katz*, 30 Cal. 2d 605, 609, 184 P.2d 521; *Blank v. Coffin*, 20 Cal.2d 457, 462, 126 P.2d 868. In an apposite case, a reduction of alimony was upheld on the ground that the trial court "could judge from the appearance of the [wife] as to whether she was or was not physically able to earn any part of the money necessary for her own support. The replies of the [wife] * * * upon the cold record indicate, at least, a lack of any real disposition on the part of the [wife] to earn any part of her own living." *Lamborn v. Lamborn*, 80 Cal.App. 494, 498, 251 P. 943, 944. Similarly, in the present case the trier of fact could conclude that it was defendant's distaste for physical exertion that precluded his obtaining employment.

In this proceeding we are not concerned with problems that might arise if defendant should refuse to pay the amounts ordered by the trial court. Under an early decision of this court a deliberate refusal to work could not be punished by contempt, *Ex parte Todd*, 119 Cal. 57, 58, 50 P. 1071, but ordinary judgment remedies would be available and the judgment could be satisfied if defendant should inherit or otherwise obtain property. Moreover, the threat of execution upon any subsequently acquired property, cf. *Di Corpo v. Di Corpo*, 33 Cal.2d 195, 201, 200 P.2d 529, might be sufficient to induce defendant to work.

I am therefore of the opinion that the orders for suit money¹ and for future support of the children should be affirmed. Since the awards for past support for the children and the wife are reversed on additional grounds, these also must be considered.

Child support

1. Reversal of the judgment for support on the merits would not necessitate reversal of the order awarding suit money, if the defendant's ability to pay were estab-

lished. *Weil v. Weil*, 37 Cal.2d 770, 790, 236 P.2d 159; *Gay v. Gay*, 146 Cal. 237, 240, 79 P. 885.

The majority opinion recognizes that a former wife having custody of minor children may bring an action for their future support. *Dixon v. Dixon*, 216 Cal. 440, 442, 14 P.2d 497. In my opinion, the judgment partially reimbursing the wife for debts incurred on behalf of the children for past support may also be sustained.

Plaintiff testified that she did not own any money or property at the time of trial, except for some stocks and bonds that had been pledged as security for her debts. Since the divorce she has partially supported the children from her own funds. Moreover, she was compelled to borrow \$7,100 for support of the children, \$3,900 from her father and \$3,200 from her second husband. The trial court ordered defendant to pay \$1,850 towards meeting the past expenditures by plaintiff.

Section 137 of the Civil Code provides that when "a father wilfully fails to provide for his children, the mother of the children may, without applying for a divorce or maintenance for herself, maintain in the superior court an action against him solely for the support and maintenance of the children."² Nothing in the statute shows that it is limited to actions for future support.

It is contended, however, that section 138 of the Civil Code, as construed in *McKay v. McKay*, 125 Cal. 65, 57 P. 677, bars the award in the present case. Section 138 is inapplicable here, since that statute applies to awards for child support in divorce proceedings brought in California courts. The controlling statute is not section 138 but section 137, providing for actions for support of children independent of divorce actions. *Dixon v. Dixon*, 216 Cal. 440, 443, 14 P.2d 497; see, also, *Foy v. Foy*, 23 Cal.App.2d 543, 546, 73 P.2d 618. In any event, the decisions construing section 138 do not support defendant's position, even by analogy.

The first case to set forth the problem of reimbursement for past expenditures is *Wilson v. Wilson*, 1873, 45 Cal. 399. The divorce decree had not provided for the sup-

port of the child. Two years after the decree the former wife sought an order for reimbursement of expenditures already incurred. This court affirmed an order of the trial court in favor of the wife, relying on the applicable statute which provided that the court might "during the pendency of the action, or at the final hearing, or afterwards, make such order for the support of the wife, and maintenance and education of the children of the marriage as may be just." Stats.1851, p. 187, Divorce Act, section 7. The court pointed out that it might be "for the interest and welfare of the child, that his past as well as future support should be paid for by the defendant." 45 Cal. at page 403. In 1872, the statute was superseded by section 138 of the Civil Code, which then provided that the court might "before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same." In *McKay v. McKay*, supra, 1899, it was held that an allowance for past expenditures could not be maintained under section 138. The *Wilson* case was not overruled, but distinguished on the ground that it was decided "prior to the adoption of the Codes, and under a statute which expressly authorized the court to make an order subsequent to the judgment for the maintenance of the children of the marriage." 125 Cal. at page 69, 57 P. at page 678. In 1905 section 138 was amended to provide that the trial court might "during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper". In *Jaeger v. Jaeger*, 1925, 73 Cal.App. 128, 238 P. 139, it was determined that the amendment was substantially the same as the 1851 statute that "had been judicially interpreted by the court in *Wilson v. Wilson*, supra. No intention to the contrary being shown, and the *Wilson* case, in respect of the court's

2. After this action arose, section 137 was amended. Provisions for child support

are now found in section 137.1, Stats.1951, ch. 1700, § 2.

interpretation of the law then in force, not having been overruled, it may fairly be inferred that the Legislature intended that the amendment should bear the same interpretation which had been given to the original act." 73 Cal.App. at page 136, 238 P. at page 142; see *Holmes v. McColgan*, 17 Cal.2d 426, 430, 110 P.2d 428.

The present action is based upon section 137, which provided at the time the complaint herein was filed that the wife may file an action "solely for the support and maintenance of the children." This language, the basis of the *Wilson* and *Jaeger* decisions, omitted the wording relied on in the *McKay* case. The conclusion is inescapable that an action for reimbursement for past expenditures for support and maintenance of children may be maintained under section 137.

In any event, even if the construction of section 137 urged by the majority opinion be adopted, we should sustain the action of the trial court in the present case. When the wife has unpaid bills at the time of suit, it is recognized that the trial court, in its discretion, may require the former husband to contribute towards repayment of the debts. As pointed out in *Jaeger v. Jaeger*, supra, 73 Cal.App. 128, 135, 238 P. 139, 141, the welfare of the children may require reimbursement "to discharge her indebtedness and restore her credit" so as to "leave her free from embarrassment through existing wants or present indebtedness, obviate the necessity of devoting any part of the future allowance to the payment of such indebtedness, and so enable her to live in the future upon the allowance provided for that purpose." The power of the trial court to order reimbursement to extinguish existing debts has been recognized in many other cases. *Gay v. Gay*, 146 Cal. 237, 243, 79 P. 885; *Larsen v. Larsen*, 101 Cal.App.2d 862, 865, 226 P.2d 650; *Younger v. Younger*, 112 Cal.App. 445, 446, 296 P. 1104; *Reed v. Reed*, 40 Cal.App. 102, 106, 180 P. 43.

At the time of trial the plaintiff was able to support the children only by borrowing from her father and from her second husband. Neither had any legal obligation to support the children. The trial

judge could reasonably conclude that partial relief from past indebtedness was necessary to restore plaintiff's credit, since the provision for \$37.50 a month for each child for future support would undoubtedly have to be complemented by further loans to plaintiff.

The wife's past support

Plaintiff's suit for support from the date of the Connecticut decree to the date of her remarriage is an independent action in equity to compel defendant to carry out the obligation to support her that he assumed by his marriage. Plaintiff bases her action upon the theory that under the law of Connecticut she had a right to support at the time of the divorce, that the question of that right was not and could not be litigated in the divorce proceedings because the Connecticut court did not have personal jurisdiction over defendant, that her right survived the divorce, and that the courts of this state have the power as courts of equity to recognize and enforce defendant's duty to support her. It is contended on behalf of defendant that an action for support depends upon the existence of the marital relation and that dissolution of the marriage ends the right to support. Two theories are thus advanced to justify denial of the action by the former wife for support: (1) that the divorce terminated the marriage status and the duty to support dependent thereon and (2) that a support order is obtainable only in an action for divorce or separate maintenance.

In my opinion, the wife's right to support, although arising out of the marriage, is not lost by dissolution of the marriage unless it could have been litigated in the proceedings thereto; further, I believe that California courts have jurisdiction to entertain proceedings in equity for support, independent of actions for divorce or separate maintenance. I cannot agree that an action by a former wife in such a situation as plaintiff's is barred simply because the parties are no longer married.

By marriage, a husband assumes the duty to support his wife, Civil Code, §§ 155, 174; *Sanderson v. Niemann*, 17 Cal.2d 563, 568, 110 P.2d 1025; *Title Ins. & Trust Co.*

v. Ingersoll, 158 Cal. 474, 492, 111 P. 360; Chaffee v. Browne, 109 Cal. 211, 219, 41 P. 1028, a duty that is enforceable by the state, Penal Code, § 270a, as well as by the wife. Although that duty arises from the marriage, it is not necessarily terminated by dissolution of the marriage. If the marriage is dissolved through the wrong of the husband, he may be compelled to support his former wife after the divorce. Civil Code § 139. The allowance of support following divorce "proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled her to enforce this obligation, and for the wrong which thus deprived her of the benefit of the obligation he must make her compensation." Ex parte Spencer, 83 Cal. 460, 464, 23 P. 395, 396, see, Arnold v. Arnold, 76 Cal.App.2d 877, 885-886, 174 P.2d 674; Remondino v. Remondino, 41 Cal.App.2d 208, 213, 106 P.2d 437.

If the divorce court has personal jurisdiction over the husband, the wife has an adequate remedy in the divorce proceeding to obtain an allowance for support. If it does not, however, it may not award the wife support, although it may dissolve the marriage. Baldwin v. Baldwin, 28 Cal.2d 406, 415, 170 P.2d 670. In that situation a wife's right to support is not lost, since it has never been adjudicated. There is nothing in section 139 to indicate that it was meant to provide the only remedy of the wife. A wife's right to support arises from the marriage and is recognized by statute. Civil Code §§ 155, 174. It is not created by a divorce decree; the decree is simply one means of enforcing the right.

It was settled at an early date that the power to award support falls within the inherent powers of a court of equity and exists independently of statutory authority. Paxton v. Paxton, 150 Cal. 667, 670, 89 P. 1083, 1084; Livingston v. Superior Court, 117 Cal. 633, 635, 49 P. 836, 38 L.R.A. 175; Galland v. Galland, 38 Cal. 265, 268; see,

also, Murray v. Murray, 115 Cal. 266, 274, 47 P. 37, 37 L.R.A. 626. "It may be admitted that where a statute creates a right, and also prescribes a particular remedy or procedure for its enforcement, such procedure can alone be invoked for such enforcement; but that is as far as the rule goes. In such case the special procedure may be considered as part of the right, limiting and conditioning it; but, where the right is given by statute without any prescribed remedy, it may be enforced by any appropriate method recognized by the general law of procedure. This principle is crystallized in section 1428, Civ.Code, which provides that 'an obligation arising from operation of law may be enforced in the manner provided by law, or by civil action, or proceeding.' And a suit in equity is peculiarly an appropriate remedy for the enforcement of the duty imposed by said section." Paxton v. Paxton, supra, 150 Cal. 667, 670-671, 89 P. 1083, 1084; see, Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 660, 242 P. 725.

The Paxton case involved section 206 of the Civil Code, imposing a duty upon parents to maintain adult children unable to support themselves. That section provided no remedy to enforce the right, but the court allowed an independent suit in equity. The Livingston case, supra, involved section 176 of the Civil Code, giving a husband the right to support from his wife when he was unable to support himself; the court allowed an independent suit in equity to enforce that right. It bears noting that rules of law have likewise been developed to protect the rights of an innocent person who enters into a husband and wife relationship in the belief that there is a valid marriage, although the Legislature has not provided a statutory solution to the variety of problems that can arise from a putative spouse relationship. See Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 99-100, 69 P.2d 845, 111 A.L.R. 342; Turknette v. Turknette, 100 Cal.App.2d 271, 274, 223 P.2d 495.

The social policy that impels a court to award support in a divorce proceeding when it has personal jurisdiction over the husband also impels the court to award support when he is first brought before the court

after the divorce. Accordingly, many courts have held that an action for support may be maintained after a marriage has been dissolved by a court that lacked personal jurisdiction over one of the parties. *Turner v. Turner*, 44 Ala. 437, 451; *Davis v. Davis*, 70 Colo. 37, 41, 197 P. 241; *Rodgers v. Rodgers*, 56 Kan. 483, 488, 43 P. 779; *Pawley v. Pawley*, Fla., 46 So.2d 464, 472; *Woods v. Waddle*, 44 Ohio St. 449, 457, 8 N.E. 297; *Cox v. Cox*, 19 Ohio St. 502, 512; *Searles v. Searles*, 140 Minn. 385, 387, 168 N.W. 133; *Crawford v. Crawford*, 158 Miss. 382, 388, 130 So. 688; *Spradling v. Spradling*, 74 Okl. 276, 277, 181 P. 148; *Nelson v. Nelson*, 71 S.D. 342, 24 N.W.2d 327, 329; *Toncray v. Toncray*, 123 Tenn. 476, 491, 131 S.W. 977, 34 L.R.A., N.S., 1106; *Hutton v. Dodge*, 58 Utah 228, 237, 198 P. 165; *Adams v. Abbott*, 21 Wash. 29, 32, 56 P. 931. These decisions point out that it was impossible for the wife to recover an allowance for support at the time of the divorce decree because the court lacked personal jurisdiction over the husband. If the question of support could not be litigated after dissolution of the marriage, the wife would be forever denied her day in court, and the husband would be allowed to escape the obligations incurred by his marriage. The wife's claim would be extinguished without an opportunity to present it for adjudication. In my opinion, the foregoing cases reach a sound result, and the majority opinion does not advance persuasive reasons to justify a denial to the former wife of an opportunity for adjudication of her claim to support from her former husband.

It is contended that the action by the former wife should be denied when, as here, she obtained the decree, on the theory that she "elected" to "waive" her right to support. Many courts have rejected this reasoning. *Woods v. Waddle*, *supra*; *Hutton v. Dodge*, *supra*; *Adams v. Abbott*, *supra*; *Spradling v. Spradling*, *supra*; *Nelson v. Nelson*, *supra*. In *Hutton v. Dodge*, *supra*, the court forcefully stated: "Let us assume, for instance, that in the present case plaintiff [wife] was not only entitled to a divorce and such property of defendant as was within the jurisdiction of the court,

but to alimony as well. She could not follow her husband into another state and obtain relief for she would first have to establish residence there before she could sue. She could not obtain a decree for alimony here because she could not make personal service of summons on defendant within this state. In such circumstances, what remedy would the plaintiff have? If there ever was a case in which litigation by piecemeal was justified because of the inherent difficulty of obtaining relief in one action, it seems to the writer that the case presented is almost a perfect example. * * * It would be a travesty upon justice and a sad commentary on the power of judicial tribunals generally if the courts were powerless to grant relief in a case of this kind where jurisdiction of the defendant is afterwards seasonably obtained and the rights of third parties have not intervened. We have no fault whatever to find with cases which hold that where full and complete jurisdiction has been obtained over the subject-matter and the parties, judgments rendered in divorce cases as well as others are res adjudicata as to every question that might have been litigated under the issues made. In such cases the only remedy for subsequent relief incident to the divorce seems to be by appropriate proceedings in the case in which the divorce was granted. Not so, however, where jurisdiction of the person was not obtained." 58 Utah at pages 232-234, 198 P. at page 166.

The former husband, however, is not foreclosed from litigating the issue of his guilt in defending an independent action in equity for support by his former wife. The divorce decree obtained by constructive service is, of course, binding upon both parties insofar as marital status is concerned. *Rediker v. Rediker*, 35 Cal.2d 796, 801, 221 P.2d 1, 20 A.L.R.2d 1152; *In re Estate of Hughes*, 80 Cal.App.2d 550, 556, 182 P.2d 253. It does not follow, however, that the decree adjudicated the husband's fault with regard to his duty to support. *Restatement, Judgments*, § 74; see, *In re Estate of Williams*, 36 Cal.2d 289, 292, 233 P.2d 248, 22 A.L.R.2d 716. The full faith and credit clause does not compel such a result, *Estin v. Estin*, 334 U.S. 541, 549, 68

S.Ct. 1213, 92 L.Ed. 1561; moreover, such a result would create serious constitutional problems under the due process clause. *Rediker v. Rediker*, supra, 35 Cal.2d 796, 803, 221 P.2d 1, 20 A.L.R.2d 1152; see, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L. Ed. 865. "It would seem to follow as a corollary of the doctrine herein enunciated that in such an action for alimony on the part of a plaintiff, the defendant would have the right in his defense to contest the merits of the divorce itself, not for the purpose of setting it aside, but for the purpose of defeating the alimony for which the action was brought. If the plaintiff had the right to bring an independent action for alimony after a divorce has been granted simply because she never had and could not have her day in court in respect to alimony in the divorce proceedings, the defendant for the same reason should be entitled to his day in court respecting the same matter." *Hutton v. Dodge*, supra, 58 Utah at page 237, 198 P. at page 168.

The majority opinion discusses the California decisions at length and concludes that an action for support could not be maintained by a California wife after a divorce decree based upon constructive service. The cases cited, however, do not preclude an independent suit in equity by a former wife for support after dissolution of the marriage in a proceeding where the remedy under section 139 was unavailable.

No California case has squarely held that the action will lie, although there have been strong indications that it will. *Matter of McMullin*, 164 Cal. 504, 507, 129 P. 773, 774 ("it fell within the power of the wife, under supplementary proceedings brought in this state, with personal service upon the former husband, to have procured * * * an award of the custody of the children, with provision for her own and their support"); *DeYoung v. DeYoung*, 27 Cal.2d 521, 527, 165 P.2d 457, 460, concurring opinion of Mr. Justice Schauer ("the right of a wife * * * to support from the other spouse as of the date of the divorce is a property right which can be adjudicated only by a court having jurisdiction in personam"),

Bernard v. Bernard, 79 Cal.App.2d 353, 357, 179 P.2d 625.

In some of the California cases relied upon for a contrary rule, *Colbert v. Colbert*, 28 Cal.2d 276, 279, 169 P.2d 633; *Carbone v. Superior Court*, 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; *Talbot v. Talbot*, 218 Cal. 1, 2, 21 P.2d 110; *Hite v. Hite*, 124 Cal. 389, 391, 57 P. 227, 45 L.R.A. 793; *Hinson v. Hinson*, 100 Cal.App.2d 745, 746, 224 P.2d 405, the action was for support pendente lite. The statements therein that marital status is a prerequisite to the granting of alimony are irrelevant to the issue presented by an action for support following an ex parte divorce. In such an action the former wife's recovery is of course predicated upon existence of the marital status at some time before suit is brought. The real question, however, is whether the relationship must continue until the date of suit. The cited cases do not supply an affirmative answer, for it is settled that suit money may be awarded in proceedings brought long after entry of the final decree of divorce. *Lerner v. Superior Court*, 38 Cal.2d 676, 685, 242 P.2d 321, and cases cited therein.

In other cases, *Cardinale v. Cardinale*, 8 Cal.2d 762, 768, 68 P.2d 351; *Patterson v. Patterson*, 82 Cal.App.2d 838, 842, 187 P.2d 113; *Calhoun v. Calhoun*, 70 Cal.App. 2d 233, 237, 160 P.2d 923, the action was for separate maintenance. Separate maintenance can be awarded only during the continuance of the marriage. As Mr. Justice Schauer noted in his concurring opinion in *DeYoung v. DeYoung*, 27 Cal.2d 521, 527, 165 P.2d 457; "Separate maintenance differs from alimony in that it presupposes a continuing marital status. The right to it cannot be established without proof that such status is existent as of the time of trial. Proof of prior dissolution of the marriage is, therefore, a complete defense to such an action." 27 Cal.2d at page 528, 165 P.2d at page 460; see, also, *Monroe v. Superior Court*, 28 Cal.2d 427, 429, 170 P.2d 473. Unlike separate maintenance, however, the obligation to support a former wife may continue after the marriage is dissolved.

Cases are cited holding that when the divorce decree is silent as to an allowance for support, or the provision therefor is limited as to time, and power to modify is not reserved, further support payments cannot be ordered except upon appeal or application of section 473 of the Code of Civil Procedure. *Puckett v. Puckett*, 21 Cal.2d 833, 841, 136 P.2d 1; *Long v. Long*, 17 Cal.2d 409, 410, 110 P.2d 383; *Tolle v. Superior Court*, 10 Cal.2d 95, 97, 73 P.2d 607; *McClure v. McClure*, 4 Cal.2d 356, 359, 49 P.2d 584, 100 A.L.R. 1257. In these cases, however, the court had personal jurisdiction over the parties and the question of support had been or could have been litigated. These cases do nothing more than apply familiar principles of *res judicata*. When, however, jurisdiction was obtained by constructive service, an *in personam* judgment for support could not be obtained. The question of the husband's obligation to provide for support of the wife was not and could not be litigated, and there is therefore no basis for *res judicata*. See, *Restatement, Judgments*, § 74.

Two other California decisions require further discussion. In *Howell v. Howell*, 1894, 104 Cal. 45, 47, 37 P. 770, the wife obtained a decree of divorce by constructive service. An allowance for support could not be made. After the decree became final, the wife attempted to reopen the divorce action and obtain a modification of the decree to provide for her support. The court held that the decree, having become final, could not be modified. The case turned on this procedural point, and the question whether the wife could bring an independent action in equity was not at issue. The court stated, however, in a broad dictum that after the marriage ended an action for support could not be maintained. This dictum overlooked the fact that in the divorce proceeding the wife had no opportunity to litigate the issue of support and that the doctrine of *res judicata* therefore did not apply. The only California authority cited by the court was *Egan v. Egan*, 90 Cal. 15, 21, 27 P. 22, where the court had personal jurisdiction over the parties.

In *Calhoun v. Calhoun*, *supra*, 70 Cal. App.2d 233, 160 P.2d 923, the husband obtained a Nevada decree by constructive service. Subsequently, the wife filed an action in California for separate maintenance, but did not question the validity of the Nevada decree. The action by the wife was denied on the ground that separate maintenance could not be obtained after dissolution of the marital status. See *Cardinale v. Cardinale*, *supra*. The wife then filed an independent action in equity for support. A judgment in favor of the husband was affirmed. *Calhoun v. Calhoun*, 81 Cal.App.2d 297, 183 P.2d 922. The court, however, expressly left open the question whether the action could be maintained. 81 Cal.App.2d at pages 300-301, 183 P.2d 922. The court denied relief on the ground that at the time of the earlier action the wife had been aware of the Nevada decree and, once she elected to seek separate maintenance instead of an allowance for support, she would not be permitted to harass her former husband by a multiplicity of actions. The *Calhoun* decision would be inapplicable when the former wife had no previous opportunity to recover an *in personam* judgment.

If a valid *ex parte* divorce is granted the husband by another state, the California wife may be protected only if she is allowed a subsequent action for support. California would of course be required to recognize that the marriage had been dissolved by the *ex parte* decree, *Williams v. State of North Carolina*, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279, but the Constitution of the United States does not compel us to go farther and hold that the *ex parte* decree of a sister state destroyed the former wife's right to support. *Estin v. Estin*, 334 U.S. 541, 549, 68 S.Ct. 1213, 92 L.Ed. 1561; *Kreiger v. Kreiger*, 334 U.S. 555, 557, 68 S.Ct. 1221, 92 L.Ed. 1572; *Barber v. Barber*, 21 How. 582, 62 U.S. 582, 16 L.Ed. 226. On the contrary, the requirement of the *Williams* case that the foreign decree be upheld strongly supports allowance of a subsequent action for support by a former wife. Formerly, when a husband obtained a foreign decree by con-

structive service the court would protect the wife by refusing to recognize the decree. *Haddock v. Haddock*, 201 U.S. 562, 606, 26 S.Ct. 525, 50 L.Ed. 867; *Delanoy v. Delanoy*, 216 Cal. 27, 37, 13 P.2d 719, 86 A.L.R. 1321. Since the *Williams* case, a husband obtaining a bona fide domicile in another state may secure a binding divorce decree by constructive service. *Williams v. State of North Carolina*, supra; *Baldwin v. Baldwin*, 28 Cal.2d 406, 410-411, 170 P.2d 670; cf. *Crouch v. Crouch*, 28 Cal.2d 243, 249, 169 P.2d 897. If the wife's right to support does not survive such an ex parte decree, she is compelled to protect that right indirectly by making a collateral attack on the decree. There is no reason to drive her to such a cumbersome and perhaps futile extreme. The policy considerations that require recognition of the foreign decree are not present when the question is the right to support. Since the courts have evolved rules of law that allow the husband readily to obtain a divorce, corresponding rules of law must be invoked to protect the wife and prevent injustice. Accordingly, we should give effect to an ex parte foreign decree obtained by the husband insofar as it affects marital status, but declare it ineffective on the issue of alimony, thus accommodating the interests of each state by restricting it to matters of her dominant concern. *Estin v. Estin*, supra, 334 U.S. 541, 549, 68 S.Ct. 1213, 92 L.Ed. 1561.

For the foregoing reasons, I am of the opinion that a former wife domiciled in California can bring an action for support, either following a divorce decree granted her by a California court lacking personal jurisdiction over her former husband, or following an ex parte decree granted her former husband by a foreign court. Although the present action is by a nonresident wife subsequent to a divorce by a court of another state, there is no reason why the courts of this state should not entertain the action. "Alimony can in its discretion be granted by a court under the law of its own state in favor of a spouse against any spouse who is personally subject or whose property is subject to the jurisdiction of the court." *Restatement, Conflict of*

Laws, § 463; cf. *Hiner v. Hiner*, 153 Cal. 254, 260, 94 P. 1044; *Wynne v. Wynne*, 20 Cal.App.2d 131, 136, 66 P.2d 467. Plaintiff invokes the inherent powers of courts of equity in this state to protect the rights of innocent persons and to prevent injustice. A former wife in the position of plaintiff may have a just claim to support from her husband upon dissolution of the marriage. By the marriage he assumed the obligation of supporting his wife, and he should not be allowed to escape that obligation by conduct that compels her to divorce him. The wife is entitled to her day in court, to have a court of equity pass on the merits of her claim that her former husband should support her. If the courts of this state are closed to her, the former husband may unconscionably avoid his obligations; if the action by the former wife is allowed, she will be able to present her claim for adjudication. California should not serve as an asylum to the former husband.

A former wife, however, would not be permitted to bring an action in California for support following an ex parte decree, if a similar action would not be entertained by courts of the state where she was domiciled at the time of the decree. If the wife was the plaintiff in the divorce action, and under the law of the state granting the decree the right did not survive divorce, the full faith and credit clause would compel California to give the same effect to the decree and hold that the decree not only dissolved the marriage status but terminated the wife's right to support. On the other hand, if the husband obtained the decree in another state and under the law of the state of the wife's domicile her right to support was lost when the marriage status terminated, she would likewise not be allowed, by migrating to another state, to revive a right that had expired.

The foregoing considerations are not present, however, if the husband leaves the wife, and the state of the wife's domicile holds that her right to support survives dissolution of the marriage. In that event, neither the full faith and credit clause nor reasons of policy would bar the action in

a California court. Whether the wife obtains the decree in the state where she remains, or whether the husband obtains a valid decree in another state, we would be required to hold that the marriage status was dissolved, *Williams v. State of North Carolina*, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279, but would not be required to deny the wife a right to bring an action in California for support and thus give the foreign decree greater effect in California than it would have in the state of the wife's domicile.

The question remains whether the judgment may be sustained on the merits. Under the Connecticut decisions, a wife granted a divorce for the misconduct of her husband may receive an allowance for her support, in the discretion of the trial court. *LaBella v. LaBella*, 134 Conn. 312, 318, 57 A.2d 627. "Alimony is awarded the wife divorced for the fault of her husband that he may continue to fulfill the obligation for her support which the law imposed upon him in virtue of the marriage contract." *Cary v. Cary*, 112 Conn. 256, 260, 152 A. 302, 303. "It is based upon the duty of the husband to continue to support a wife whom he has in legal effect abandoned." *Wright v. Wright*, 93 Conn. 296, 300, 105 A. 684, 686. In the present case, however, service of process was by registered mail in New York. Both parties agree that the in personam provisions of the Connecticut decree are invalid.³ Plaintiff did not base this action upon the alimony provisions of the Connecticut decree and, in view of defendant's concession, he waived any contention that plaintiff's right to support was merged into the Connecticut decree and that her exclusive remedy is an action thereon.

No Connecticut decisions have been discovered or cited by the parties that directly pass on the question whether a wife domi-

ciled in Connecticut at the time of an ex parte divorce decree may subsequently bring an action for support. The Connecticut courts, however, follow the same rule as do the California courts and hold that the duty of the husband to support his wife may be continued after dissolution of the marriage as part of the obligations assumed by the marriage. *LaBella v. LaBella*, supra; *Cary v. Cary*, supra. In the absence of announcement of the law of Connecticut by the highest court of appellate jurisdiction of that state, Code Civ.Proc. § 1875(3); see, *Loranger v. Nadeau*, 215 Cal. 362, 366, 10 P.2d 63, 84 A.L.R. 1264; *Knox v. Pryor*, 10 Cal.App.2d 76, 78, 51 P.2d 106, we may assume that Connecticut would reach the same result as would California, and that Connecticut would protect the wife and not deny her the right to present her claim to support for adjudication. Cf. *German v. German*, 122 Conn. 155, 163, 188 A. 429.

In Connecticut, as in California, a former wife cannot obtain an allowance for support if the divorce is granted for the misconduct of the wife. *Allen v. Allen*, 43 Conn. 419, 426; *Geer v. Geer*, 8 Conn.Sup. 279, 282. As previously pointed out, defendant could have litigated the issue of his guilt in the present proceeding. At the trial, a copy of the Connecticut decree was admitted in evidence, providing that the divorce was granted plaintiff on the ground of defendant's "intolerable cruelty," and the case apparently was tried on the theory that the Connecticut decree settled that issue. Defendant did not contend at the trial or on appeal that the decree improperly granted plaintiff the divorce.

The award in the present case was for past support and not for future support. An action by a former wife for reimbursement of past expenses for her own support is not barred as a matter of law. Since

3. Service outside the state by registered mail is apparently permissible under Connecticut statutes, Conn.Gen.Stats., Rev. 1949, § 7330, but no decision of the highest court of that state has been called to our attention and our research discloses none holding that an in personam judgment, like that in the present case, obtained on such service would be valid in Connecticut. Cf. *Cikora v. Cikora*, 133

Conn. 456, 459, 52 A.2d 310; *Kohler v. Kohler*, 12 Conn.Sup. 476; *Sattler v. Sattler*, 7 Conn.Sup. 179. Such a judgment is not necessarily in violation of the United States Constitution. *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278; but see *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82.

she was unable to obtain an allowance for support until personal service could be made on her former husband, she should, absent proof of laches or the bar of a statute of limitation, in a proper case be allowed reimbursement, as well as an award of future support. Otherwise, a premium would be placed on the ability of the former husband to escape service of process. The former wife cannot, however, obtain greater relief in a subsequent action for support than she would have received had the divorce court had personal jurisdiction over the former husband. She did not have at the time of the Connecticut decree an absolute right to continued support from her former husband; she had only a right to have a court pass on the merits of her claim that her husband should support her after the marriage had been dissolved. Since the former husband could have defeated or reduced a claim for support at the time of the divorce by showing that the amount claimed was not needed by the wife or that he did not have the ability to pay it, he similarly could contest a subsequent action for reimbursement for past expenses. Likewise, since an award made at the time of the decree could be increased or decreased by the divorce court on the ground of changed circumstances, either party can introduce evidence to show events that have occurred between the date of the divorce and the date of the action for support and that bear on the question of the amount of past support that should be awarded.

The final problem is whether the evidence in the present case justifies the amount of past support awarded plaintiff. The trial court in making an award for support, or in modifying an award on the ground of changed circumstances, must take into consideration the needs of the wife and the ability of the husband. It appears from the record in the present case that after defendant left plaintiff she sold the property in Connecticut that had been purchased with defendant's money, but placed in her name, and that, insofar as expenses for her own past support were concerned, plaintiff was never in need before her remarriage. Nevertheless, the trial court awarded her \$1,950 for past support. Additionally, the

awards for child support and suit money amounted to approximately \$3,400 outright plus \$37.50 per month for each child for future support. The evidence of defendant's ability to pay that sum, although sufficient to sustain the awards, is decidedly weak. When the evidence of plaintiff's need and defendant's ability to pay the additional \$1,950 are viewed together, it is apparent that the award reimbursing plaintiff for expenses for her own support cannot be sustained. See, *Rawley v. Rawley*, 94 Cal.App.2d 562, 564, 210 P.2d 891; *Farnsworth v. Farnsworth*, 81 Cal.App.2d 380, 382, 184 P.2d 7.

For the foregoing reasons, I concur in the affirmance of the judgment in favor of plaintiff on the cross-complaint, and in the reversal of that part of the judgment awarding plaintiff \$1,950 for her past support, solely on the ground that the evidence is insufficient to sustain the award. I dissent from the reversal of the judgments in favor of plaintiff in her actions for suit money and past and future child support, and from the majority opinion insofar as it holds that the trial court did not have jurisdiction to entertain plaintiff's action for her support.

SCHAUER, Justice (concurring).

I concur in the judgment and also in the majority opinion except insofar as some expressions in the latter (unnecessary to the conclusion) may be deemed to indicate a view inconsistent with that expressed by me in a concurring opinion in *DeYoung v. DeYoung* (1946), 27 Cal.2d 521, 527, 165 P.2d 457.

In the *DeYoung* case I said: "In a divorce action in a foreign state upon constructive service the court there has authority to adjudicate status (in rem) of a person residing in that state but has not jurisdiction to adjudicate away (in personam) any of the then vested property rights of the absent spouse who does not reside in such state, who is not personally served with process in that state and who does not appear in the action. The personal rights of the spouses in property not within the jurisdiction of the acting court remain subject to litigation in the proper forum. It

seems to me that the right of a wife, or in a proper case the husband, to support from the other spouse as of the date of the divorce is a property right which can be adjudicated only by a court having jurisdiction in personam.

"The above stated view does not necessarily conflict with the well established proposition that a court having jurisdiction over a domiciliary may adjudicate his marital status in rem and that (assuming due process) as an incident of the change of status any rights to future accruing support *dependent upon a continuing marital status* no longer accrue because the status no longer exists."

It is obvious from the quoted language that it has no application to a case such as the instant one in which it was the plaintiff herself who upon substituted service in Connecticut sought and procured the decree changing her status. She chose the forum and must be charged with knowledge of the limitations upon what relief she might get and also with knowledge of the character and extent of the rights which she would, or might, lose by bringing her action in that forum. In bringing that action she submitted herself to the jurisdiction of the Connecticut court for all purposes related to the litigation she instituted. Her in personam rights growing out of or dependent on the marital status are not in that case terminated by any act of the husband or without her having her day in court but, rather, are ended by her own act in bringing and prosecuting the suit to terminate the marriage, and procuring and accepting the judgment which does dissolve it.

If the plaintiff here had wished to bring in California a personal action against her husband in respect to property rights growing out of or dependent upon the marital status, including the right of support, she could have brought such an action during the marriage regardless of her lack of residence in California. The fact that California, like most other states, has enacted legislation requiring a specified minimum period of residence before an action for divorce, as distinguished from an action for support, may be maintained should not be

regarded as an excuse for permitting a plaintiff voluntarily and unnecessarily to split a cause of action and try the sections piecemeal in as many states as fancy dictates. If there is to be a divorce at all it is the better public policy that the decree of divorce shall settle for all time all the rights and obligations of the parties to the dissolved marriage to the end that litigation arising from such marriage shall end and be known to have ended, and that the parties may have an opportunity to build to a future, free from, and perhaps the better for, the past, rather than to be wrecked by recurring litigation. Except, then, where there is a complete jurisdictional failure, as was the situation mentioned in the De-Young case in respect to the personal property rights of the absent spouse, the courts and legislatures should look with disfavor on delayed litigation between former spouses seeking to assert rights growing out of the status which has long since been dissolved.



40 Cal.2d 368

SEVEN UP BOTTLING CO. OF LOS ANGELES, Inc. v. GROCERY DRIVERS UNION LOCAL 848 et al.

L. A. 21347.

Supreme Court of California, in Bank.

March 10, 1953.

Rehearing Denied April 2, 1953.

Suit to enjoin certain labor unions and others from picketing retail food markets selling plaintiff's products for the purpose of compelling plaintiff to recognize defendant unions as collective bargaining agents for plaintiff's employees and to recover damages for such picketing. From a judgment of the Superior Court, Los Angeles County, for defendants, plaintiff appealed. The Supreme Court, Carter, J., held that the Jurisdictional Strike Act is valid as against defendants' contention that it deprives labor organizations of the right to engage in lawful concerted action of peaceful picketing in violation of the con-

stitutional guarantees of freedom of speech and of the press.

Judgment reversed.

Prior opinion, Cal.App., 233 P.2d 617.

I. Appeal and Error ⇨713(1)

On plaintiff's appeal from judgment for defendants in injunction suit after sustaining their objection to introduction of any evidence on ground that complaint did not state facts sufficient to constitute cause of action, Supreme Court should not consider affidavits presented in connection with separate preliminary injunction proceedings as supplementing and explaining complaint, though brought up as part of clerk's transcript, but may properly consider only the complaint.

2. Labor Relations ⇨933

The National Labor Management Relations Act is inapplicable in action under state Jurisdictional Strike Act to enjoin and recover damages for labor unions' picketing of retail food markets selling plaintiff's products to compel plaintiff to recognize unions as collective bargaining agents for plaintiff's employees, in absence of allegation in complaint that plaintiff is engaged in business affecting interstate commerce. Labor Code, §§ 1115-1120; Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

3. Labor Relations ⇨352

Activities of labor unions in concerted-ly interfering with beverage bottling company's business by picketing retail food markets selling plaintiff's products as result of controversy between defendants and independent employees' association, having collective bargaining agreement with company, as to whether defendants or such association should have right to bargain collectively with company as its employees' agents, are within terms of state Jurisdictional Strike Act. Labor Code, §§ 1115-1120.

4. Constitutional Law ⇨90

Labor Relations ⇨298

Peaceful picketing is identified with freedom of speech as a means by which pickets communicate to others existence of labor controversy, but such identification

does not free concerted activity of picketing from all restraint.

5. Labor Relations ⇨836

Injunctive relief against picketing is available, where object sought to be achieved by such picketing or means used to achieve it are unlawful.

6. Constitutional Law ⇨90

Labor Relations ⇨828

The clear and present danger test, as applied in ordinary free speech cases, is not necessarily controlling in determining whether picketing to publicize labor dispute may be restrained.

7. Labor Relations ⇨283

Employers' and employees' rights to conduct their economic affairs and compete with others for share in products of industry are subject to modification or qualification in interests of society wherein they exist through exercise of state's power to set limits of permissible contest open to industrial combatants.

8. Labor Relations ⇨283

Unlawful conduct is not immune from state regulation because an integral part thereof is carried on by display of placards by peaceful picketers.

9. Constitutional Law ⇨70(3)

Whether such condition exists in industry that industrial combatants cannot continue their struggle without danger to community is not for judge to determine, nor is it their function to set limits of permissible contest and declare duties demanded by new situation, but that is function of legislature, which may substitute processes of justice for trial by combat while limiting individual and group rights of aggression and defense.

10. Constitutional Law ⇨81

A state's public policy is found in its constitution, acts of its legislature, and decisions of its courts, and is primarily for lawmakers to determine.

11. Constitutional Law ⇨90, 275(2)

Labor Relations ⇨284

The Jurisdictional Strike Act, prohibiting concerted interference with employer's operation or business because of contro-

versy between labor organizations as to which of them should have exclusive right to bargain collectively with employer on his employees' behalf and giving any person suffering injury from violation of Act right to injunctive relief and damages, is valid as against contention that it deprives such organizations of right to engage in lawful concerted action of peaceful picketing in violation of constitutional guarantees of freedom of speech and of the press. Labor Code, §§ 1115-1120; U.S.C.A.Const. Amend.* 1.

Thomas P. Menzies, Harold L. Watt, Carl M. Gould and Hill, Farrer & Burrill, Los Angeles, for appellants.

Roth & Bahrs, San Francisco, amici curiæ on behalf of appellants.

Stevenson & Richman, Los Angeles, Todd & Todd, Clarence Todd, San Francisco, John C. Stevenson and Arthur Garrett, Los Angeles, for respondents.

Charles P. Scully and Tobriner & Lazarus, San Francisco, amici curiæ on behalf of respondents.

CARTER, Justice.

By its complaint in this action plaintiff sought injunctive relief and damages. Following the issuance of a preliminary injunction, the case was called for trial, at which time defendants' objection to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained, and the court gave judgment that plaintiff recover nothing, but continued the preliminary injunction in force pending appeal. This appeal is by plaintiff from that judgment. There is no appeal from the order granting the injunction. There was a dispute as to whether the appeal was from the order sustaining the objection to the evidence, or from the judgment, but that was resolved in favor of the latter appeal. *Seven Up etc. Co. v. Grocery etc. Union*, 97 Cal.App.2d 623, 218 P.2d 41.

[1] Preliminarily it should be observed that defendants assert that some affidavits presented in connection with the preliminary injunction proceedings should be con-

sidered on this appeal as supplementing and explaining the complaint, because they were brought here by plaintiff as a part of the "clerk's transcript." The judgment from which the appeal is taken, however, is the same as one of dismissal after demurrer sustained. No appeal was taken by defendants from the order granting the preliminary injunction, or from the judgment and, of course, plaintiff is not objecting to the order. The primary issue presented for decision in the court below and here is the validity of California's Jurisdictional Strike Law, *infra*. The court, in rendering its judgment, did not purport to pass upon anything but the sufficiency of the complaint. The proceedings on the preliminary injunction were separate from those leading to the judgment. Hence we deem it proper to consider only the complaint, and such cases as *Brock v. Fouchy*, 76 Cal.App.2d 363, 172 P.2d 945; *Mason v. Drug, Inc.*, 31 Cal.App.2d 697, 88 P.2d 929, and *Fox Chicago R. Corp. v. Zukor's Dresses*, 50 Cal.App.2d 129, 122 P.2d 705, relied upon by defendants, are not controlling.

The complaint is in four counts. Plaintiff is a corporation engaged in the business of bottling and distributing beverages. Most of defendants are labor unions, referred to as teamsters' unions, and are labor organizations existing for the purpose of dealing with employers concerning grievances, labor disputes, wages, hours and working conditions. Other defendants are officers or agents of the unions. All defendants have acted in "concert" in the activities stated in the complaint. Plaintiff employs persons in its business who were, in March, 1949, members of *Seven Up Employees Association*, hereafter referred to as the association, an unincorporated labor organization of employees existing for the usual purposes of such groups. The association is not financed, dominated or controlled in any respect by plaintiff. In March, 1949, plaintiff and the association entered into a collective bargaining agreement prescribing the wage rate, working conditions, etc., of plaintiff's employees, which is still in effect. Since June, 1949, defendants have been

carrying on concerted "economic activities" to compel plaintiff to recognize defendant unions as the collective bargaining agents of its employees, and a controversy has arisen between defendants and the association as to which should represent plaintiff's employees. The activities consist of picketing by defendants of retail food markets where plaintiff's products are sold, resulting in the refusal of those markets to buy or sell plaintiff's products. Plaintiff has no dispute or controversy with any of its employees with regard to wages, hours or working conditions.

All of the foregoing appears from the first count in the complaint. In addition it is charged that plaintiff has suffered damages of over \$2,000 because of defendants' acts and that the damage remedy is inadequate. The second, third and fourth counts reallege the first count. Count two asserts that defendants' actions violated the Jurisdictional Strike Law, *infra*; count three, that defendants, by their activities, are endeavoring to induce plaintiff and its employees to break the 1949 collective bargaining agreement between plaintiff and the association. Count four alleges that the activities of defendants are aimed at compelling plaintiff to recognize defendants as bargaining agents when it would be unlawful for plaintiff to do so, for to compel their employees to belong to a certain union would be in violation of sections 921-923 of the Labor Code and the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 *et seq.*; and that as a result it has been damaged in the sum of \$100,000.

On this appeal plaintiff rests its case on the Jurisdictional Strike Act, *infra*, public policy, Labor Code, sections 921-923 and interference with contract relations.

The Jurisdictional Strike Act was adopted in 1947, Stats. 1947, ch. 1388, by adding sections 1115-1120 to the Labor Code. A jurisdictional strike is defined as "a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with

an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer." Labor Code, § 1118. A labor organization is "any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer." *Id.*, § 1117. Nothing in the act shall "interfere with collective bargaining subject to the prohibitions herein set forth, nor to prohibit any individual voluntarily becoming or remaining a member of a labor organization, or from personally requesting any other individual to join a labor organization." *Id.*, § 1119. The jurisdictional strike is "against the public policy" of the state and is "unlawful," *Id.*, § 1115, and any person suffering injury from a violation of the act is entitled to injunctive relief and damages. *Id.*, § 1116.

[2] In view of the result reached herein it will be necessary to consider only the jurisdictional strike law. There is no allegation showing that plaintiff was engaged in a business affecting interstate commerce and hence the Labor Management Relations Act of 1947, *supra*, has no application.

[3] It should be clear that the activities of defendants, as alleged, fall within the terms of the act, Jurisdictional Strike Act. Defendants and the association are labor organizations and the latter is not financed, interfered with, dominated or controlled by plaintiff. There has been a concerted interference by defendants with plaintiff's employer's business. That interference arises out of a controversy between two or more labor organizations—defendants and the association—as to which of them should have the right to collectively bargain with plaintiff-employer. The latter

follows from the allegation in the complaint that there was a collective bargaining agreement between the association and plaintiff, to the former of which plaintiff's employees belong, and that agreement controls the labor relations between them. Since then defendants have been carrying on concerted economic activities (picketing) to compel plaintiff to choose defendants as the exclusive bargaining representatives of its employees, who are working under the agreement. It may reasonably be inferred that the cause of such activity was a dispute between defendants and the association, for their demands to be exclusive agents would necessarily be to replace the association, and it was expressly alleged that: "Thereby, a controversy has arisen between the defendants and the Seven Up Employees' Association as to which of them has or should have the exclusive right to have its members perform work for the plaintiff in the job classifications above set forth." We do not take the use of "thereby" in the above quotation to mean that there was no dispute between defendants and the association before the activities were launched. Implicit in the pleading is the assertion of a dispute between defendants and the association which the former seek to win by their activities. In addition to the above it is alleged that defendants, Grocery Drivers Union Local 848, and the association claim bargaining rights on behalf of plaintiff's employees; that the bargaining agreement with the association was in full force and satisfactory to the association, and that defendants "knew of the existence of said contract and of the arrangements between plaintiff and its employees thereunder."

Defendants' contention of unconstitutionality of the act rests on the argument that under the guaranties of freedom of speech and of the press the picketing was lawful, and the act, therefore, in condemning concerted interference with the employer's business, is invalid, because it deprives them of the right to engage in lawful concerted action, that is, peaceful picketing; that such activity does not create a "clear and present danger" justifying a restraint on the freedoms mentioned.

[4, 5] Peaceful picketing has been identified with freedom of speech—a means by which the pickets communicate to others the existence of a labor controversy. *Thornhill v. State of Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; *Carlson v. People of State of California*, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; *A.F.L. v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; *Carpenters and Joiners Union v. Ritter's Cafe*, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143; *Bakery and Pastry Drivers and Helpers Local v. Wohl*, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178; *Hotel Employees' Local v. Wisconsin Employment Relations Board*, 315 U.S. 437, 62 S.Ct. 706, 86 L.Ed. 946; *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58; *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; *McKay v. Retail Auto Salesmen's Union* No. 1067, 16 Cal.2d 311, 106 P.2d 373; *Steiner v. Long Beach Local No. 128*, 19 Cal.2d 676, 123 P.2d 20; *In re Bell*, 19 Cal.2d 488, 122 P.2d 22; *Magill Bros. v. Bldg. Service, etc., Union*, 20 Cal.2d 506, 127 P.2d 542; *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828; *Emde v. San Joaquin County, etc., Council*, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916; *James v. Marirship Corp.*, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; *Park & Tilford I. Corp. v. International etc. of Teamsters*, 27 Cal. 2d 599, 165 P.2d 891, 162 A.L.R. 1426; *In re Porterfield*, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675; *In re Blaney*, 30 Cal.2d 643, 184 P.2d 892; *Northwestern Pac. R. Co. v. Lumber & Sawmill Workers Union*, 31 Cal.2d 441, 189 P.2d 277. It has been pointed out that such identification does not free the concerted activity of picketing from all restraint.

"And it appears to be settled that injunctive relief against picketing is available where the object sought to be achieved or the means used to achieve it are unlawful. See, *Park & Tilford I. Corp. v. International etc. Teamsters*, supra; *James v. Marirship*, supra; *Magill Bros. v. Building Service etc. Union*, supra; *Dorchy v. State of Kansas*, 272 U.S. 306, 47 S. Ct. 86, 71 L.Ed. 248; *Milk Wagon Drivers Union v. Meadowmoor* [312 U.S. 287,

61 S.Ct. 552, 85 L.Ed. 836], *supra*; Carpenters Union v. Ritter's Cafe, *supra*; Allen-Bradley Local v. Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154 * * *.

"The solution of labor problems requires, however, an approach with a broader perspective. Although literally, and in a strict sense, the objective or means employed in the union activity may be unlawful, there still remains the necessity for preserving the general public welfare and the constitutional guaranties of freedom of speech, press and assembly. The asserted illegality may be merely incidental or of only minor importance when weighed against the requirement of competition and some measure of equality in the economic struggle between the seller and purchaser of services. The public interest may tip the scales one way or the other. If preventive relief were available in every instance of labor activity interfering with the performance by a common carrier or other public utility of its duties, or involving some unlawful act, no matter how insignificant on the part of the person upon whom the economic pressure is exerted, conceivably there would be little left in the way of protection for the exercise of the fundamental rights of freedom of speech, press and assembly, and organized labor would be at a serious if not hopeless disadvantage in our competitive economy." *Northwestern Pac. R. Co. v. Lumber & Sawmill Workers Union*, *supra*, 31 Cal.2d 441, 445, 189 P.2d 277, 280.

[6] Furthermore, it should be noted that the clear and present danger test as applied in the ordinary free speech cases is not "necessarily" controlling. In *re Blaney*, *supra*, 30 Cal.2d 643, 646, 184 P.2d 892. Since the foregoing cases were decided the United States Supreme Court has upheld restraints on picketing without mentioning clear and present danger. *Hughes v. Superior Court*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985; *International Brotherhood Teamsters Union v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995. In a case in the group of recent cases hereinafter discussed, in which the test was mentioned, it was set forth as follows: "The Missouri policy against restraints of trade is of long

standing and is in most respects the same as that which the Federal Government has followed for more than half a century. It is clearly drawn in an attempt to afford all persons an equal opportunity to buy goods. There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy a dead letter insofar as purchases by nonunion men were concerned. Appellants' power with that of their allies was irresistible. And it is clear that appellants were doing more than exercising a right of free speech or press. * * * They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834. Under that view, and application of the test, it is clear that defendants' activities here will have the immediate result of thwarting the main purpose of the act to protect an employer against interference with his business and the public from disturbances resulting from a dispute between unions as to which should have the right to bargain collectively (and all that entails) with the employer. Thus it would appear that the test as stated in the *Giboney* case, *supra*, is here satisfied.

[7] This brings us then to the question of the extent to which the Legislature may regulate activities, which have some aspects of free speech, in labor controversies, and particularly those activities relating to disputes between rival unions, both seeking to attain the status of the exclusive bargaining agent for an employer's employees. The solution hinges upon the recent cases decided by the United States Supreme Court. First, it should be observed that the basic case applying the free speech guaranty to picketing had this to say while invoking that guaranty: "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to in-

dustrial combatants." *Thornhill v. State of Alabama*, supra, 310 U.S. 88, 103, 60 S.Ct. 736, 745, 84 L.Ed. 1093. Similar remarks were made in subsequent cases. *Carpenters Union v. Ritter's Cafe*, supra, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143; *Bakery Drivers Local v. Wohl*, supra, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178; *Hotel Employees' Local v. Wisconsin Employment Relations Board*, supra, 315 U.S. 437, 62 S.Ct. 706, 86 L.Ed. 946; *Thomas v. Collins*, supra, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430.

[8, 9] Following those expressions the subsequent decisions have dealt with various situations. *Giboney v. Empire Storage Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, dealt with peaceful picketing by a union in an effort to organize nonunion ice peddlers, in which one ice dealer refused to agree not to sell to such peddlers. A judgment enjoining peaceful picketing to compel that dealer to make such an agreement was upheld by the Supreme Court of Missouri on the ground that to compel the dealer to agree would be in violation of Missouri's anti-trade restraint act V.A.M.S. §§ 416.010, 416.050. The Supreme Court of the United States upheld the injunction, stating:

"Neither *Thornhill v. [State of] Alabama*, supra, nor *Carlson v. [People of State of] California*, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104, both decided the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by display of placards by peaceful picketers. In both these cases this Court struck down statutes which banned all dissemination of information by people adjacent to certain premises, pointing out that the statutes were so broad that they could not only be utilized to punish conduct plainly illegal but could also be applied to ban all truthful publications of the facts of a labor controversy. But in the *Thornhill* opinion, 310 U.S. at pages 103-104, 60 S.Ct. [736] at page 745, 84 L.Ed. 1093, the Court was careful to point out that it was within the province of states 'to set the limits of permissible contest open to industrial combatants.' See *Lincoln [Federal] Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525,

536, 69 S.Ct. 251, 257 [93 L.Ed. 212]; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748-751, 62 S.Ct. 820, 825-826, 86 L.Ed. 1154. Further emphasizing the power of a state 'to set the limits of permissible contest open to industrial combatants' the Court cited with approval the opinion of Mr. Justice Brandeis in *Duplex Printing Co. v. Deering*, 254 U.S. 443, at page 488, 41 S.Ct. 172, at page 184, 65 L.Ed. 349. On that page the opinion stated: 'The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. *This is the function of the legislature* which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.'

"After emphasizing state power over industrial conflicts, the Court in the *Thornhill* opinion, 310 U.S. at page 104, 60 S.Ct. [736], at page 745, 84 L.Ed. 1093, went on to say, that states may not 'in dealing with the evils arising from industrial disputes * * * impair the effective exercise of the right to discuss freely industrial relations * * *.' This statement must be considered in its context. It was directed toward a sweeping state prohibition which this Court found to embrace 'nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute.' * * *

"Appellants also rely on *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143, and *Bakery [and Pastry] Drivers Local v. Wohl*, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178, decided the same day. Neither lends support to the contention that peaceful picketing is beyond legislative control. The Court's opinion in the *Ritter* case approvingly quoted a part of the *Thornhill* opinion which recognized broad state powers over industrial conflicts. In the *Wohl* case, 315 U.S. at

page 775, 62 S.Ct. at page 819, 86 L.Ed. 1178, the Court's opinion found no 'violence, force or coercion, or conduct otherwise unlawful or oppressive' and said that 'A state is not required to tolerate in all places * * * even peaceful picketing by an individual.' A concurring opinion in the Wohl case, 315 U.S. at pages 776-777, 62 S.Ct. at pages 819-820, 86 L.Ed. 1178, pointed out that picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation. No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 689, 93 L.Ed. 834.

The *Giboney* case was followed by *Hughes v. Superior Court*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985, where the California court was upheld in enjoining Negroes from picketing a store to enforce a demand that it hire a proportionate number of Negroes on the ground that it was picketing to compel racial discrimination, which was against the court declared public policy of the state. Four justices agreed with the opinion written by Justice Frankfurter and Justices Black, Minton and Reed concurred on the ground the case was controlled by the *Giboney* case. Justice Douglas did not participate. It was again pointed out that picketing is not free from any restraint even though having aspects of communication, stressing its coercive features.

[10] Next came *Building Service Employees Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045. There in a suit for damages by a hotel owner employer, the employer had refused to sign a closed shop contract with a union because his employees at an election had declined to join the union, and for him to sign would violate a Washington statutory policy forbidding him to coerce his employees' choice of representative. Peaceful picketing followed and the Washington court gave damages and injunctive relief. The Supreme Court of the United States affirmed, holding that there was no violation of the free speech guaran-

ty. After pointing out that picketing may be restricted, the court said:

"The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the lawmakers to determine the public policy of the state.' * * *

"The State of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. * * * Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment.

"* * * An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative." *Building Service Employees Union v. Gazzam*, supra, 339 U.S. 532, 537, 70 S.Ct. 784, 787, 94 L.Ed. 1045.

In *International Brotherhood Teamsters Union v. Hanke*, supra, 339 U.S. 470, 70 S.Ct. 773, 775, 94 L.Ed. 995, the peaceful picketing by one picket was aimed at a person in the automobile repair business without employees because he kept open at times that were proscribed by agreement between the union and an association of employers engaged in the same business. The banner of the picket merely said "Union People Look for the Union Shop Card". The injunction was upheld in an opinion written by Justice Frankfurter, concurred in by three justices. Justice Clark concurred in the result. Three

justices dissented. Justice Frankfurter said:

"Our decisions reflect recognition that picketing is 'indeed a hybrid.' * * * The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' * * * A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect.

"These two cases emphasize the nature of a problem that is presented by our duty of sitting in judgment on a State's judgment in striking the balance that has to be struck when a State decides not to keep hands off these industrial contests. Here we have a glaring instance of the interplay of competing social-economic interests and viewpoints. Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power." *International Brotherhood of Teamsters Union v. Hanke*, supra, 339 U.S. 470, 474, 70 S.Ct. 773, 775, 94 L.Ed. 995.

International Brotherhood v. National Labor Rel. Board, 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299, held that picketing in aid of a secondary boycott which was proscribed by statute could be prevented.

[11] Those cases and the discussion therein leave no doubt as to the validity of the instant act. It is not vague or uncertain as was the act in *In re Blaney*, supra. It is no more subject to attack than the broad language used in the Labor Manage-

ment Relations Act of 1947 dealing with secondary boycott. In upholding this act the Supreme Court said:

"The prohibition of inducement or encouragement of secondary pressure by § 8 (b) (4) (A) carries no unconstitutional abridgment of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone call emphasizing its purpose. The constitutionality of § 8(b) (4) (A) is here questioned only as to its possible relation to the freedom of speech guaranteed by the First Amendment. This provision has been sustained by several Courts of Appeals. The substantive evil condemned by Congress in § 8(b) (4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise.

"Petitioners object to the breadth of the Board's order as stated in 82 N.L.R.B. at 1030, supra, 341 U.S. 698-699, 71 S.Ct. 957. They contend that its language prohibits inducement not only of employees of Deltorto but also the inducement of employees of any other employer to strike, where an object thereof is to force Giorgi or any other employer or person to cease doing business with Langer. To confine the order solely to secondary pressure through Giorgi or Deltorto would leave Langer and other employers who do business with him exposed to the same type of pressure through other comparable channels. The order properly enjoins petitioners from exerting this pressure upon Langer, through other employers, as well as through Giorgi and Deltorto. We may well apply here the principle stated in *International Salt Co. v. United States*, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20: 'When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.'" *International Brotherhood v. National Labor Rel. Board*, supra, 341 U.S. 694, 705, 71 S.Ct. at page 960, 95 L.Ed. 1299.

The jurisdictional strike law here involved specifically provides that a concerted

refusal to work or concerted interference with an employer's business is against public policy when it arises out of a dispute between two labor organizations as to which should have the exclusive right to bargain collectively. Hence an activity such as picketing to achieve unlawful ends, refusal to work or interference with the employer's business when the dispute is between two organizations seeking exclusive rights, is banned. Wisely or unwisely the Legislature has declared the policy of this state that an employer's business shall not be interfered with or the public welfare disrupted by reason of an argument between two or more unions as to which shall be chosen to represent his employees, a matter which may hinge largely on the respective claims of the quality of representation. The act eliminates the situation where the labor organization is employer controlled, hence an independent union is not prevented from endeavoring to organize an employer's employees when they belong to an employer controlled union or no union. Whatever may have been the rule before the recent decisions of the United States Supreme Court, *supra*, we have the act which declares the public policy of this state and those cases establish its validity.

Judgment reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ. concur.



40 Cal.2d 382

VOELTZ v. BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION NO. 37 et al.

L. A. 21660.

Supreme Court of California, in Bank.
March 10, 1953.

Rehearing Denied April 2, 1953.

Action to enjoin certain labor unions and members thereof from picketing plaintiff's

254 P.2d—35½
Cal.Rep. 253—254 P.2d—45

bakery plant for the purpose of compelling him to sign contracts making defendant unions exclusive bargaining agents for plaintiff's employees. From orders of the Superior Court, Los Angeles County, W. Turney Fox, J., granting a preliminary injunction and denying a motion to vacate it, defendants appealed. The Supreme Court, Shenk, J., held that the existence of a labor dispute between plaintiff and defendants before plaintiff's employees formed an independent association to represent them as bargaining agent did not take the case out of the Jurisdictional Strike Act requiring that interference with an employer's business arise out of a controversy between labor unions to be within the prohibition thereof.

Orders affirmed.

Carter and Traynor, JJ., dissented.

Prior opinion, Cal.App., 233 P.2d 624.

1. Labor Relations ⇐933

The National Labor Management Relations Act is not involved in action under state Jurisdictional Strike Law to enjoin labor unions from picketing plaintiff's bakery plant for purpose of compelling him to sign contracts making such unions exclusive bargaining agents for plaintiff's employees, where National Labor Relations Board's order, in which Board stated that it did not agree that plaintiff was not engaged in interstate commerce, was not called to trial court's attention either before its order granting preliminary injunction or on motion to vacate such order and there was no allegation in complaint or statement in any affidavit or defendants' answer that plaintiff was engaged in such commerce. Labor Code, § 1115 et seq.; Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

2. Labor Relations ⇐284

The Jurisdictional Strike Law is valid. Labor Code, § 1115 et seq.

3. Labor Relations ⇐971

In action to enjoin labor unions from picketing plaintiff's bakery plant to compel plaintiff to sign contracts with defendants as exclusive bargaining agents for plaintiffs' employees, who formed independent association to represent them as bargaining agent, trial court was judge of credibility of affidavits supporting plaintiff's veri-

fied complaint, alleging that association was not dominated or controlled by plaintiff, and resolution of all conflicts in evidence on such issue was court's province, so as to require treatment of case as if association were wholly independent labor organization, as found by trial court, rather than company union, excluded from consideration under Jurisdictional Strike Law, on appeal from order granting preliminary injunction. Labor Code, §§ 1117, 1118.

4. Labor Relations 844

The fact that labor dispute existed between plaintiff and defendants in action to enjoin labor unions from picketing plaintiff's bakery plant to compel him to sign contracts with defendants as exclusive bargaining agents for plaintiff's employees before such employees formed independent association to represent them in collective bargaining did not take case out of Jurisdictional Strike Law, requiring that interference with employer's business arise out of controversy between labor unions to be within prohibition thereof, where defendants continued such activities after association endeavored to have defendants withdraw and to induce plaintiff to bargain with association exclusively. Labor Code, § 1115 et seq.

Gilbert, Nissen & Irvin, Robert W. Gilbert, Los Angeles and Clarence E. Todd, San Francisco, for appellants.

Charles P. Scully and Tobriner & Lazarus, San Francisco, amici curiæ on behalf of appellants.

Hyman Smith and Howard R. Harris, Los Angeles, for respondent.

Roth & Bahrs, San Francisco, amici curiæ on behalf of respondent.

SHENK, Justice.

This is an appeal from an order granting a preliminary injunction and an order denying a motion to vacate that order.

According to the complaint and affidavits viewed most favorably to plaintiff, it appears that plaintiff is engaged in the business of making and distributing bakery products to the wholesale trade, under the

name Golden Krust Bakery. Defendants are labor unions and members thereof, the main ones being Bakery and Confectionery Workers' International Union of America, Local Union No. 37 and Bakery Drivers Local Union No. 276. In 1948, plaintiff employed 49 persons, consisting of 45 production workers, 2 truck drivers and 2 miscellaneous. Plaintiff sells his products to independent "route dealers" who in turn sell to consumers, and to retail dealers in bakery products, delivery to the latter being made by plaintiff's trucks and the product being picked up by the former at plaintiff's place of business. In the latter part of 1948, defendants' Locals 37 and 276, commenced a campaign to organize plaintiff's employees and to induce them to join their unions and demanded that plaintiff sign a contract with them making them exclusive bargaining agents for his employees. Plaintiff refused, because a "substantial number" of his employees advised him that they would refuse to join the unions, and if he signed such a contract, they would quit. In August, 1948, it was claimed that plaintiff discharged one of his employees because of union membership and the unions filed charges with the National Labor Relations Board that such act was an unfair labor practice. Later, in November, 1948, the employee was reinstated under a settlement in that proceeding and plaintiff was required to post notices that it would discontinue such practice. Defendants assert that the employee was again discharged. In September, 1948, Local 37 filed a petition with the National Labor Relations Board for certification as collective bargaining representative for plaintiff's employees. The board held a hearing and dismissed the petition on November 23, 1948.

On December 7, 1948, the unions representing ten of plaintiff's employees threatened to and did place pickets around plaintiff's plant, and continued to picket said plant until January 19, 1950, when this action was commenced; said unions also called a strike of plaintiff's employees to which ten responded and ceased work for a week. The unions advised plaintiff on occasions between December, 1948, and

November, 1949, that unless he signed contracts with them they would destroy his business, although they knew plaintiff's employees were against it. The unions placed plaintiff on the "blacklist" as unfair to organized labor. The pickets carried signs stating that plaintiff was unfair to organized labor. Some of the pickets followed the independent route dealers to their customers and displayed their signs. The unions contacted plaintiff's retail customers and threatened to picket them unless they ceased to buy plaintiff's products; some of plaintiff's customers were picketed by defendants. As a result of defendant unions' activities, plaintiff's customers refused to buy from him, to the grave injury of plaintiff's business.

On November 19, 1949, all but two of plaintiff's then 39 employees (the others later consented) met and formed a labor organization, called Golden Krust Independent Employees Association, to represent them. It is not controlled or dominated by plaintiff. On November 21, 1949, the association petitioned the National Labor Relations Board for certification as exclusive bargaining agent. It was certified as a labor organization but the petition to be exclusive bargainer was dismissed on the ground that interstate commerce was not affected. Discussions were had between the association and the unions in the latter part of December, 1949, and January, 1950, the former requesting the latter to cease their concerted activities. On December 10, 1949, the association requested of the unions that a secret ballot election be held among plaintiff's employees to determine the bargaining representative. This request was denied. The association informed plaintiff that if he signed a contract with the unions it would call a strike.

The trial court, in the preliminary injunction, enjoined defendants from picketing plaintiff's plant, representing that his employees are unorganized, and his products are made by unorganized labor.

[1,2] There is no indication that the dispute affected interstate commerce, hence the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq., is not in-

volved. Defendants belatedly make the contention that the National Labor Relations Board said in one of its orders of dismissal above referred to that it did not agree with plaintiff that he was not engaged in interstate commerce, but it does not appear that such order was called to the attention of the trial court either before its order for the preliminary injunction or on the motion to vacate it. There is no allegation in the complaint or statement in any affidavit or defendants' answer that plaintiff is engaged in interstate commerce. The validity of the Jurisdictional Strike Law of California, Labor Code, § 1115 et seq., is questioned, but that point was settled in *Seven Up Bottling Co. v. Grocery Drivers Union*, Cal.Sup., 254 P.2d 544.

Plaintiff rests his support for the injunction and the court granted it on the basis of the Jurisdictional Strike Law. The main contention of defendants, aside from the claimed invalidity of the Jurisdictional Strike Law, is that there was no violation of that law, because their picketing and concerted activity did not arise out of a dispute between two labor organizations, they and the association, because the dispute between them and plaintiff had been in existence some eleven months before the association was organized. Involved herein is the interpretation and application of sections 1117 and 1118 of the Labor Code, reading: "As used herein, 'labor organization' means any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be financed in whole or in part, interfered with, dominated or controlled by the employer." § 1117. "As used in this chapter, 'jurisdictional strike' means a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain col-

lectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer." § 1118.

[3] It should first be observed that the defendants speak of the association as a "company" union, suggesting that as such it is excluded from consideration under the Jurisdictional Strike Law. But it is only a company union "financed in whole or in part, interfered with, dominated or controlled by the employer" that is excluded. Labor Code, §§ 1117, 1118, *supra*. While the evidence is conflicting, plaintiff's verified complaint and affidavits offered by him show the association not to be such an organization. Defendants claim that the one who organized the association was the brother of one of plaintiff's foremen, that some of plaintiff's supervisory employees attended a meeting of the association, and that such organizations must be carefully scrutinized, citing *McKay v. Retail Auto Salesmen's Local Union*, 16 Cal.2d 311, 106 P.2d 373. Nevertheless, the court granted the injunction, thereby impliedly finding that the association was not company dominated, and stated in its memorandum opinion: "As to defendant's second contention, it cannot be said, *at this stage of the proceedings*, that the employee organization is not a bona fide union and that it is not free from company domination and control. It appears from the affidavits that the idea of an employee union had been discussed between at least some of the employees as early as April of last year, and that in November a person who was experienced in labor organization problems and who was in no way connected with plaintiff was consulted by the employees and invited to meet with them. Such a meeting was held on November 19th and the union of non-supervisory employees was formed and officers elected." The trial court was the judge of the credibility of the affidavits and it was its province to resolve all conflicts. *Northwestern Pac. R. Co. v. Lumber and Sawmill Workers Union*, 31 Cal.2d 441, 443, 189 P.2d 277.

The complaint alleged that there was no domination or control by plaintiff over the association and the affidavits submitted by him are to the same effect.

In their argument that their concerted interference did not arise out of a controversy between them and another labor organization, Labor Code, § 1118, *supra*, because the controversy existed prior to the formation of the association, they stress the assertion that the latter was an excluded company union. It was not, however, so far as the preliminary injunction is concerned, and hence the case must be treated as if there are two wholly independent labor organizations.

[4] We do not believe that the fact that a dispute existed between defendants and plaintiff before the association was formed and came into the picture, takes the case out of the act requiring that the interference with the employer's business arise out of a controversy between unions, for after the association was formed and plaintiff's employees became members thereof, it endeavored to have defendants withdraw from the arena and to induce plaintiff to bargain with it exclusively, yet defendants continued their activities, interfering with plaintiff's business. It may be inferred that what began as a dispute between employer and the union became a dispute between unions as to which should be exclusive bargaining agent. To place defendants' construction on the act would make it practically never applicable, for the unions would have to act simultaneously in their demands or disputes with the employer before there would be an interference with the employer's business arising out of a controversy between the unions as to which should be exclusive bargaining agent. If one of them made the demand any time before the other, then the interference would arise out of a dispute between the employer and that union rather than between the unions. It would rest wholly within the power of the unions to arrange the chronology of their demands, and escape the force of the act. We do not believe such an interpretation of the act is reasonable.

The orders are affirmed.

GIBSON, C. J., and EDMONDS, SCHAUER and SPENCE, JJ., concur.

not apply if the dispute is simply between an employer and a union.

CARTER, Justice.

I dissent.

The construction placed by the majority on the Jurisdictional Strike Act will prevent a union from continuing to press its dispute with the employer over wages or working conditions whenever the employer calls in another union and makes the dispute jurisdictional. In my opinion it was not the intention of the Legislature that the act be so construed.

The majority holds that the demand for recognition by the association, which was not even in existence until eleven months after the strike began, converted the previously lawful picketing within the prohibitions of the Jurisdictional Strike Act. The employer is allowed by the majority holding to enjoin the picketing by the union that instituted the strike, and to negotiate solely with the second union that subsequently appeared on the scene and created the inter-union conflict. The act can not reasonably be interpreted to allow an injunction in this situation.

The Jurisdictional Strike Act is designed to protect employers caught between conflicting union demands. It applies when the dispute is not one over traditional and lawful union demands, such as wages and hours, but instead is over overlapping claims by rival unions to job opportunities. In the latter situation the employer is placed in a position where he will be subjected to picketing and economic coercion, no matter how willing he may be to bargain in good faith with either union. By outlawing aggressive union action in connection with controversies between several unions over the exclusive right to perform work, California has followed a general trend in state and national legislation.

California did not, however, go farther and give the employers more protection than the necessities of the problem demanded. By the phrase "arising out of a controversy between two or more labor organizations," the application of the Act is limited to cases where the forbidden concerted activity results from inter-union disputes. It does

In the present case, the picketing by the Bakery Workers was peaceful and for a lawful purpose when it commenced on December 7, 1948. At that time there was no basis for injunctive relief. Nearly a year later, the association appeared on the scene and informed the employer that if he signed a contract with the Bakery Workers, the association would commence picketing. The majority opinion states that thereafter the picketing by the Bakery Workers came within the Act. But can it be seriously contended that a continuous course of picketing in support of a strike, existing for many months before the appearance of the second union, arose out of, resulted from, or was proximately caused by a controversy between the two unions? The employer concedes that the picketing was lawful in its inception, but argues that he "obtained a remedy" when the second labor organization presented a demand for recognition. The majority accepts this argument and gives the employer injunctive relief, not against the second union that interfered and subjected the employer to the conflicting demands, but against the first union, that had been picketing in support of a hitherto lawful strike for the purposes of gaining recognition and reinstatement of a discharged union member. I have difficulty following the reasoning that the lawful acts of the Bakery Workers were transformed into unlawful acts by the conduct of a hostile labor organization, with which it has no affiliation or connection.

Other provisions of the Jurisdictional Strike Act and the Labor Code would seem to reinforce the conclusion that the words "arising out of a controversy between two or more labor organizations" made the Act inapplicable at the time the injunction issued. Section 1119 provides that nothing in the Act "shall be construed to interfere with collective bargaining subject to the prohibitions herein set forth". This provision is meaningless, if picketing may be prohibited whenever a second union makes a demand upon the employer during the existence of a bona fide dispute between the employer and the union engaged in the

picketing. Absent more specific provisions in the Act, this section prevents the Act from being interpreted to ban concerted union action in ordinary strikes. See *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665, 673, 71 S.Ct. 961, 95 L.Ed. 1277. Moreover, the public policy of this state, as expressed in section 923 of the Labor Code, is that individual workers shall be free to negotiate the terms of their employment, and to be free from the interference of their employers in concerted activities for the purpose of collective bargaining. The decisions of this court make it clear that a union may use concerted action to gain objectives reasonably related to legitimate interests of organized labor. *McKay v. Retail Auto. S. L. Union*, 16 Cal.2d 311, 106 P.2d 373, and companion cases.

The majority supports its construction of the Act on the ground that otherwise it would be "practically never applicable, for the unions would have to act simultaneously in their demands or disputes with the employer before there would be an interference with the employer's business arising out of a controversy between the unions as to which should be exclusive bargaining agent."

This objection would be obviated if the Act applies to the union that intervened in the pre-existing dispute between the first union and the employer. The California statute is significantly different from the Taft-Hartley Act, which provides that when one union gains certification as the union which the employees wish to represent them, other unions cannot thereafter intervene and subject the employer to conflicting demands for work assignments. Section 8(b)(4)(D); see *International Longshoremens' Union v. Juneau Spruce Corp.*, 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275; *Petro, Union Job-Seeking Aggression*, 50 Mich.L.Rev. 497, 510-520. The California statute does not contain certification procedure, and there thus is presented a serious problem in determining in disputes between an employer and more than one union which union is entitled to carry out concerted activities so that employees may achieve the legitimate objectives of or-

ganized labor, and which unions are prevented from entering the picture and exposing an innocent employer to mutually exclusive demands by rival unions. The majority resolves this difficulty by applying the statute to *all* unions making claims for the right to represent the employees, regardless of the prior history of disputes and contracts between the employer and the union first representing, or claiming to represent, the employees. Further, as I read the majority opinion, there is no requirement that the unions in fact represent any of the employees; all that is required is that more than one union *claim* the right to represent them. The majority would thus allow the employer either to contract with the union that offers the best terms and obtain injunctive relief against other unions making more unpalatable requests, or, so long as two rival unions are present, to enjoin picketing by both unions and gain perpetual freedom from concerted labor action. To protect employers from demands by more than one union, the majority gives the right to ban picketing by all unions, even though one union may have represented the employees for many years.

The express language of the Act does not support the foregoing construction. As we have already seen, the words "arising out of a controversy between two or more labor organizations" prevent the statute from being applied to the union that originally began picketing for a lawful purpose. Concededly, however, unless the statute is meaningless, the employer must be entitled to some type of injunctive relief in order to eliminate jurisdictional demands from the picketing and confine the dispute to one over traditional lawful union objectives. The employer will be fully protected and the purposes of the Act carried out by giving him relief against the demand by the *second* union. An ordinary strike between a single union and an employer does not "arise out" of a dispute between two unions, and the Act thus does not apply to picketing arising out of renewal of a collective bargaining agreement or out of an organizational strike when no other union is simultaneously making a claim that it should represent the employees. On the

other hand, when an employer either has a contract with one union, or is engaged in a strike with a union, and a second union intervenes and makes demands for job rights that conflict with the demands of the first union, the controversy between the second union and the employer would appear to be one "arising out of" a jurisdictional conflict between the two unions. The action of the second union puts the employer in a position where he would face economic pressure whether he acceded to the demands of the first union, or rejected them and accepted those of the second union. The first union, however, did nothing different from what it had been doing before the second union appeared and, as to the first union, the picketing would, therefore, still "arise out of" the original dispute with the employer. Since the only reason there is any conflict between two unions over job rights is the interference of the second union, it would seem to follow that the employer is entitled to prevent the second union from concerted interference with his business, but that the first union is not within the prohibitions of the Act.

The Act as a whole is aimed at preventing a union from interfering with another union which has a dispute with the employer—to prevent the latter union from creating a situation where the employer is faced with demands from both unions for exclusive representation rights. It is, therefore, the latter union which should be enjoined from its activities because it is in the wrong. This is recognized by the Act when it provides that "any person" injured or threatened with injury by a violation of the Act may obtain injunctive relief. Lab.Code, § 1116. "Person" includes a labor organization. Ibid., § 1117. Thus the union engaged in a dispute with the employer should be entitled to have the interfering union restrained from concerted activity on the ground that such activity merely creates an illusory jurisdictional strike where none exists.

The orders should be reversed.

TRAYNOR, J., concurs.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

SOMMER v. METAL TRADES COUNCIL OF SOUTHERN CALIFORNIA et al.

L. A. 21757.

Supreme Court of California, in Bank.

March 10, 1953.

Rehearing Denied April 2, 1953.

Action for an injunction against and damages for picketing and secondary boycott activities by defendants, labor unions and members and officers thereof. From an order of the Superior Court, Los Angeles County, W. Turney Fox, J., granting a preliminary injunction, defendants appealed. The Supreme Court, Shenk, J., held that the trial court was justified in maintaining the status quo until it decided questions of the lawfulness of defendants' union activities and propriety of issuing a permanent injunction after a trial on the merits, and that a prima facie showing of the qualification and voluntary character of an organization of plaintiff's employees, demanding recognition as exclusive bargaining representative, in the complaint and supporting affidavits, established the trial court's jurisdiction to order temporary relief.

Order affirmed.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

Prior opinion, Cal.App., 234 P.2d 323.

1. Labor Relations ⇐284

The Jurisdictional Strike Act is constitutionally valid. Labor Code, § 1115 et seq.

2. Labor Relations ⇐283

The state has power to set limits of permissible contest available to industrial combatants, so long as constitutional guarantees are observed.

3. Labor Relations ⇐283, 510

The presence of factors of protection and condemnation of labor union activities in Federal Labor Management Relations Act discloses Congress' intention to place exclusive jurisdiction of such matters in National Labor Relations Board, but state does not necessarily encroach on area of control vested in such Board, if subject matter of state statute is otherwise within area of permissible exercise of state power in maintenance of industrial peace and state policy is consistent with federal poli-

cy. National Labor Relations Act, § 8(b)(4), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 158(b)(4); Labor Management Relations Act of 1947, § 303(a), 29 U.S.C.A. § 187(a).

4. Labor Relations ⇨284

The state statutory restrictions on labor unions' jurisdictional strike activities are consistent with federal policy established by Labor Management Relations Act, defining as unfair labor practice activity by a union seeking to substitute itself for union selected by employees as their collective bargaining agent, and hence are not invalid as in conflict with federal policy. Labor Code, § 1115 et seq.; National Labor Relations Act, § 8(b)(4), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 158(b)(4); Labor Management Relations Act of 1947, § 303(a), 29 U.S.C.A. § 187(a).

5. Labor Relations ⇨352

In absence of final action by National Labor Relations Board in proceedings by contesting labor unions for certification as employees' collective bargaining representative or proceedings on charges of unfair labor practices, there was a possible area of activity which was neither protected nor condemned under Federal Labor Management Relations Act and hence was subject to state action under provisions of state Jurisdictional Strike Act. Labor Code, § 1115 et seq.; National Labor Relations Act, § 8(b)(4), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 158(b)(4); Labor Management Relations Act of 1947, § 303(a), 29 U.S.C.A. § 187(a).

6. Labor Relations ⇨844

The state policy of outlawing jurisdictional coercive activity in maintenance of peaceful industrial relations justifies injunctive as well as legal relief. Labor Code, § 1115 et seq.

7. Labor Relations ⇨283

The provisions of section of Federal Labor Management Relations Act confining actions which may be brought in state courts to those for recovery of damages to business or property are concerned with state jurisdiction in matters covered by

such act and do not preclude local injunctive relief in area open to state control. Labor Code, § 1115 et seq.; Labor Management Relations Act of 1947, § 303(b), 29 U.S.C.A. § 187(b).

8. Labor Relations ⇨283

The states have constitutional right to proscribe picketing in furtherance of unlawful objectives.

9. Labor Relations ⇨352

Labor unions have no right to publicize controversy with employer by means of placards and picketing for an objective in violation of state Jurisdictional Strike Act. Labor Code, § 1115 et seq.

10. Constitutional Law ⇨90

While picketing has an ingredient of communication, it cannot dogmatically be equated with constitutionally protected freedom of speech, but courts endeavor to strike balance between constitutional protection of communication in picketing and state's power to set limits of permissible contest open to industrial combatants.

11. Labor Relations ⇨205

A local unit of one employer's employees may constitute a labor organization for collective bargaining purposes within Jurisdictional Strike Act, if qualified and undominated by employer. Labor Code, § 1115 et seq.

12. Labor Relations ⇨964, 966

In action to enjoin peaceful picketing and secondary boycott activities by labor unions demanding recognition by plaintiff as his employees' exclusive collective bargaining representatives, trial court was justified in maintaining status quo by granting preliminary injunction until it decided questions of lawfulness of unions' activities and propriety of issuing permanent injunction after trial on merits. Labor Code, § 1115 et seq.

13. Labor Relations ⇨970, 971

In action to enjoin peaceful picketing and secondary boycott activities by labor unions demanding recognition by plaintiff as his employees' exclusive collective bargaining representatives, complaint and supporting affidavits showed prima facie qualification and voluntary character of em-

ployees' organization also demanding recognition as such representative, so as to establish trial court's jurisdiction to order preliminary injunction pending decision of questions of lawfulness of unions' activities and propriety of issuing permanent injunction after trial on merits. Labor Code, § 1115 et seq.

14. Labor Relations 974

On application for order granting preliminary injunction against picketing and secondary boycott activities by defendant labor unions, court would weigh probable injury to plaintiff from denial of temporary relief as against absence of probable injury to defendant by granting thereof. Labor Code, § 1115 et seq.

Arthur Garrett, Los Angeles, Todd & Todd, San Francisco, John C. Stevenson, Los Angeles, and Clarence E. Todd, San Francisco, for appellants.

Charles P. Scully and Tobriner & Lazarus, San Francisco, amici curiæ on behalf of appellants.

Gibson, Dunn & Crutcher, William French Smith, James R. Hutter and C. Robert Simpson, Jr., Los Angeles, for respondent.

Roth & Bahrs, San Francisco, amici curiæ on behalf of respondent.

SHENK, Justice.

This is an appeal by the defendants from an order granting a preliminary injunction.

[1] The controversy involves concerted union activities which bring into question the application of the Jurisdictional Strike Act of this state, Section 1115 et seq., Labor Code, added by Stats. 1947, p. 2952. The constitutional validity of that statute has been determined in *Seven-Up Bottling Company v. Grocery Drivers*, L.A. 21347, Cal. Sup., 254 P.2d 544. The question is whether the state court had jurisdiction to order the preliminary injunction and, if it had jurisdiction whether it properly exercised its discretion in directing that it should issue.

For thirty-one years the plaintiff has manufactured, distributed and installed auto service stations and equipment. He em-

plys fifty persons. The defendant unions are affiliated with the American Federation of Labor. The individual defendants are members and officers of the unions.

Prior to July 1949 the plaintiff's employees were unorganized. In that month the defendants demanded of the plaintiff that he recognize the unions as the exclusive collective bargaining representatives of the employees, and that only members of the unions be employed by him. In September the employees held meetings to organize The Workers Association of Manufacturers and Builders of Auto Service Union Local No. 1, without A. F. of L. or other union affiliation, and demanded that the employer recognize it as their exclusive bargaining representative. The plaintiff refused to recognize either Local No. 1 or the unions as the employees' collective bargaining agent. Peaceful picketing and secondary boycott activities, including the representation that the plaintiff was unfair to organized labor, were commenced by the defendants on September 15, 1949.

Also in September the employees' Local filed a petition with the National Labor Relations Board for certification as the representative for collective bargaining purposes. The unions intervened and contested for recognition. On February 24, 1950, the National Board found that the plaintiff was engaged in commerce within the meaning of the federal labor relations law and ordered an election. The plaintiff alleges that an election was conducted by the Local; that twenty-five employees voted for the Local, seven of which votes were challenged by the defendants, and that five employees voted for the unions. It does not appear whether the election was pursuant to the board's direction or whether certification of a collective bargaining representative followed.

The defendants continued their concerted activities and the plaintiff commenced this action for injunctive relief and damages in March 1950. A hearing on the return to an order to show cause was had on the verified complaint and numerous affidavits. The court granted the preliminary injunction enjoining the defendants from conducting the picketing and secondary boycott activi-

ties and from representing to others that the plaintiff is unfair to organized labor.

The plaintiff's employees are not on strike. The dispute is between the two groups concerning union organization of the plaintiff's employees, collective bargaining representation and consequent work assignment. It is not questioned that the union picketing and secondary boycott activities substantially interfered with the conduct of the plaintiff's business.

The plaintiff contends that the concerted union activity presents a case of a jurisdictional strike which is in violation of and enjoined pursuant to the Jurisdictional Strike Act of which the state court has jurisdiction. The defendants contend that their activity is not in violation of the act and in any event is governable solely pursuant to the federal law.

Section 1115 of the Labor Code declares a jurisdictional strike to be against the public policy of the state and unlawful. Section 1116 provides the remedies by injunction and damages. "Labor organization" is defined as any organization or any agency or employee representation committee or any local unit thereof in which employees participate which exists for the purpose of dealing with employers concerning grievances and labor disputes and is not found to be financed, interfered with, dominated or controlled by the employer. Sec. 1117. Section 1118 defines "jurisdictional strike" as a "concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer." Section 1119 preserves, subject to the foregoing restrictions, the right of collective bargaining and the right of any individual voluntarily to become or remain a member of a labor organization or personally to request any

other individual to join a labor organization.

A policy prohibiting concerted jurisdictional activity is also contained in the federal law. Section 8(b) (4) of the amended Wagner Act, National Labor Relations Act, July 5, 1935, 49 Stats. 452, c. 372, as amended by the Labor Management Relations Act, 1947, 61 Stats. 140, 29 U.S.C.A. § 158, specifies concerted jurisdictional activities which are declared to be unfair labor practices on the part of labor organizations, and section 303(a) of the amended act, 29 U.S.C.A. § 187(a), declares the conduct to be unlawful. See discussion Teller, *Labor Disputes and Collective Bargaining*, 1950 Supplement, pp. 111 et seq., pp. 121 et seq. For present purposes it is sufficient to note that section 8(b) (4) (C) declares it to be an unfair labor practice for a labor organization to engage in concerted activity (as here) for the purpose of forcing or requiring the employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as their representative under the provisions of the act.

The preliminary injunction was ordered in May 1950. The trial court appears not to have been informed as to any finality in the representation proceeding before the National Labor Relations Board. For the purpose of this appeal it is assumed that the plaintiff is engaged in interstate commerce and that there is no certification of a collective bargaining representative for his employees under the federal act. In the representation proceeding the unions sought to introduce evidence of employer domination of the Local, but the evidence was refused consideration because the issue was not subject to litigation in that proceeding. Subsequently the unions filed charges of employer coercion and domination of the Local in violation of sections 8(a) (1) and (2) of the federal act. In December, 1949, the evidence of domination was held to be insufficient to warrant investigation at that time. On September 22nd and December 5, 1949, the employer filed with the National Board charges of union jurisdic-

tional activity in violation of section 8(b) (4) of the act. On December 28th the charges were dismissed for lack of evidence of violation at that time. It does not appear that the charges were renewed after a possible certification of the employees' Local as their representative for collective bargaining purposes.

It may also be assumed that the evidence which was relevant in the representation contest and to the several charges of unfair labor practices before the National Board bears on the issues here. But it does not follow that the state court does not have jurisdiction of this controversy.

Gerry of California v. Superior Court, June 1948, 32 Cal.2d 119, 194 P.2d 689, does not determine with finality the matter of jurisdiction on this appeal. The *Gerry* case involved interstate commerce but was not concerned with union jurisdictional activity as defined in our statute. Secondary boycott activities were there employed by A. F. of L. unions for the purpose of organizing the petitioner's nonunion employees. In view of the fact that the court in *In re Blaney*, 30 Cal.2d 643, 184 P.2d 892, had held invalid the hot cargo and secondary boycott act of 1941, Labor Code, § 1131 et seq., the petitioner agreed that there was no California statute which could furnish equitable redress. The petitioner contended that the state had concurrent jurisdiction with the National Labor Relations Board to enforce the provisions of the federal act. The decision rejecting the contention was a determination that in the absence of a valid applicable local statute affording relief, facts which amount to unfair labor practices under the federal act are cognizable exclusively in a proceeding before the National Board. This court in *In re DeSilva*, 33 Cal.2d 76, 78, 199 P.2d 6, again recognized that the *Gerry* case involved the question of the concurrent jurisdiction of the state court to enforce the federal act. Thus the problem now is not whether the state has concurrent jurisdiction with the National Board to enforce the federal act. The question is whether the state court has jurisdiction to enforce the provisions of a state statute

making the defined union jurisdictional activity unlawful and subject to restraint.

At the time of the decision in the *Gerry* case, *Bethlehem Steel Co. v. New York State Labor Relations Board*, April 1947, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234, was the latest holding of the Supreme Court that except where jurisdiction had been ceded by the National Board to a state agency, state and federal action in matters covered by the federal act could not coexist. The Supreme Court has since recognized the validity of state action in those cases where the conduct complained of is neither forbidden nor legalized and approved under the federal act.

The *Bethlehem Steel* formula was followed in *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*, Jan. 1949, 336 U.S. 18, 69 S.Ct. 379, 93 L.Ed. 463, where cession had not been granted. The jurisdiction of the local board in a certification procedure was denied because of inconsistencies between the federal and the state acts. The court said, 336 U.S. at page 26, 69 S.Ct. at page 383, 93 L.Ed. 463: "A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme even though it has not yet been applied in any formal way to this particular employer."

[2] The state power to set the limits of permissible contest available to industrial combatants, so long as constitutional guaranties are observed, is not open to question. *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; *Thornhill v. State of Alabama*, 310 U.S. 88, 103, 60 S.Ct. 736, 84 L.Ed. 1093. *International Union v. Wisconsin Employment Rel. Board*, Feb. 1949, 336 U.S. 245, at page 257, 69 S.Ct. 516, at page 523, 93 L.Ed. 651, again recognized the area of control open to the state, see numerous cases cited; cf. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93

L.Ed. 834; see also *Gerry of California v. Superior Court*, supra, 32 Cal.2d 119 at page 125, 194 P.2d 689 and cases cited. There the local board ordered the union to cease intermittent unannounced work stoppages for unstated purposes and other concerted activity except by leaving the premises in an orderly manner for the purpose of exercising the protected right of going on strike. The Supreme Court pointed out that the enjoined activity was neither forbidden nor protected by the federal act.

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, Mar. 1949, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691, concerned a Wisconsin law which provided for a maintenance-of-membership clause in the labor contract when a two-thirds employee vote favored the inclusion in a referendum conducted by the Wisconsin Board. No referendum had been conducted under the state or federal act, but in January 1947 an employee was discharged pursuant to such a clause in the current labor contract. The state court sustained the jurisdiction of the local board in the issuance of a cease and desist order to the employer including a direction for reinstatement and back pay. With the less restrictive conditions in the federal act the Supreme Court found no conflict between it and the state act on the subject of union security maintenance. In affirming the state judgment, the court reviewed the legislative history and debate and concluded that Congress did not intend to interfere with state action on the subject. Cession was deemed essential only where the state and federal laws were parallel. Where there was no overlapping, cession was said to be unnecessary because the state's jurisdiction remains unimpaired. The court also recognized the impact of the 1947 amendments to require a modification of the Bethlehem Steel decision in cases where the National Board had declined jurisdiction, in order to permit freedom of state action including pursuit of the more restrictive state policies. The modification was held to apply so long as Congress did not manifest an unambiguous intention to vest exclusive jurisdiction in the National

Board, and the state policy was not inconsistent with national policy.

Plankinton Packing Co. v. Wisconsin Employment Relations Board, Feb. 1950, 338 U.S. 953, 70 S.Ct. 491, 94 L.Ed. 588, also involved the maintenance of union membership. On December 6, 1946, the local board ordered the re-employment of employee Stokes who on May 9, 1945, had been discharged for failure to maintain his union membership. The state court determined that the local board had jurisdiction on the authority of the *Algoma Plywood* decision. The Supreme Court reversed without opinion citing *Bethlehem Steel and La Crosse*. But it cannot be assumed that the Supreme Court intended to overrule the *Algoma Plywood* declarations. It must on the contrary be assumed that the facts in *Plankinton* would disclose a federally protected union maintenance clause which would form the basis of the implied conclusion of absence of state jurisdiction.

International Union etc. v. O'Brien, May, 1950, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978, involved a strike vote provision of the Michigan Labor mediation law, Comp.Laws 1948, § 423.1 et seq. It was held that since this was a protected and regulated right in a field occupied by Congress it was closed to state regulation under a statute which conflicted with the exercise of federally protected labor rights. The court recognized that in *International Union v. Wisconsin Employment Rel. Board*, supra, 336 U.S. 245, 252, 69 S.Ct. 516, 93 L.Ed. 651, it had reaffirmed the principle that if "Congress has protected the union conduct which the state has forbidden * * * the state legislation must yield." 339 U.S. at page 459, 70 S.Ct. at page 784, 94 L. Ed. 978.

[3] It is thus apparent that the factors of protection and condemnation under the federal act largely determine whether the area is one closed to state control. The decisions indicate that the presence of those factors are deemed to disclose an intention on the part of Congress to place exclusive jurisdiction in the National Board. They also demonstrate that the problem is not one which in every case

is resolved solely by looking to the provisions of the federal act; but that if the subject matter of the local statute is otherwise one within the area of permissible exercise of state power in the maintenance of industrial peace, and state policy is consistent with federal policy, the state does not necessarily encroach upon the area of control vested in the National Board. And in some cases it is seen that the presence or absence of the factors of protection or condemnation under the federal act may be resolved by the fact of whether the National Board has or has not assumed jurisdiction.

[4] The extent to which the organizational coercive measures are lawful is not involved at this time. It is sufficient to note that the statutory restrictions on jurisdictional strike activity are consistent with the federal policy enacted in 1947 defining as an unfair labor practice activity by a union which seeks to substitute itself as the collective bargaining agent in the place of one duly selected by the employees. There is here therefore no conflict with federal policy such as was considered fatal in *Amalgamated Association v. Wisconsin Employment Relations Board*, Feb. 1951, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364, in connection with a statute outlawing all strike activity on the part of public utility employees and substituting arbitration in the settlement of disputes. It was there pointed out that the activity forbidden by the Wisconsin law was one protected under the federal law.

[5] If the union activity here involved is not protected under the federal act it is not immunized from state action. The union concerted activity was not protected under the federal act if another union was certified by the national board as the collective bargaining representative of the plaintiff's employees. And in the absence of such certification there is no immunity under the state law if the employees' Local constitutes a collective bargaining representative within the meaning of the anti-jurisdictional strike provisions. Cf. *Park & Tilford Import Corp. v. International Brotherhood of Teamsters, etc.*, Jan. 1946, 27 Cal.2d 599, 603, 604, 165 P.2d 891, 162

A.L.R. 1426. Since the certification of a union other than the defendant is not shown, a case of condemnation of the union activity under the federal act is not presented. And as it does not appear that the National Board has seen fit to act finally in either the representation or the unfair charges proceedings there is involved a possible area of activity which is neither protected nor condemned under the federal act, and pursuant to the foregoing decisions is subject to state action under the anti-jurisdictional strike provisions of the Labor Code.

[6, 7] Thus, there is here an area open to the state for the exercise of its police power. The state policy of outlawing jurisdictional coercive activity in the maintenance of peaceful industrial relations justifies the injunctive as well as legal relief. The provisions of section 303(b) of the amended federal act confining the action which may be brought in the state courts to that for recovery of damages to business or property are concerned with state jurisdiction in matters covered by that act. They do not preclude local injunctive relief in an area open to state control.

[8-10] In view of the many decisions recognizing the constitutional right of states to proscribe picketing in the furtherance of unlawful objectives, *Giboney v. Empire Storage & Ice Co.*, supra, 336 U.S. 490, 502-503, 69 S.Ct. 684, 93 L.Ed. 834, citing *Bakery and Pastry Drivers Local v. Wohl*, 315 U.S. 769, 776-777, 62 S.Ct. 816, 86 L.Ed. 1178; *Hughes v. Superior Court*, 339 U.S. 460, 464, 70 S.Ct. 718, 94 L.Ed. 985; *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470, 474, 70 S.Ct. 773, 94 L.Ed. 995; *Build- hood of Teamsters v. Hanke*, 339 U.S. 532, 537, 70 S.Ct. 784, 94 L.Ed. 1045, citing numerous cases; *International Brotherhood of Electrical Workers v. National Labor Relations Board*, June 1951, 341 U.S. 694, 705, 71 S.Ct. 954, 95 L.Ed. 1299; see also *James v. Marinship Corp.*, 25 Cal. 2d 721, 729-730, 155 P.2d 329, 160 A.L.R. 900, and cases cited; *Rubin v. American Sportsmen*, Cal.Sup., 254 P.2d 510, it may not successfully be contended that the defendant unions have the right to publicize

the present controversy by means of placards and picketing if the objective is shown to be in violation of the Jurisdictional Strike Act. As said in the Hughes case, 339 U.S. at page 464, 70 S.Ct. at page 721, 94 L.Ed. 985, the "Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations"; and in the Hanke case, 339 U.S. at page 474, 70 S.Ct. at page 775, 94 L.Ed. 1045, that "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. * * * The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.'"

In *Gerry of California v. Superior Court*, supra, 32 Cal.2d 119, 194 P.2d 689, there was an attempt by the petitioner's employees to form their own organization for collective bargaining purposes and an unsuccessful attempt to obtain certification under the federal act. The events took place in November 1947 after the effective dates of the Labor Management Relations Act, 1947 (August), and of the state Jurisdictional Strike Act (September 1947). In that case apparently neither counsel nor court considered that the effort to form a local unaffiliated organization of the non-union employees constituted a labor organization within the meaning of section 1117 of the Labor Code. Consequently the petitioner's employees were treated as unorganized for the purpose of the decision in that case.

[11-14] The controversy here presents for the first time the question whether a somewhat similar attempt effects a labor organization within the meaning of the statute. At this point it may not be seriously questioned that such a local unit, if qualified and undominated by the employer, may constitute a labor organization for collective bargaining purposes. That it may is clearly indicated by the language of the statute. That effect was also impliedly determined by the order of the National

Board in the representation proceeding and in the dismissal of the charges based on alleged employer domination. But here the factual elements which would support the granting of an injunction cannot be finally resolved until a trial on the merits. In the meantime the trial court was justified in maintaining the status quo until it should decide the questions of the lawfulness of the union activity and the propriety of issuing a permanent injunction. The requirements of qualification and voluntary character of the employees' organization are preliminarily met by the prima facie showing in the complaint and the affidavits, and thereby the trial court's jurisdiction to order the temporary relief is established. On the application for the preliminary order the court also could, and undoubtedly did, weigh the probable injury which would ensue to the plaintiff by denying the temporary relief as against the absence of probable injury which would accrue to the defendants by granting it. The record does not indicate that the court abused its discretionary power in making these determinations adversely to the defendants and in granting the injunctive order pending a trial on the merits.

The order is affirmed.

EDMONDS, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion concedes that the activities of defendants unions and Local 1 and its effect on plaintiff employer are within the jurisdiction of the National Labor Relations Board and the terms of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq., and obviously that is true. It goes on to hold, however, that such activities are also within the purview of our statute known as the Jurisdictional Strike Act. Lab.Code, § 1115 et seq. It then concludes that the state act and state courts in enforcing it can operate concurrently on those activities. It attempts to distinguish Gerry of California v. Superior Court, 32 Cal.2d 119, 194 P.2d 689, and In re DeSilva, 33 Cal.2d 76, 199 P.2d 6, on the ground that

in those cases there was no state statute or policy which regulated the activity. That, however, is immaterial for those cases further state that where the activity comes within the federal act, *exclusive* jurisdiction is conferred on the Board under that act. That exclusive jurisdiction does not disappear merely because the state passes a statute on the same subject.

The fundamental premise of the majority opinion, that activities in connection with labor disputes although within the jurisdiction of the federal law and national board, may also be regulated and controlled by state statutes and enforced by state courts, is clearly erroneous as I will endeavor to demonstrate hereinafter. First, reference should be made to the most recent case called to my attention, of Capital Service, Inc. v. National Labor Relations Board, 204 F.2d 848, where the premise of the majority opinion is squarely repudiated. There the federal district court had granted, at the request of the National Labor Relations Board, an injunction against an employer enjoining it from enforcing an injunction it had obtained in a California Superior Court enjoining concerted activities (a boycott and picketing) by a union. The Federal Court held that the activities violated the federal law and hence the *California court had no jurisdiction* to enjoin the activities and the district court was correct in so holding. The court stated:

"The question then arises whether, since both these acts of picketing are in violation of the Taft-Hartley Act, the state courts are excluded from attempting to enjoin such acts where prohibited by the State or federal law?

"We think that the control by the federal tribunals is exclusive. 29 U.S.C.A. § 160(a) of the original Act provided: 'The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power *shall be exclusive*, and shall not be affected by any other means of adjustment or prevention that has been or may be estab-

lished by agreement, code, law, or otherwise.' (Emphasis supplied.)

"As amended by the Taft-Hartley Act, these two sentences remain save that the words 'shall be exclusive, and' are stricken, and the states given power of enforcement by agreement with the board in certain cases by adding the following proviso after the word 'otherwise': '*Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.'

"We construe this amendment as giving to a state a right of enforcement only by an agreement reached by it with the board. Here there was no such agreement."

In the instant case it appears from the complaint that plaintiff is doing business under the fictitious name of Comwel Company in Lynwood, California. His business consists of manufacture, distribution and installation of steel machinery and equipment, chiefly for service stations. Defendants are various local labor unions affiliated with the American Federation of Labor and members and officers of those unions. Plaintiff employs about 50 people.

An organization called Workers Association of Manufacturers and Builders of Auto Service Union Local No. 1 (hereafter called Local 1), not financed or controlled by plaintiff, organized early in September, 1949, filed on September 16, 1949, a petition with the National Labor Relations Board, claiming the right to represent plaintiff's employees in collective bargaining, in which plaintiff was a party, and one of defendant unions intervened. On February 24, 1950,

the board ordered an election to determine whether the union or Local 1 should be the bargaining representative. It also determined that plaintiff was engaged in a business affecting interstate commerce. At the election a majority voted in favor of Local 1.

On September 22, 1949, plaintiff filed with the board a charge, later amended, against some of defendant unions, claiming the union was engaged in unfair labor practices affecting interstate commerce under and in violation of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 158(b) (4) (A) and (B), in that the unions were inducing other employees of other employers to refuse to use and handle plaintiff's products, with the object of forcing other employers to bargain with a union not certified as a representative, by picketing and otherwise. Plaintiff thus admitted that interstate commerce was affected. On December 28, 1949, the regional director of the board refused to issue a complaint in the matter for "lack of sufficient evidence of violations" of the act. No appeal was taken from such refusal.

On October 28, 1949, one of defendant unions filed a charge with the board alleging unfair labor practices affecting interstate commerce in violation of the Labor Management Relations Act, 29 U.S.C.A. § 158(a) (1) and (2), in that Local 1 was formed by plaintiff to influence his employees in an election by them to determine their bargaining representative. On December 13, 1949, the regional director of the board refused to issue a complaint for lack of evidence. On appeal to the general counsel, the refusal was affirmed.

The charge in the complaint and affidavits is that defendants demanded that plaintiff accept them as the exclusive bargaining representative for his employees and to that end defendants have picketed plaintiff's place of business and his customers' places of business where plaintiff was installing his equipment and otherwise sought to induce other employers and employees to refuse to deal with plaintiff or handle his products, which practices succeeded in injuring plaintiff's business. According to plaintiff, he was approached

during 1949, before Local 1 was formed, by defendants who demanded the right to be the exclusive bargainers for his employees and to execute a contract to that end. He refused because his employees did not want to join the union. Threats of picketing and of preventing suppliers and subcontractors from working on the jobs were made by defendants. Defendants engaged in concerted action against plaintiff consisting of picketing and advising plaintiff's customers not to deal with him, and coercing the contractors by threatening to call off the men on their jobs if they continued to deal with plaintiff. The activity was successful, causing considerable damage to plaintiff's business. The injunction restrained the foregoing activities.

Plaintiff seeks to justify the injunction on the basis of the Jurisdictional Strike Act, Labor Code, § 1115 et seq., considered in *Seven Up Bottling Co. v. Grocery Drivers Union, etc.*, Cal.Sup., 254 P.2d 544. Defendants claim the act is unconstitutional and that it does not apply here because their concerted activities did not arise out of a dispute between them and Local 1, see Labor Code, § 1118, but had been in existence prior to Local 1's formation. Plaintiff also relies upon section 923 of the Labor Code.

Beyond doubt the case is controlled exclusively by the National Labor Management Relations Act of 1947 and is within the jurisdiction of the National Labor Relations Board, and any state policy, legislative or judicial, must give way. The act sets up a comprehensive system dealing with representation in collective bargaining and unfair labor practices on the part of both management and labor organizations. Its declared policy is that industrial strife which interferes with the flow of interstate commerce can be avoided or minimized if employers, employees and labor organizations each recognize the others legitimate rights, and the purpose of the act is to preserve the legitimate rights of employers and employees and to provide for orderly and peaceful procedures to achieve these goals. 29 U.S.C.A. § 141. Rights are assured to employees "to self-

organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title." Id., § 157. Certain activities on the part of the employer are declared unfair labor practices, such as "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this sub-chapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 158(a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 159(e) of this title the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable

to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *." Id., § 158(a) (1) and (3). Similarly it is unfair practice for a labor organization to "(1) restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forc-

ing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; * * *. (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Id., § 158(b) (1), (2), (4) and (c). The board has jurisdiction to determine the proper bargaining representative on petition of employees, labor organization, or employer and for elections to that end. Id., § 159. Also, it is given power to prevent engaging in unfair labor practices and to invoke federal court jurisdiction to that end. Id., § 160. That jurisdiction excludes injunctive relief by the state courts. *Gerry of California v. Superior Court*, 32 Cal.2d 119, 194 P.2d 689; *In re DeSilva*, 33 Cal.2d 76, 199 P.2d 6.

The trend of the decisions of the courts is that state regulation is not applicable either on the theory of occupation of the field of regulating strikes, picketing and boycotts by the Labor Management Relations Act of 1947, or that such concerted action falls within the protection of section 157 of the law quoted *supra*; that minority picketing for recognition is not subject to state regulation. One phase of the problem was considered by this court in *Gerry of California v. Superior Court*, *supra*, 32 Cal. 2d 119, 194 P.2d 689, and *In re DeSilva*, *supra*, 33 Cal.2d 76, 199 P.2d 6. In both of those cases picketing of an employer was done by a union to organize the employer's employees. An injunction was sought on the ground that the conduct consisted of an unfair labor practice under the Labor Management Relations Act, no state law being violated. It was decided in the *Gerry* case that there was an unfair labor practice and in the *De Silva* case that was "assumed." We held that an injunction could not stand because the exclusive jurisdiction

to prevent a violation of the act rested with the National Labor Relations Board. While we were primarily concerned with whether the state courts had jurisdiction to enforce a violation of the national act rather than whether a state could enforce its own labor regulation where interstate commerce was affected, we reviewed the whole field as to the place occupied by the federal law and that left to the states. We stated in the *De Silva* case, summarizing the holding of the *Gerry* case, 33 Cal.2d at p. 78, 199 P.2d at page 8: "This court there [in the *Gerry* case], held that the declared intent and purpose of the Labor Management Relations Act, 1947, was to vest *exclusive jurisdiction* in the National Labor Relations Board over *unfair labor practices* affecting interstate commerce and to vest in the courts generally jurisdiction only of actions for damages arising out of the commission of such practices, and that the act deprived the superior courts of original equitable jurisdiction in such cases." (Emphasis added.) In the *Gerry* case the holding of the United States Supreme Court in *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738, was summarized: "The Supreme Court pointed out that the course of procedure was definite and restricted; that the *board* and the *board alone* could determine whether an employer had engaged in an unfair labor practice; that *the board was chosen as the instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce*, and that the board alone was authorized to take proceedings to enforce its order. The *sole* authority of the *board* to secure prevention of unfair labor practices affecting commerce was thus recognized. That *section 10 of the National Labor Relations Act committed to the board the exclusive power to decide whether unfair labor practices by the employer had been engaged in and to determine the action that should be taken to remove or avoid the consequences thereof was again stated* * * *. The most recent pronouncement of the Supreme Court to come to our attention is in *Bethle-*

hem Steel Co. v. New York State Labor Relations Board, supra, 330 U.S. 767, 67 S. Ct. 1026, 91 L.Ed. 1234, reversing 295 N.Y. 601 and 607, 64 N.E.2d 350, wherein it was held that *state and federal action covering the subject matter of the National Labor Relations Act could not co-exist.*" (Emphasis added.) *Gerry of California v. Superior Court*, 32 Cal.2d 119, 124, 194 P.2d 689, 692. That discussion means that in cases such as this it rests with the board to determine, at least at this stage of the proceeding, whether an unfair labor practice has been committed and to take such action as it deems advisable. This Court cannot, therefore, be concerned with the question of whether in fact there have been unfair labor practices committed.

Since the DeSilva case the Supreme Court of the United States has continued in the same direction. It held in *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 69 S.Ct. 379, 93 L.Ed. 463, that the federal act controlled questions relating to representation of employees. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691, seemed to take a step backward, but in *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953, 70 S.Ct. 491, 94 L.Ed. 588, the decision of the Supreme Court of Wisconsin holding that Wisconsin's labor relations law as to unfair labor practices controlled, was reversed without opinion. In *International Union U.A.W. v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978, a Michigan strike control law which required a prior notice and a majority vote before a strike, was held inapplicable because of the federal act, in that it attempted to limit a federal right of employees to engage in concerted activities and to strike, and that the federal act regulated such rights. The court concluded the opinion by referring to certain areas in which state action was proper, including a discussion of the cases, such as *International Union of Auto Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651, heavily relied upon by plaintiff and showing that the Jurisdictional Strike Law is not

in the class of activity reserved for state action. The court said: "*Auto Workers v. Wisconsin Board*, 1949, 336 U.S. 245, 69 S.Ct. 516 [93 L.Ed. 651], upon which Michigan principally relies, was not concerned with a traditional, peaceful strike for higher wages. The employees' conduct there was 'a new technique for bringing pressure upon the employer', a 'recurrent or intermittent unannounced stoppage of work to win unstated ends.' *Id.* 336 U.S. at pages 249, 264, 69 S.Ct. at pages 519, 526. That activity we regarded as 'coercive,' similar to the sit-down strike held to fall outside the protection of the federal Act in *Labor Board v. Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627, and to the labor violence held to be subject to state police control in *Allen-Bradley Local v. Wisconsin Board*, 1942, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154. In the *Wisconsin Auto Workers* case, we concluded that the union tactic was 'neither forbidden by Federal statute nor was it legalized and approved thereby.' 336 U.S. at page 265, 69 S.Ct. at page 527. 'There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned.' *Id.* 336 U.S. at page 254, 69 S.Ct. at page 521. *Clearly, we re-affirmed the principle that if 'Congress has protected the union conduct which the state has forbidden * * * the state legislation must yield.'* *Id.* 336 U.S. at page 252, 69 S.Ct. at page 520." (Emphasis added.) *International Union U. A. W. v. O'Brien*, supra, 339 U.S. 454, 459, 70 S.Ct. 781, 783, 94 L.Ed. 978. The court summarized the area still open to state action in *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154, stating that: "[T]he state's exercise of its police power (e. g., the prevention of mass picketing of the employer's factory, threatening personal injury or property damage to employees desiring to work, obstructing entrance to and egress from the employer's factory, obstructing the streets and public roads,

picketing the homes of employees, and other breaches of the peace in connection with labor disputes) was not intended to be excluded by the provisions of the National Labor Relations Act, and that the exercise of that power by the state could stand consistently with the operation of the federal act." *Gerry of California v. Superior Court*, supra, 32 Cal.2d 119, 125, 194 P.2d 689, 693. The conduct here involved does not fall in that category. I believe it is clear that the circumstances existing here present either a case of an unfair labor practice, or that the conduct is protected by the national act, 29 U.S.C.A. § 157, which questions are, at this state at least, determinable by the National Board.

The court had no jurisdiction, therefore, to grant the injunction and I would reverse the order.

GIBSON, C. J., and TRAYNOR, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



40 Cal.2d 424

Ex parte KELLEHER et al.

Cr. 5264, 5265.

Supreme Court of California, in Bank.

March 10, 1953.

Rehearing Denied April 2, 1953.

Habeas corpus proceedings for petitioners' release from custody following their arrest for picketing a steamship company's vessels in violation of a temporary restraining order. The Supreme Court, Shenk, J., held that continued picketing of the vessels by petitioners and a marine engineers' union, of which they were officers and members, after being advised of a collective bargaining contract, made by the company with another marine engineers' union after petitioners' union called a strike and commenced the picketing to induce the company to recognize such union as the company's marine engineers' exclusive bargaining agent, arose out of a dispute between

two labor organizations within the Jurisdictional Strike Law.

Writs discharged and petitioners remanded to custody.

Carter and Traynor, JJ., dissented.

1. Labor Relations — 1014

Continued picketing of steamship company's vessels by marine engineers' union and officers and members thereof after being advised of collective bargaining contract, made by company with another marine engineers' union after picketing commenced, arose out of dispute between two labor organizations within Jurisdictional Strike Law, so as to warrant such officers' and members' arrest for picketing in violation of temporary restraining order issued after execution of such contract, though picketing was initiated because of dispute between company and picketing union over terms of collective bargaining agreement between them. Labor Code, §§ 1115-1120; Pen.Code, § 166, subd. 4.

2. Labor Relations — 352

The State Jurisdictional Strike Law, not Federal Labor Management Relations Act, applies to dispute between two unions of marine engineers as to which should represent marine engineers, employed by steamship company engaged in interstate commerce, in collective bargaining, as against contention that state cannot regulate disputes between supervisory employees and employer, in view of provision of federal act that no employer shall be compelled to deem supervisors as employees for purpose of any law, either national or local, relating to collective bargaining. Labor Code, §§ 1115-1120; Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.; National Labor Relations Act, § 14(a), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 164(a).

Delany, Fishgold, Werchick & Minudri and J. Paul Madsen, San Francisco, and Lee Pressman, Washington, D. C., for petitioners.

McCutchen, Thomas, Matthew, Griffiths & Greene and Morris M. Doyle, San Francisco, for respondents.

SHENK, Justice.

These are habeas corpus proceedings in which petitioners seek release from custody resulting from their arrest for picketing in violation of a temporary restraining order issued by the superior court in an action pending therein entitled *Isthmian Steamship Company v. National Marine Engineers Beneficial Association*, Cal.Sup., 254 P.2d 579.

The restraining order was issued on the basis of the verified complaint of plaintiffs in the action, and we turn, therefore, to it to ascertain the facts. Plaintiff, *Isthmian Steamship Company*, is a corporation engaged in the business of operating steamships as a common carrier of interstate and foreign commerce and a part of that business is conducted in California. Plaintiff, *Seaboard Stevedoring Corporation*, is a corporation engaged in loading and unloading steamships, known as stevedoring, and has a contract with *Isthmian* to load and unload its vessels in this state. Defendants are a labor union operating as an unincorporated association known as *National Marine Engineers Beneficial Association*, referred to herein as M.E.B.A., *Marine Engineers Beneficial Association No. 97*, called *Local 97*, which is a labor organization operating as a corporation and affiliated with, and a local unit of, M.E.B.A. and also affiliated with the *Congress of Industrial Organizations*, known as C.I.O., and the officers and members of those organizations. The *Brotherhood of Marine Engineers*, referred to as B.M.E., is an unincorporated labor organization or union affiliated with the *American Federation of Labor*. None of the unions are financed or controlled by plaintiffs. The members of the M.E.B.A. and B.M.E. are marine engineers whose work is later described herein.

Isthmian in its business employs licensed marine engineers who are officers in charge of engineroom departments on its steamships and as such "have authority, in the interest of *Isthmian*, effectively to recommend the transfer, suspension, promotion, discharge, assignment, reward and discipline of other employees, to wit, unlicensed engineroom personnel. Such engi-

neers also have authority responsibly to direct unlicensed engineroom personnel and do so direct such personnel in the ordinary performance of their duties. The exercise by the said engineers of the authority referred to in the next two preceding sentences is not of a merely routine or clerical nature, but requires the use of independent judgment."

Prior to July 15, 1951, *Isthmian* had a collective bargaining agreement with M.E.B.A. which by its terms expired on that day. Prior to March, 1950, the B.M.E. commenced soliciting plaintiffs' marine engineer employees for membership in it. In March and April of that year *Isthmian* conducted a vote among its engineers to ascertain whether they desired M.E.B.A. or B.M.E. to represent them as collective bargaining representative, which resulted in a victory for M.E.B.A. Nevertheless, B.M.E. continued to solicit for members among *Isthmian's* engineers, and on May 14, 1951, advised *Isthmian* that it had a majority, but *Isthmian* continued to recognize and deal with M.E.B.A. under the bargaining contract with it. About two months before the expiration of that contract M.E.B.A. demanded provisions for a hiring hall and closed shop in a new contract. *Isthmian* refused, and on July 16, 1951, M.E.B.A. called a strike of the former's engineers, and commenced picketing its vessels. By letter, on August 2, 1951, B.M.E. renewed its demand to represent *Isthmian's* engineers, and on August 15th, the latter requested proof of its right to representation, whereupon B.M.E. exhibited pledge cards signed by 128 of *Isthmian's* 204 engineers and accordingly B.M.E. and *Isthmian* entered into a collective bargaining contract which did not contain closed shop or hiring hall clauses. M.E.B.A. was advised of that contract but continued to picket and demanded that it be recognized as exclusive bargaining agent. The B.M.E. have also picketed vessels whose owners recognize M.E.B.A. It is alleged that the picketing of *Isthmian* by M.E.B.A. "arises out of a controversy between the M.E.B.A. and the B.M.E. as to which of them has or should have the exclusive right to bargain

with Isthmian, as an employer, on behalf of licensed marine engineers, as employees of Isthmian."

As a result of the picketing, longshoremen employed by plaintiff Seaboard Stevedoring Corporation have refused to cross the picket lines and Isthmian has been unable to load or unload its vessels to the injury of its business.

The temporary restraining order issued on August 29, 1951, enjoined defendants from picketing for the purpose of inducing Isthmian to recognize them as the exclusive bargaining agent for its engineers in violation of its agreement with B.M.E. pending a hearing of an order to show cause why a preliminary injunction should not issue. Petitioners, in violation of the order, were picketing on August 30th and were arrested for violating the statute which provides that: "Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor: * * *. 4. Willful disobedience of any process or order lawfully issued by any court". Penal Code, § 166(4).

On the assumption that the restraining order was based on the Jurisdictional Strike Law, Labor Code, §§ 1115-1120, petitioners assert that that law is unconstitutional and that it does not apply to the facts in the instant case.

[1] As pointed out in *Seven Up Bottling Co. v. Grocery Drivers Union*, Cal. Sup., 254 P.2d 544, the Jurisdictional Strike Law defines a labor organization, Labor Code, § 1117, declares a jurisdictional strike as therein defined to be unlawful and against public policy, Id. § 1115, and gives a person injured by its violation the right to injunctive relief, Id. § 1116. A jurisdictional strike is defined as "a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have

the exclusive right to have its members perform work for an employer." Id. § 1118. We held that that law did not violate the free speech, press and assembly guaranties of the Constitution in the *Seven-Up* case. Petitioners assert, however, that the picketing here involved did not arise out of a dispute between two unions as required by section 1118, because the dispute between Isthmian and M.E.B.A. which resulted in the strike and picketing on July 16, 1951, and thereafter, all existed prior to the entry of B.M.E. on the scene; that the dispute at that time was solely between Isthmian and M.E.B.A. over the terms of a collective bargaining agreement, as the election in April, 1950, among Isthmian's engineers had resulted in victory for M.E.B.A. and B.M.E. was therefore out of the picture.

We cannot agree. As seen, it is alleged in the complaint that after the election and collective bargaining agreement with M.E. B.A., B.M.E. continued to solicit Isthmian's employees for members, and in May, 1951, told Isthmian it had a majority. In August, 1951, after the strike was called and picketing commenced, B.M.E. renewed its demand on Isthmian that it recognize it as bargaining agent and furnished proof that it represented a majority, which resulted in a collective bargaining agreement between B.M.E. and Isthmian. M. B. A. was advised of that contract but has continued to insist that it is the collective bargaining representative of licensed marine engineers employed by plaintiff Isthmian, and has continued picketing Isthmian's vessels," and finally it is alleged, as heretofore quoted, that the picketing arises out of a dispute between M.E.B.A. and B.M.E. While it may have been a dispute between Isthmian and M.E.B.A. alone over the terms of a collective bargaining agreement which initiated the picketing, it has now become a dispute between M.E. B.A. and B.M.E. as to which should represent Isthmian's engineers, and the picketing thus arises out of a dispute between two labor organizations. True, M.E. B.A. wanted certain clauses in a new collective bargaining contract when it called the strike, but now B.M.E. insists on its

right to be the exclusive bargaining agent and has a contract, and it follows that the dispute over the the terms of a contract drop into the background because M.E. B.A. would have to be the representative of Isthmian's engineers and recognized as such before any effective action could be taken concerning the terms of the contract. That is to say, the dispute is now between it and B.M.E. as to which one shall be bargaining agent for the engineers. M.E. B.A.'s demand for a closed shop and hiring hall necessarily means that it be the exclusive bargaining representative. The facts do not present a case where the employer invoked the interference by another union (B.M.E.) to create a jurisdictional strike situation. On the contrary, B.M.E., as far as appears, acted entirely on its own. Isthmian entered into a contract with B.M. E. because it furnished proof that it represented a majority of its engineers rather than as a means of creating a jurisdictional dispute. *DeWilde v. Scranton Building Trades etc. Council*, 343 Pa. 224, 22 A.2d 897, relied upon by petitioners, is not in point. There Pennsylvania had a law barring injunctions in labor disputes except disputes in disregard or breach of a collective bargaining agreement. An A.F. of L. union claimed it had a contract with the employer and the employer entered into a contract with a C.I.O. union. The court held the exception did not apply because the purpose of it was to protect the employer from activities by the employees or their representatives in violation of an existing agreement between them, that is, to in some measure insure compliance with the contract.

[2] It is contended that the Jurisdictional Strike Law does not apply, because the engineers are supervisory employees; that Isthmian is engaged in interstate commerce, and under the National Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq., no state can regulate such disputes between such employees and an employer. Reliance is placed particularly on the section reading: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no

employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S. C.A. § 164(a). Hence the state law—the Jurisdictional Strike Law—applies. Moreover, it is clear that the claim of petitioners avails them nothing, for accepting their contention, the second clause of the section says that the *employer* shall not be compelled to treat supervisory employees as employees for the purpose of a law, federal or local. The Jurisdictional Strike Act does not compel the employer to so treat his engineers. If any protection would flow from the second clause it would inure to the benefit of the employer rather than the employees or their union.

The writs heretofore issued herein are discharged and the petitioners are remanded to custody.

GIBSON, C. J., and SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I reaffirm the views expressed in my dissent in *Voeltz v. Bakery & Confectionery Workers*, Cal.Sup., 254 P.2d 553, but wish to point out, in addition, that this case emphasizes the fallacy of the construction placed by the majority on the Jurisdictional Strike Act in the *Voeltz* case as well as in the case at bar.

Under the collective bargaining agreement between Isthmian and M.E.B.A. that expired on July 15, 1951, preferential hiring was given to members of M.E.B. A. According to the affidavit of Yost, Manager of the Operations Department of Isthmian, for all practical purposes all licensed engineers employed by Isthmian were required to be members of M.E.B. A. B.M.E., however, actively solicited support among M.E.B.A. engineers employed by Isthmian and, in the spring of 1950, about 30% of the engineers preferred B.M.E. and 70% preferred M.E. B.A. The inroads of B.M.E. were probably owing to the fact that all other seamen aboard Isthmian vessels were mem-

bers of various A.F.L. maritime unions. Isthmian continuously recognized M.E.B.A. as sole representative of the engineers and, as expiration of the 1950-1951 contract neared, negotiated only with M.E.B.A.

M.E.B.A. demanded a hiring hall,¹ which had been obtained from the Pacific Coast steamship companies in 1949 and from nearly all other dry-cargo steamship companies on the Atlantic and Gulf Coasts in June, 1951. Isthmian refused to sign the agreements accepted by the other companies. After negotiations broke down, M.E.B.A. called a strike, July 16, 1951. As conceded by Isthmian on oral argument, the employer at that time considered the strike as a dispute over the hiring hall issue, and *not* as a dispute over which union would represent the licensed engineers aboard the vessels.

When the strike was called, most of the engineers left the vessels. Isthmian promptly replaced them with men willing to pass through the picket lines and recommenced shipping operations. The picketing was peaceful at all times. On the East and Gulf Coasts the A.F.L. longshoremen disregarded the picket lines and normal operations could be had. On the Pacific Coast, however, the independent longshore union respected the picket lines and Isthmian turned to the courts to break the strike. On July 30th, Isthmian sought an injunction in the Superior Court of Los Angeles County on the ground that a strike by supervisors for a closed shop was illegal. No reference whatsoever was made in the complaint to any jurisdictional conflict between M.E.B.A. and B.M.E. The trial court properly dismissed the complaint on August 13th. *Park & Tilford Import Corp. v. International Brotherhood of Teamsters, etc.*, 27 Cal.2d 599, 603, 165 P.2d 891, 162 A.L.R. 1426.

On August 20th, Isthmian signed a collective bargaining agreement with B.M.E., which now represented a majority of the engineers aboard the vessels. The B.M.E. contract gave members of the B.M.E. preferential employment² but did not contain the hiring hall clause that was obnoxious to Isthmian. It is not surprising, of course, that a majority of the engineers expressed preference for B.M.E.; the men loyal to M.E.B.A. had left the ships and the men now sailing the vessels were willing to break the M.E.B.A. strike.

After its unsuccessful efforts in the Los Angeles Superior Court, Isthmian turned to the San Francisco Superior Court for relief against the picketing by M.E.B.A. On August 27th, it filed an amended complaint, the basis of the temporary restraining order involved in the present habeas corpus proceeding. Comparing this complaint with that filed on July 30th in Los Angeles, one discovers that the strike is now alleged to be a jurisdictional strike, a controversy between M.E.B.A. and B.M.E., with Isthmian cast in the role of an innocent employer ground between two rival unions.

Thus at the inception of the strike the only dispute was between Isthmian and M.E.B.A. over the addition of a hiring hall clause upon renewal of a collective bargaining agreement. Isthmian adamantly refused to grant the clause and a strike followed. Over a month after picketing began, Isthmian signed an agreement with a rival union willing to forego the hiring hall demand and to break the M.E.B.A. strike. At the present time, two unions claim the right to represent licensed engineers aboard Isthmian ships: M.E.B.A. representing the men out on strike, and B.M.E. representing the men sailing the ships. The determinative issue in this pro-

1. The requested clause provided: "The Company agrees that when hiring any Licensed Engineer other than the Chief Engineer or a First Assistant Engineer, the employee shall be obtained through the offices of the Association; provided that Engineers so named by the Association shall be qualified to fill the available positions, and further provided that the

Company shall have the right to select men who the Company considers qualified and satisfactory."

2. The clause provided: "The Company shall have the absolute right to select the Engineers employed by it from among members in good standing of the Brotherhood."

ceeding is whether under these circumstances the Jurisdictional Strike Act allowed the employer to obtain injunctive relief against the union that initially called the strike.

As pointed out in my dissent in *Voeltz v. Bakery & Confectionery Workers*, Cal. Sup., 254 P.2d 553, the words "arising out of a controversy between two or more labor organizations" restrict application of the Act to cases where the *initial* picketing by the enjoined union is for one of the illegal objectives enumerated in section 1118. For example, Isthmian would be protected if it had renewed the M.E.B.A. contract and B.M.E. thereafter picketed Isthmian to force the employer to break the contract with M.E.B.A. and recognize B.M.E. as having the exclusive right to bargain with Isthmian on behalf of the engineers. Again, the statute would apply if M.E.B.A. picketed Isthmian for the purpose of gaining the exclusive right to perform work aboard the vessels that had previously been performed by the union representing unlicensed engine room personnel.

The majority, however, as in the *Voeltz* case, interprets "arising out of a controversy between two or more labor organizations" to apply to conflicts between rival unions that arise during the course of a previously existing and continuing labor dispute between an employer and a single independent union. The result is to prevent unions from peaceful picketing for traditionally recognized objectives of organized labor in all cases where a rival union is willing to offer the employer more pleasing terms than the striking union. Because of the rivalry between various labor organizations,³ the proposed interpretation of the Act would place in the hands of an employer a weapon to enjoin picketing in any industry where the entrenched union has rivals eager to replace it.

Of course, an employer has the right to continue his business behind picket lines

and replace the strikers with other workers. And it could be argued that if he should be clearly successful in breaking the strike, so that all of his workers reject the first union and adhere to the second union, the picketing by the first union will no longer arise out of the original cause of the strike. Then, perhaps, the supplanting union would be the one entitled to deal with the employer and the first union, continuing picketing when its cause is hopeless, would be the one interfering and causing the jurisdictional strike. But this problem is not presented here, where the only issue on habeas corpus is the propriety of issuance of the temporary restraining order violated by petitioners. At the time that order was issued, it is undisputed that M.E.B.A. had not lost the strike and, accordingly, the picketing still arose from the dispute between M.E.B.A. and Isthmian.

In conclusion, I believe that the Jurisdictional Strike Act was designed to protect an employer from the effects of a struggle between two or more unions, either for recognition as bargaining agent or for a determination of which has the exclusive right to perform certain work, in which the employer is an innocent party. I do not believe that the statute was ever meant to protect an employer who is engaged in a dispute with his employees and the union of their choice over legitimate labor objectives, and who seeks a ban on otherwise lawful picketing on the ground that he has signed a contract with another union willing to fill the jobs of the striking workers, thereby himself creating the "jurisdictional dispute" from which he seeks relief.

In my opinion the petitioners should be released.

TRAYNOR, J., concurs.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

M.E.B.A., B.M.E., and United Mine Workers, Local No. 50.

3. At least three unions compete for organization of licensed marine engineers:

40 Cal.2d 433

ISTHMIAN S. S. CO. et al. v. NATIONAL MARINE ENGINEERS BENEFICIAL ASS'N et al.

BROTHERHOOD OF MARINE ENGINEERS, AFL, et al. v. NATIONAL MARINE ENGINEERS BENEFICIAL ASS'N et al.

S. F. 18519.

Supreme Court of California, in Bank.

March 10, 1953.

Rehearing Denied April 2, 1953.

Action for a permanent injunction against and damages for picketing of plaintiff steamship company's vessels by a marine engineers union and officers and members thereof. From an order of the Superior Court, San Francisco County, Clarence W. Morris, J., granting a preliminary injunction, defendants appealed. The Supreme Court, Shenk, J., held that whether a preliminary injunction shall be granted rests largely in the discretion of the trial court, whose order will not be reversed on appeal, in the absence of a manifest abuse of discretion.

Order affirmed.

Carter and Traynor, JJ., dissented.

1. Appeal and Error ⇨920(3)

On appeal from order granting preliminary injunction in action for permanent injunction and damages, Supreme Court must review evidence most favorably to plaintiffs.

2. Injunction ⇨158

A preliminary injunction, based on facts existing when action for permanent injunction and damages was commenced, preserved status quo existing at commencement of action as against contention that temporary restraining order previously issued swung balance in plaintiff's favor.

3. Appeal and Error ⇨954(1)

Injunction ⇨135

Whether preliminary injunction shall be granted rests largely in discretion of trial court, whose order will not be reversed on appeal, in absence of manifest abuse of discretion.

Pressman, Washington, D. C., for appellants.

McCutchen, Thomas, Matthew, Griffiths & Greene and Morris M. Doyle, San Francisco, for respondents.

Tobriner & Lazarus and Mathew O. Tobriner, San Francisco, for intervenors.

SHENK, Justice.

This is an appeal from an order granting a preliminary injunction enjoining picketing of plaintiffs by defendant union in an action for a permanent injunction and damages. One phase of this case was before this court in *Ex parte Kelleher*, Cal.Sup., 254 P.2d 572. In those cases, Regan and Kelleher sought their release from custody after their arrest for violating a temporary restraining order issued by the court in the action, and we there held that the Jurisdictional Strike Law, Labor Code, § 1115 et seq., furnished a proper basis for the restraining order, and that plaintiffs' employees—marine engineers—were supervisory employees and hence not subject to the National Labor Management Relations Act, 29 U.S.C.A. § 141 et seq. The factual basis for the preliminary injunction is the same, with some amplification, as the temporary restraining order in the Regan and Kelleher cases. Defendants assert facts as grounds for reversal, in addition to the ones raised in those cases, but nothing more than a conflict is created and the question of credibility of witnesses is presented, and this has been resolved favorably to plaintiffs by the trial court in ordering the preliminary injunction. The facts recited in the Kelleher and Regan cases are supported by the record here.

Defendants make three additional legal arguments: (1) That a preliminary injunction will not be issued in a "doubtful" case; (2) that such an injunction is to preserve the status quo as it existed at the commencement of the action and this one does not do so because the temporary restraining order swung the balance in favor of plaintiff employer, Isthmian Steamship Company; and (3) that the injunction will cause defendants great damage.

Delany, Fishgold, Werchick & Minudri, Jack H. Werchick, San Francisco, and Lee

[1] The first contention is answered in part by the fact that the case is not neces-

sarily close on its facts when we review the evidence most favorable to plaintiffs, as we must do since the trial court made the order in plaintiffs' favor.

[2] The second contention is subject to the same comment as the first and also the injunction was based on the facts as they existed when the action was commenced.

[3] The third, and also the first and second contentions are more properly addressed to the discretion of the trial court. Whether a preliminary injunction shall be granted rests largely in the discretion of the trial court and will not be reversed on appeal unless there is a manifest abuse of discretion. *Thompson v. Moore Drydock Co.*, 27 Cal.2d 595, 165 P.2d 901; 14 Cal. Jur. 180 et seq. We find no abuse of discretion here.

The order is affirmed.

GIBSON, C. J., and SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent for the same reasons and upon the same grounds stated in my dissents in *Voeltz v. Bakery Workers*, Cal.Sup., 254 P.2d 553, and *Ex parte Kelleher*, Cal.Sup., 254 P.2d 572.

TRAYNOR, J., concurs.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.



117 Cal.App.2d 13

SCHORR et al. v. SOUTHERN PACIFIC CO. et al.
Civ. 4610.

District Court of Appeal, Fourth District,
California.

March 25, 1953.

Rehearing Denied April 13, 1953.

Hearing Denied May 21, 1953.

Action was brought by driver and occupant of automobile against railroad and crew of freight train to recover for injuries sustained

when automobile ran into eighth car from rear at night in desert area. The Superior Court of Kern County, W. L. Bradshaw, J., entered a judgment adverse to driver and occupant of automobile, and they appealed. The District Court of Appeal, Barnard, P. J., held that alleged errors were not prejudicial.

Judgment affirmed.

1. Appeal and Error ⇐1042(2)

In action by driver and occupant of automobile against railroad and crew of freight train to recover for injuries sustained when automobile ran into eighth car from rear of train at night in desert area, alleged error in striking from complaint allegations that railroad and crew knew that crossing was unusually dangerous and was obstructed from view, was not prejudicial error, where evidence as to actual conditions at crossing was thoroughly gone into at trial and much of it, including maps, charts and pictures was specifically admitted without objection.

2. Appeal and Error ⇐1047(2)

Where defendants objected to the admission of certain type of evidence on ground that it was not admissible under complaint, and counsel for plaintiffs then stated that counsel would like to put in all of the evidence and then if the trial court desired to strike it later, "that would be another matter," and counsel for defendants stated that he wanted record to show that he objected to such evidence without having to go to trouble to make objection each time, and counsel for plaintiffs agreed, and evidence was received, and nothing was done about striking such evidence, alleged error of court in failing to rule expressly on admissibility of evidence was not prejudicial to plaintiffs.

3. Appeal and Error ⇐1048(6)

In action by driver and occupant of automobile against railroad and crew of freight train to recover for injuries sustained when automobile ran into eighth car from rear of train at night in desert area, alleged error in refusing to permit cross-examination of train crew regarding prior accidents at crossing was not prejudicial error, where there was a full and a complete hearing with respect to circumstances of the accident and full showing of all facts in con-

nection with situation and conditions at crossing.

West, Vizzard, Howden & Baker, Bakersfield, for appellants.

Borton, Petrini & Conron, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is a damage action arising out of a collision between an automobile driven by the plaintiff husband and a freight train owned and operated by the defendants. The court, sitting without a jury, found that the allegations of negligence in the complaint were not true; that it is not true that any of the defendants had been guilty of careless or negligent conduct "in any way whatsoever or at all"; that it is not true that the plaintiff had sustained any injuries as a proximate result of any negligence on the part of the defendants; that it is not true that any of the defendants were careless or negligent in any particular on this occasion; that the affirmative defense of contributory negligence set forth in the answer is true; that the accident occurred without fault or neglect on the part of any of the defendants; and that the accident was caused by the carelessness and negligence of the plaintiff husband in driving his automobile. The plaintiffs have appealed from the judgment which followed.

The accident occurred about 1:30 A. M. on November 20, 1949, at a point where U. S. Highway 395 crosses the Owenyo branch of the Southern Pacific Railroad in the desert area of Kern County. Just north of this crossing the highway curves gradually to the left before crossing the tracks at a right angle. As the appellants were approaching this crossing from the north on this highway a 50-car freight train was moving across the crossing in a westerly direction at about 15 miles an hour. The freight cars were painted red. The automobile ran into the eighth car from the rear of the train, causing the damage complained of. There was a standard crossarm sign 12 feet from the first rail; a painted white crossing sign on the pavement 336 feet north of the crossing consisting of two broad lines across

the pavement with a large "X" and the letters "R. R." in between; and another 24" reflectorized crossing sign near the road about 450 feet north of the crossing with a large "X" and the letters "R. R." which had on them "little buttons that reflect in the light of your automobile."

The appellant husband, who was driving, testified that he did not see any signs that there was a railroad crossing there until he got up close to the tracks, and heard no whistle or bell; that he first saw the train when he was about 35 or 40 feet from it; that he was going about 40 miles an hour and had good lights; and that his headlights did not show the train "until after I was around the curve." There was evidence, and the appellants so state, that a motorist could see the crossing only during the last 240 feet before reaching it. It also appears that the highway was on the same level as the tracks at a point 135 feet north of the tracks, that it descended one foot in the next 65 feet, and that it then rose one foot in the last 70 feet before reaching the tracks.

A traffic officer, who investigated the accident the next day, testified that he found skid marks extending 24 feet north of the north rail at this crossing. He testified that he traveled across this crossing that night, November 21, going from north to south; that when he was 230 feet from the crossing he had vision of the railway about 20 feet west of the crossing; that as he came around the curve his lights shifted across the tracks; that the road is straight before you come to the curve; that the crossing sign painted on the highway is just as you go into the curve; that this painting on the highway looked like it was either faded or that a bad grade of white had been used; that the reflectorized "R. R." sign farthest to the north was visible as you approached at night for about half a mile; and that this sign was less conspicuous than it would otherwise have been because of reflectors on posts along the side of the curve in the highway.

A man who was also driving south on this highway and who arrived at the scene immediately after the accident and before the train crew got there, testified that when he

was 250 feet away he saw the appellant husband standing by the road and waving his hand, and that he had no difficulty in bringing his car to a stop. There was evidence that the crossing signs above referred to, except the crossarm signal at the tracks, were installed by the Highway Department, maintained by them, and were of the usual type; and that on this occasion a whistle was blown and a bell rung on the engine continuously for a quarter of a mile before the engine reached the crossing, but not thereafter.

Some pictures were introduced in evidence which were taken the next day after the accident. The traffic officer identified these as correctly showing the situation as he saw it on that day. These pictures were taken by a person standing in the center of the southbound lane of the highway about "where a driver would be in driving a car." The first of these, taken at a point 150 feet north of the track shows a clear and straight view of the crossing, the two crossarms in sight, and nothing to interrupt the view for a considerable distance on either side. The second, taken from 300 feet north of the track, shows a slight curve in the road, a clear view of the crossing and the crossarm sign, and nothing on either side to interrupt the view. The third, taken from 370 feet north of the crossing, shows the painted sign on the pavement which appears as clear as such signs usually are, gives a rather clear view of the whole road and the intersection, and shows the two crossarms at the intersection. Another picture, taken 500 feet north of the intersection, shows much the same view and shows the reflectorized sign at the right of the road. Sketches of the highway as it approached the tracks showing distances, elevations, etc., were introduced in evidence and explained by the surveyor who prepared them.

The appellants contend that they were prevented from having a fair trial by the exclusion of their evidence of the extremely dangerous condition at this crossing which prevented them from seeing the train in time to avoid it; that the finding that the respondents were not negligent cannot be explained on any theory other than that

this evidence, as to the dangerous condition of the crossing, was excluded; that it was clearly negligence to let a long freight train lumber through this crossing at night without ringing a bell or blowing a whistle, and without waving a lantern or throwing out a flare; and that if the dangerous nature of the crossing was considered the appellant could not have been guilty of negligence in failing to see the various signs and in failing to appreciate the danger.

[1] It is first contended that the court erred in striking from the complaint certain allegations to the effect that the respondents knew that this crossing was unusually dangerous and was obstructed from the view of the appellant driver as he approached it from the north because of the curve in the highway. This allegation was struck out on motion by another judge prior to the trial of the action. The matter struck out was evidentiary in character, and no prejudice resulted since the evidence as to the actual conditions at this crossing was thoroughly gone into at the trial and much of it, including the maps, charts and pictures, was specifically admitted without objection.

[2] It is next contended that the court committed prejudicial error in failing to expressly rule on the admissibility of the evidence regarding the dangerous condition of the crossing; that this evidence was admissible under the general allegation of negligence; that it must be presumed that the objection to this evidence was sustained; and that in view of the substantial nature of the evidence of respondents' negligence it cannot be presumed that the court's decision would have been the same had the evidence of the dangerous condition of the crossing been admitted.

While counsel for the appellants was making his opening statement, counsel for the respondents suggested that the allegation concerning the dangerous crossing had been stricken. After some discussion the court stated that a hasty reading of the complaint seemed to indicate the theory of negligent operation, but added "there is an allegation here that the crossing was dangerous and hazardous." When the first witness was called, counsel for the appellants

asked whether or not the allegations of the complaint were approved as to the negligent operation of the train. The court stated that he had not had an opportunity to study it carefully but this seemed to be the theory of the case. Counsel for the appellants then said "We would like to put in all the evidence then if the court desires to strike some of it later, that would be another matter." Counsel for the respondents stated that he wanted the record to show his objection to any evidence bearing upon the dangerous condition of the crossing, and asked for a stipulation that such an objection be considered as made so he would not have to object every time a question was asked. Counsel for the appellants said he would stipulate to that, and the court then said: "All right then, with that understanding we will proceed."

A great deal of evidence was received with relation to the actual conditions at this crossing, including surveyors' maps with the surveyors' explanation, photographs taken the next day, and the testimony of witnesses. While there was a stipulated objection to this line of testimony, which was never directly ruled on, there was no motion to strike and under the stipulation the evidence was not received subject to a motion to strike. The evidence was received under the agreement referred to, that all of the evidence would be put in and if the court desired to strike it later that would be another matter. The court expressed no such desire, nothing further was done, and the only reasonable inference to be drawn from the record is that this evidence remained in the record and was considered by the trial court. Under the circumstances, no prejudicial error appears. *DeTray v. Higgins*, 31 Cal.App.2d 482, 88 P.2d 241. Under the court's findings, that this accident was caused solely by the negligence of the driver of this automobile, it would be unreasonable to assume that the court disregarded all this evidence with relation to

the existing situation at this crossing, to which the major part of the trial was devoted, or to believe that the findings would have been any different had an express ruling been made with respect to the admission of this evidence.

[3] It is further contended that the court committed prejudicial error in refusing to permit the cross-examination of members of the train crew regarding other accidents. Each of these witnesses was asked on cross-examination whether he had ever known of any accident at this crossing prior to this one, on a night which was dark, clear and cold and under conditions similar to those on this particular night. An objection was sustained. It is argued that these questions were material on the subject of the employees' knowledge of the dangerous condition as well as the degree of care which was required in view of such knowledge, and reliance is placed on such cases as *Martindale v. Atchison, T. & S. F. Ry. Co.*, 89 Cal.App.2d 400, 201 P.2d 48. The questions related to accidents in general and the similarity of general conditions as to time and visibility, but no effort was made to inquire as to other accidents where an automobile had run into the side of a freight train. No attempt was made to establish any similarity on this important condition, and any evidence on other kinds of accidents would have been far less material. Conceding that answers to these questions should have been permitted, no prejudice appears in view of the full and complete hearing with respect to the circumstances of this accident, and the full showing of all facts in connection with the situation and conditions at this crossing, as disclosed by the record.

The appellants' motion to correct the reporter's transcript by striking one word therefrom is granted.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

116 Cal.App.2d 820

PEOPLE v. STUART.

Cr. 4913.

District Court of Appeal, Second District,
Division 3, California.

March 20, 1953.

Defendant was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., of grand theft of an automobile, and he appealed. The District Court of Appeal, Wood, J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal Law §680(2)

It was not necessary that corpus delicti be established before extrajudicial statements of accused were received in evidence.

2. Criminal Law §680(2)

The order of proof is within discretion of trial judge, and accused may not complain because proof of corpus delicti did not precede evidence of admission or confession.

3. Criminal Law §563

The corpus delicti may be proved by circumstances shown in evidence or by inferences reasonably drawn therefrom.

4. Larceny §65

Evidence, independent of accused's extrajudicial statements, supported conviction for grand theft of automobile. Penal Code, § 487.

5. Criminal Law §412(1)

Evidence established corpus delicti of crime of grand theft of automobile so that it was not error to receive extrajudicial statements of accused. Penal Code, § 487.

Edward Rosslyn, Hollywood, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused in count 1 of grand theft of an automobile, and in count 2 of violation of section 503 of the Vehicle Code (driving automobile without consent

of owner). Defendant waived trial by jury. The court found defendant guilty as charged in count 1, and not guilty as to count 2. Defendant's application for probation was denied, and he was sentenced to imprisonment in the state prison. Defendant appeals from the judgment.

The sole contention on appeal is that the corpus delicti was not established, and it was therefore error to receive evidence of extrajudicial statements of defendant.

George Cary, Jr., a witness called by the People, testified that on July 13, 1951, he owned a blue Jaguar automobile, motor number W23468, which had Nevada license plates on it, and also emblems of two clubs; about 3 p. m. on that date, he parked said automobile across the street from the showroom and offices of the Hornberg Jaguar Distributor on Sunset Boulevard in Los Angeles County; he left the keys in the ignition switch of the automobile, and gave one Eddie Wright, an employee of Hornberg, permission to take the automobile and do some work on it; he never saw the automobile again; he did not give defendant permission to take the automobile.

Officer Mansell, a witness called by the People, testified that he discussed the charges with the defendant, and that defendant's statements were made freely and voluntarily. Counsel for defendant then objected "to this line of questioning as to any conversation with the defendant" on the ground that the corpus delicti had not been established. The objection was overruled. The officer then testified that the conversation with defendant took place about 7:30 p. m. on February 1, 1952, in the presence of Officer Brooks and Officer Powers; Officer Brooks asked defendant if he knew why he had been arrested and the defendant said he did not; Officer Brooks asked defendant if he had ever "earned [owned]" a Jaguar car and he said he had not; Officer Mansell asked defendant when he went to Florida, and defendant said in July, 1951; said officer asked defendant if he remembered how he got to Florida, and defendant smiled and stated that he thought the officer knew; the officer then asked defendant if he drove the Jaguar to Florida and defendant said that he had; Officer Brooks asked defendant

where he obtained the Jaguar and defendant said he thought the officers knew where he had obtained it; Officer Mansell asked defendant if he got the car on Sunset Boulevard by the foreign car agency, and he said "Yes"; defendant stated that the car was in the street, the keys were in it, and it had Nevada license plates; he stated that he remembered some emblems on the front of the car and he disposed of them; he stated further that he drove the car to Florida the next day, and that nobody gave him permission to take it; Officer Mansell then asked defendant how he obtained title to the vehicle in Georgia, and defendant replied that he went down there and got a bill of sale and a Georgia car report; the officer asked defendant how he got the bill of sale in Georgia and he replied: "I am not going to put someone else in the middle on this. I had the car and you know I had it." The officer testified further that in answer to questions defendant stated that he sold the car to Waco Motors in Florida for \$500 cash and a new M. G. roadster; he drove the M. G. back to California and sold it to a dealer on Ventura Boulevard.

Defendant testified that, in a conversation prior to his arrest, Officer Brooks asked him if he knew anything about a Jaguar, and he replied that he did not; the officer asked him if he had been in Florida and he replied that he had returned sometime ago; the officer then told him that he was under arrest; Officers Mansell, Brooks, and Powers took him to a room in a building downtown where they told him that they had the goods on him; they asked him if he had stolen a Jaguar on Sunset Boulevard and he told them he knew nothing about a stolen automobile; they asked him if he ever owned a Jaguar and he replied that he had; he told the officers that he had purchased a blue Jaguar in Atlanta, Georgia. He testified further that he purchased the Jaguar the first week in August, 1951, and paid \$3,200 for it; at that time the automobile had Georgia license plates; he did not know that the automobile previously had Nevada license plates on it or that there was anything wrong with the title; he went to the Division of Re-registration in Georgia and got title to the automobile from the authorities

there; he drove the car to Florida where he traded it for an M. G. automobile and \$500 cash; he returned to California with the M. G. and sold it in August, 1951, for \$1,553.50; he took a substantial loss because he had an opportunity to go into business and needed the cash.

During cross-examination of defendant, the deputy district attorney showed defendant photostatic copies of some documents (People's exhibit 1) and asked him if the last three of those documents were documents of title which he signed at the time he sold the Jaguar automobile and defendant answered: "That is right"; the deputy district attorney then asked the defendant if that was a Jaguar he sold, "the one that bears motor number W23468," and defendant replied that he was not familiar with the motor number. The deputy district attorney then asked him if he recognized the document as being the one he signed at the time he sold the Jaguar and defendant replied: "I recognize this as my signature, yes."

[1-5] It appears to be appellant's argument that the corpus delicti must be established prior to the admission of extrajudicial statements. He asserts that, at the time evidence of the extrajudicial statements was received, there was no evidence of a permanent disappearance of the automobile and that the trial judge stated that the People had not established any unauthorized taking. It was not necessary that the corpus delicti be established before extrajudicial statements of the appellant were received in evidence. "The order of proof is within the discretion of the trial judge and a defendant may not complain because proof of the corpus delicti did not precede the evidence of an admission or confession." *People v. Cucco*, 85 Cal.App.2d 448, 453, 193 P.2d 86, 89. "The corpus delicti may be proven by circumstances shown in evidence, or by inferences reasonably drawn therefrom." *People v. Mainhurst*, 67 Cal.App.2d 882, 884, 155 P.2d 843, 844. In the present case, there was evidence that the owner of the automobile parked it on Sunset Boulevard and gave one Wright permission to take it and do some work on it; that the owner did not see the automobile again;

that about three weeks later the defendant caused a blue Jaguar automobile, with the same motor number as the Cary automobile, to be registered in his name in Georgia; and that about one week thereafter defendant sold the automobile in Florida and signed documents transferring title to it. The evidence, independently of the extrajudicial statements, was sufficient to support findings that the owner intended to part with possession of his automobile for a limited time only, and for the specific purpose of having work done on it; that the automobile was taken out of the state against his will and with the intent to deprive him permanently of it. All the elements of larceny were present. See *People v. Fountain*, 91 Cal. App.2d 158, 161, 204 P.2d 639. Larceny of an automobile is grand theft. Penal Code, § 487. The corpus delicti was established, and it was not error to receive the extrajudicial statements in evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



117 Cal.App.2d 29

PEOPLE v. MEANS.

Cr. 4909.

District Court of Appeal, Second District,
Division 2, California.

March 26, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, of violation of statute inhibiting the exciting of lust of child under age of fourteen, and he appealed from order of commitment. The District Court of Appeal, McComb, J., held that failure of trial judge to pass upon defendant's application for probation was a deprivation of a substantial right, entitling defendant to a reversal of order of commitment in that circumstances were such that probation might justifiably have been granted in view of nature of tes-

timony of prosecuting witness under which defendant was convicted.

Order vacated and case remanded with instructions.

1. Criminal Law ☞1134(8)

Where defendant did not appeal from judgment and sentence pronounced upon conviction for violation of statute prohibiting the exciting of lust of child under age fourteen, defendant was not entitled to have considered, upon his appeal from an order that judgment and sentence previously imposed were in full force and effect, his contentions as to sufficiency of evidence, error in refusing testimony, in limiting impeachment of complaining witness, and rulings with reference to certain character evidence. Pen.Code, §§ 288, 1237, subd. 3; Rules on Appeal, rule 31.

2. Criminal Law ☞1023(12)

Where a judgment has been pronounced and become final, a subsequent order of commitment substantially affects the rights of a defendant whose application for probation has not been ruled upon, and is therefore appealable as an order made after judgment affecting the substantial rights of a party. Pen.Code, § 1237, subd. 3.

3. Criminal Law ☞1186(4)

Failure of trial judge to rule upon defendant's application for probation after conviction amounted to a deprivation of a substantial right, entitling defendant to reversal of order of commitment subsequently entered. Pen.Code, § 1237, subd. 3; Const. art. 6, § 4½.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

Gladys Towles Root, Los Angeles, for appellant.

McCOMB, Justice.

Chronology: i. April 24, 1952, defendant, after trial by jury, was found guilty of violating section 288 of the Penal Code. Defendant's request to have leave to file an application for probation was granted and the hearing on said application and time

for pronouncing judgment was set for May 21, 1952.

ii. May 21, 1952, judgment and sentence were pronounced upon defendant directing that he be incarcerated in the State Prison for the term prescribed by law. The court found defendant to be a sexual psychopath, suspended execution of the sentence and ordered him to be sent to the State Hospital at Norwalk for observation and diagnosis pursuant to section 5512 of the Welfare and Institutions Code. *No action was taken at this time or any subsequent period upon defendant's application for probation.*

iii. July 24, 1952, the Superintendent of the Norwalk State Hospital having reported that defendant was not a sexual psychopath, the court ordered defendant's return for further proceedings.

iv. August 6, 1952, the trial judge made an order that the judgment and sentence imposed on May 21, 1952, was in full force and effect and ordered defendant into the custody of the Sheriff of Los Angeles County by him to be delivered to the Director of Institutions at the California State Prison at Chino.

From this order defendant appeals.

Defendant urges as grounds for reversal that (1) the evidence is insufficient to support the judgment of conviction, (2) the trial court erred in refusing to permit certain expert testimony, (3) the court erred in limiting the impeachment of the complaining witness, and (4) the trial judge erred in rulings with reference to certain character evidence.

[1] None of these questions may be considered by this court for the reason that defendant did not appeal from the judgment pronounced May 21, 1952.

Since in criminal cases an appeal must be taken within 10 days of rendition of a judgment (Rules on Appeal, Rule 31, 36 Cal.2d 26), the judgment in the present case became final. Thus since there is no appeal from the judgment pending before this court we are precluded from considering the various grounds upon which defendant

urges its reversal. (Cf. *People v. Howerton*, 40 Cal.2d 217, 253 P.2d 8, et seq.; *People v. Neal*, 108 Cal.App.2d 491, 493[1] et seq., 239 P.2d 38.)

There remains for determination, however, this question:

Was the order of August 6, 1952, appealable and prejudicially erroneous?

[2] This question must be answered in the affirmative. Where a judgment has been pronounced and become final a subsequent order of commitment substantially affects the rights of a defendant whose application for probation has not been ruled upon, and is therefore appealable under section 1237, subsection 3 as an order made after judgment affecting the substantial rights of a party. (*People v. Neal*, supra, 108 Cal.App.2d 495[3] [4], 239 P.2d 38.)

[3] In the instant case it was mandatory upon the trial judge to rule upon defendant's application for probation and his failure to do so deprived defendant of a substantial right entitling him to a reversal of the order of August 6, 1952. (See *People v. Neal*, supra, 108 Cal.App.2d 495[3] et seq., 239 P.2d 38.)

Section 4½, Article VI of the Constitution of the State of California is not here applicable for the reason that an examination of the record discloses that the prosecuting witness, a child of eight years of age, gave contradictory testimony pertaining to matters of vital importance at the trial, and many portions of her testimony were improbable, if not actually incredible, and the trial judge might justifiably have granted probation had he ruled on defendant's application therefor since it had been determined defendant was not a sexual psychopath. (Cf. *People v. Headlee*, 18 Cal. 2d 266, 267, 115 P.2d 427.)

The order of August 6, 1952 is vacated and the cause remanded to the Superior Court with instructions that the court consider and determine defendant's application for probation.

MOORE, P. J., and FOX, J., concur.

116 Cal.App.2d 677

**SWITAL v. REAL ESTATE
COM'R et al.**
Civ. 19305.

District Court of Appeal, Second District,
Division 2, California.

March 13, 1953.

Proceedings on petition for writ of mandate to review administrative proceeding pursuant to which petitioner had been dropped from membership in local realty board. The Superior Court of Los Angeles County denied writ, and petitioner appealed. The District Court of Appeal, Fox, J., held that suspension of membership without notice to petitioner, and with no hearing or other proceeding before board wherein petitioner could defend or protect her rights, was void and could not operate to divest petitioner of her status as member of board, and petitioner was entitled to have record certified and reviewed.

Order reversed with directions.

1. Associations Ⓒ10

Membership in an unincorporated professional society or trade or business association, including board of real estate brokers, is a valuable right, and such membership may not be terminated except by adherence to the fundamental requirements of law.

2. Associations Ⓒ10

Brokers Ⓒ3

Suspension of broker's real estate license and membership in local real estate board without notice, hearing, or other proceedings before board at which broker could defend or protect her rights, was void and could not operate to divest broker of her status as member of board.

3. Associations Ⓒ10

The requirements of notice, hearing and a fair trial antecedent to expulsion of member from unincorporated association, such as local real estate board, are so fundamental that they are imposed upon the association even though its own constitution, charters, or rules fail to make such provision.

4. Associations Ⓒ10

Although members expelled from associations are required as a general rule to

exhaust the internal remedies provided by the association before appealing to courts, such rule does not prevail where the attempted action is void because the member has been denied due process of notice and a hearing.

Larwill & Wolfe, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondents.

FOX, Justice.

Petitioner was a duly licensed real estate broker, maintaining offices in the cities of Glendale and Los Angeles. In January, 1952, an accusation was filed by a deputy real estate commissioner charging that on or about October 17, 1951, and thereafter petitioner "did wilfully use the term 'realtor' without legal right so to do; that such illegal use consisted of maintaining a sign, advertising board and window name-plate with the word 'realtor' immediately following respondent's [petitioner's] name;" that such action was in violation of section 10177(e), Business & Professions Code. The hearing officer made a finding in the precise language above quoted from the accusation and held that this was a violation of the cited section. The commissioner approved this decision and ordered the real estate broker's license of petitioner suspended for three days.

In her petition for a writ of mandate to review the administrative proceedings, pursuant to the provisions of section 1094.5, Code of Civil Procedure, petitioner alleged, among other grounds, that the evidence at the hearing on the accusation showed that she was a member of the Los Angeles Realty Board and that on October 14, 1951, a letter was sent to her by the secretary of said board stating that she had been dropped from membership of that board on October 1, 1951, "for using the term realtor"; that the board did not meet and by order expel petitioner; that the secretary sent such letter without authorization; that she had thus been dropped as a member of

the Los Angeles Realty Board without notice or an opportunity to be heard.

Petitioner further alleged that the evidence adduced at the hearing conclusively showed she had the right to use the word "realtor" and that she did not wilfully use that word without legal right so to do. She then charged that this action of the commissioner in suspending her real estate broker's license was without and in excess of his jurisdiction, arbitrary, capricious, and an abuse of discretion.

Petitioner prayed that an alternative writ of mandate be issued commanding respondent commissioner to restore her license to act as a real estate broker without any period of suspension, or to show cause why this should not be done, and that the court order a record of the administrative proceedings prepared and filed with the court.

Points and authorities in opposition to the petition were filed on behalf of the commissioner, pursuant to section 1107, Code of Civil Procedure. Thereupon the petition for an alternative writ was summarily denied. This was error.

Respondent contends that the term "realtor" has a technical meaning in the real estate business and only licensed real estate brokers who are members of a local board, which in turn is a member of the National Association of Real Estate Boards, or who are themselves members of the national association, are entitled to use such designation. Here petitioner alleged that she was a member of the Los Angeles board (which is concededly a member of the national association). She was therefore entitled to use the designation "realtor" under the respondent's own contention (the validity of which we do not here pass upon), so long as she maintained her local membership. Her petition charged that she was dropped from the Los Angeles board for using a designation which, by reason of such membership, she was entitled to use; that this was done summarily and without authority; and that by thus being illegally dropped from the local board she became subject to disciplinary action for using the term "realtor" which was legally her privilege.

[1,2] Membership in an unincorporated professional society or trade or business association is a valuable right, and such membership may not be terminated except by adherence to the fundamental requirements of the law. *Smith v. Kern County Medical Ass'n*, 19 Cal.2d 263, 265, 120 P.2d 874; *Taboada v. Sociedad Espanola, etc.*, 191 Cal. 187, 191, 215 P. 673, 27 A.L.R. 1508; *Cason v. Glass Bottle Blowers Ass'n*, 37 Cal.2d 134, 143, 231 P.2d 6, 21 A.L.R.2d 1387. In this state "a member of an unincorporated association may not be suspended or expelled * * * without charges, notice and a hearing, even though the rules of the association make no provision therefor." (Citing cases.) *Ellis v. American Federation of Labor*, 48 Cal.App.2d 440, 443-444, 120 P.2d 79, 80. In the instant case, by virtue of her membership in the Los Angeles Real Estate Board, petitioner was entitled to describe herself as a "realtor." According to her petition she received a letter on October 14, 1951, from the Los Angeles Real Estate Board purporting to advise her that she had been dropped from membership in said board on October 1, 1951. However, her petition further alleges that this attempted expulsion was effectuated without any notice to petitioner and with no hearing or other proceeding before the said board wherein petitioner could defend or protect her rights. An expulsion from an association under such circumstances, which flout the requirements of substantial justice, is void and cannot operate to divest petitioner of her status as a member of the Los Angeles Realty Board. *Taboada v. Sociedad Espanola, etc.*, supra; *Ellis v. American Fed. of Labor*, supra; *Cason v. Glass Bottle Blowers Ass'n*, supra.

[3,4] Respondent contends that (1) petitioner alleged no facts showing that such notice and hearing was required by the constitution or by-laws of the Los Angeles Realty Board; and (2) petitioner failed to allege that she had exhausted her administrative remedies prior to the filing of her petition for a writ of mandate. These arguments are completely untenable. The requirements of notice, hearing and a fair trial antecedent to expulsion are so funda-

mental that they are imposed upon an association such as here under discussion even though its own constitution, charter, or rules fail to make such provision. *Cason v. Glass Bottle Blowers Ass'n*, supra; *Taboada v. Sociedad Espanola*, etc., supra; *Von Arx v. San Francisco G. Verein*, 113 Cal. 377, 379, 45 P. 685. While members expelled from associations are required, under the general rule, to exhaust the internal remedies provided by the association before appealing to the courts, "this is not the rule where the attempted action is void because the member * * * has been denied the due process of notice and a hearing." Citing cases. *Ellis v. American Fed. of Labor*, supra, 48 Cal.App.2d at page 444, 120 P.2d at page 81.

Applying these principles, it is clear from the allegations of her petition that petitioner made a prima facie showing that her alleged expulsion from the Los Angeles Realty Board was invalid and did not have the legal effect of depriving her of the right to use the designation "realtor." Petitioner was entitled to have the administrative record certified and reviewed by the trial court.

The order is reversed with directions to issue an alternative writ as prayed.

MOORE, P. J., and McCOMB, J., concur.



116 Cal.App.2d 841

PUTMAN v. PUTMAN.

Civ. 19386.

District Court of Appeal, Second District,
Division 1, California.

March 23, 1953.

Husband's action for annulment. The Superior Court, Los Angeles County, denied the relief sought, and the plaintiff appealed. The District Court of Appeal held that the wife's

physical incapacity to enter into the marital state and fraud on her part inducing the husband to enter into marriage were proved.

Reversed with directions.

1. Marriage ⇌60(7)

In husband's action for annulment, wife's physical incapacity to enter into marital state and fraud on her part inducing husband to enter into marriage were proved.

2. Marriage ⇌60(7)

It is error for trial court to arbitrarily refuse to grant decree of annulment when plaintiff's testimony establishes grounds for annulment and is not impeached, contradicted, or inherently improbable.

3. Appeal and Error ⇌1176(4)

Where wife died prior to submission of husband's appeal from decree denying annulment, and appellate court determined that husband was entitled to have marriage annulled, judgment would be reversed, with directions to enter judgment annulling marriage nunc pro tunc as of date of judgment.

Eleanor V. Jackson, Los Angeles, for appellant.

No appearance for respondent.

PER CURIAM.

This is an action for annulment of marriage.

Defendant wife was served with summons, and defaulted.

At the trial the husband testified that he was potent, and he introduced medical testimony in corroboration thereof; that he tried to enter into marital relations with his wife but that she was incapable of it physically; and that prior to the marriage he asked her if she could be a wife in every sense of the word and she said she could.

No other testimony was heard by the trial court.

When the case was submitted the following colloquy took place between court and counsel:

"Miss Jackson. May I ask your Honor on what grounds the annulment is being denied?

"The Court. The proof is insufficient.

"Miss Jackson. What proof would Your Honor like?

"The Court. I do not suggest what proof should be produced. I say this proof is insufficient and the annulment will be denied."

Plaintiff appeals from the judgment.

[1] Two causes of action were proved: physical incapacity to enter into the marital state on the part of the wife, and fraud on her part inducing plaintiff to enter into the marriage.

[2] It is the settled rule in this state that it is error for the trial court to arbitrarily refuse to grant a decree of annulment when plaintiff's testimony establishes grounds for annulment, and is not impeached, contradicted, or inherently improbable. *Shepard v. Shepard*, 65 Cal.App. 310, 223 P. 1012; *Dobson v. Dobson*, 86 Cal. App.2d 13, 193 P.2d 794.

A death certificate has been filed in this case, showing the death of defendant after judgment in the Superior Court and before the submission of the case in this court.

[3] Therefore, in order to protect plaintiff's rights, whether claimed under the marriage, or otherwise, the judgment is reversed, with directions to enter judgment annulling the marriage *nunc pro tunc* as of the date of said judgment.



116 Cal.App.2d 807

SULLIVAN v. CITY OF LOS ANGELES
DEPARTMENT OF BLDG. &
SAFETY et al.
 Civ. 19325.

District Court of Appeal, Second District,
 Division 3, California.
 March 20, 1953.

Suit by landowner against city of Los Angeles for declaration of his rights under

city's building and plumbing codes, and for injunction restraining city from enforcing codes against him. City cross-complained for injunction requiring compliance with codes. The Superior Court, Los Angeles County, George A. Dockweiler, J., entered judgment for city on cross-complaint, and landowner appealed from judgment and from order denying new trial. The District Court of Appeal, Valleé, J., held that order denying motion for new trial was nonappealable, and that the codes were directed to preservation of public safety and health, and were well within scope of police power.

Judgment affirmed; appeal from order dismissed.

1. Appeal and Error ⇨110

Order denying motion for new trial is nonappealable.

2. Municipal Corporations ⇨597, 603

Reasonable regulations governing construction of wooden buildings within fire limits, and governing methods and devices for conveyance of sewage from private dwellings in municipalities, are within police power.

3. Municipal Corporations ⇨63(1, 2)

Except where court can see, in light of evidence, that a given police regulation has no just relation to object which it purports to carry out, and no reasonable tendency to preserve or protect public safety, health, comfort, or morals, decision of legislative body as to necessity or reasonableness of regulation in question is conclusive.

4. Municipal Corporations ⇨597, 605

Exercise of police power is not limited to regulation of such things as have already become nuisances or have been declared such by court, but local legislative body may make and enforce ordinances to regulate or prohibit a thing or act which is of such nature that it may become nuisance or may be injurious to public health if not suppressed or regulated.

5. Municipal Corporations ⇨597, 603

In exercise of police power, municipality may regulate manner of construction and occupation of buildings, to end of safeguarding health of their occupants and lessening fire hazard.

6. Municipal Corporations ⇨603

A municipality, in order to protect property of all its citizens, may establish fire limits and regulate or prevent use of wooden building within such limits, and although this may disturb enjoyment of rights of an individual, he is, in contemplation of law, compensated by sharing general benefits derived from it.

7. Municipal Corporations ⇨597

Regulation by ordinance of methods and devices for conveyance of sewage from private dwellings is within branch of police power pertaining to public health.

8. Municipal Corporations ⇨597

In "plumbing" code, regulating, under police power, methods and devices for conveyance of sewage from private dwellings, quoted word includes pipes, fittings, and fixtures for conveyance of such sewage.

See publication Words and Phrases, for other judicial constructions and definitions of "Plumbing".

9. Municipal Corporations ⇨597

Where plumbing work or alteration proposed is in accordance with sanitary regulations, an inspection thereof by officers duly authorized is a proper preliminary requirement and may be conducted, at proper time, to end that public health be preserved and protected.

10. Municipal Corporations ⇨63(1)

Legislation with respect to preservation and protection of public health will not be set aside unless legislative discretion is obviously wrong.

11. Municipal Corporations ⇨589

Municipality may guard against creation or extension of threatened evils without undertaking to wipe out every similar existing evil, where a more sweeping enactment would work undue hardship.

12. Municipal Corporations ⇨603

Discrimination between buildings erected and those to be built is proper in enactment of laws prohibiting future construction of wooden buildings within certain boundaries.

13. Appeal and Error ⇨179(2)

Where pleadings made issue of whether entryway was constructed in violation

of municipal building ordinances, but no evidence was received from which court could determine exact date it was built or requirements of ordinances at such time, and court consequently did not undertake to settle issue and granted no relief to either side, matter was moot on appeal.

14. Municipal Corporations ⇨595, 597

Building and plumbing codes of city of Los Angeles are directed to preservation of public safety and health, and are well within scope of police power.

Gordon Leslie Cooper, Ridgecrest, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Alan G. Campbell, Asst. City Atty., Los Angeles, for respondents.

VALLÉE, Justice.

[1] Plaintiff sued the city of Los Angeles for a declaration of his rights under the building and plumbing codes of the city, and for an injunction restraining the city from enforcing them against him. The city cross-complained for an injunction requiring plaintiff to comply with the codes. The judgment was for the city on the cross-complaint. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. Since the latter order is nonappealable, the appeal therefrom will be dismissed.

Plaintiff owns a parcel of realty in fire district No. 2 in Los Angeles, which is improved with a two-story brick building. Without first obtaining a permit from the Department of Building and Safety, he constructed about a 25-foot square carport in the rear yard. It consisted of a framework of pipes and scantlings covered with a flammable tarpaulin. With the intention of constructing a rest room as an addition to his building, plaintiff roughed in the waste lines in the rear yard for two toilets. After completing this preliminary step, the project was either abandoned or postponed. No toilets were installed nor was the site enclosed or protected by a roof. Plaintiff

stuffed plaster of Paris into the sewer openings.

The building code of the city required a construction permit for every structure, and required the roof covering of every building or structure in fire district No. 2 to be fire retardant, the exterior walls to be constructed entirely of incombustible materials or at least one-hour fire-resistive construction. The plumbing code required that toilet bends, unconnected to a fixture, should be securely capped with a standard cast iron or other metallic noncorrosive plug, and that the plug should be securely leaded and caulked in place under the supervision of a plumbing inspector.

The court found that the carport did not conform to the requirements of the building code, and that the maintenance of the toilet bends was in violation of the plumbing code. The judgment directed plaintiff to remove all canvas and tarpaulin material from the carport, and enjoined him from maintaining it without first securing a permit from the city for the construction of the structure and without constructing it in accordance with the building code, and ordered him either to remove the toilet bends, and plug, cover, and conceal the sewer connections in accordance with the plumbing code, or under the supervision of a city plumbing inspector to securely lead and caulk the openings as provided by the code, or to install flush toilets as provided by the code.

Plaintiff contends the applicable ordinances are not within the police power; that they deprive him of his property without due process of law in that they restrain his free use of the property, and that they deny him the equal protection of the laws.

[2] Plaintiff's property is located in a fire district as fixed by an ordinance of the city. It is elementary that reasonable regulations governing the construction of wooden buildings within fire limits and governing methods and devices for the conveyance of sewage from private dwellings in municipalities, are within the police power. *Maguire v. Reardon*, 41 Cal.App. 596, 183 P. 303, affirmed 255 U.S. 271, 41 S.Ct. 255, 65 L.Ed. 625; *In re Nicholls*, 74 Cal.App. 504, 241 P. 399.

[3-6] "[E]xcept where the court can see, in the light of facts properly brought to its knowledge, that a given police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to preserve or protect the public safety, health, comfort, or morals, the decision of the legislative body as to the necessity or reasonableness of the regulation in question is conclusive." *Odd Fellows' Cemetery Ass'n v. City and County of San Francisco*, 140 Cal. 226, 233, 73 P. 987, 989. A local legislative body may, in the exercise of its police power, make and enforce ordinances to regulate or prohibit a thing or act which is of such a nature that it may become a nuisance or may be injurious to the public health if not suppressed or regulated. The exercise of the police power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court. *Odd Fellows' Cemetery Ass'n v. City and County of San Francisco*, supra. In the exercise of the police power a municipality may regulate the manner of the construction and occupation of buildings to the end of safeguarding the health of their occupants and lessening the fire hazard. *Matter of Stoltenberg*, 165 Cal. 789, 134 P. 971. In *Ex parte Fiske*, 72 Cal. 125, 127, 13 P. 310, 311, the court declared "[I]t has become the settled law that a state,—and under our system a municipality of the state,—in order to protect the property of all its citizens from the ravages of fire, may establish fire limits, and regulate or prevent the use of wooden buildings within such limits; and that, although this may disturb the enjoyment of the rights of an individual, he is, in contemplation of law, compensated by sharing the general benefits derived from it."

[7-10] "Regulation by ordinance of methods and devices for the conveyance of sewage from private dwellings in municipalities is recognized as an exercise of that branch of the police power which pertains to the public health; and the word 'plumbing' is held to include the pipes, fittings, and fixtures for the conveyance of such sewage." *In re Nicholls*, 74 Cal.App.

504, 507, 241 P. 399, 400. When the work or alteration proposed is in accordance with sanitary regulations, an inspection thereof by officers duly authorized is a proper preliminary requirement and may be conducted, at the proper time, to the end that the public health be preserved and protected. In *re Nicholls*, supra, 74 Cal. App. 508, 241 P. 400. Legislation with respect to the preservation and protection of the public health will not be set aside unless the legislative discretion is obviously wrong. *National Milk, etc., Ass'n v. City etc.*, of San Francisco, 20 Cal.2d 101, 124 P.2d 25. No such showing is made here.

[11, 12] Plaintiff's principal complaint appears to be that while the city ordinances forbid him to construct or maintain a canvas carport they permit his neighbor to continue to maintain an old wooden building as to which there was no evidence that it was not erected in conformity with ordinances then existing. The legislature may guard against the creation or extension of threatened evils without undertaking to wipe out every similar existing evil where a more sweeping enactment would work undue hardship. In *Matter of Stoltenberg*, 165 Cal. 789, 134 P. 971, the state Tenement Housing Act of 1911 had detailed provisions regulating the mode of construction and occupation of all tenement houses. There the petitioner contended that the act was invalid because different requirements were set up for houses built before the act and those constructed subsequently. The court said that, 165 Cal. at page 794, 134 P. at page 973: "there is a substantial, inherent, logical difference between tenement

houses already constructed and those to be built, and that this difference was one that the Legislature might fairly make the basis of the different treatment that it has accorded to the two classes." See also *McCloskey v. Kreling*, 76 Cal. 511, 18 P. 433. A discrimination between buildings erected and those to be built has been recognized as proper in the enactment of laws prohibiting the future construction of wooden buildings within certain boundaries. *Maguire v. Reardon*, 41 Cal.App. 596, 183 P. 303, affirmed 255 U.S. 271, 41 S.Ct. 255, 65 L.Ed. 625; *Bancroft v. Goldberg, Bowen & Co.*, 166 Cal. 416, 137 P. 18.

[13] A small entryway had been attached to the rear wall of plaintiff's building. The pleadings made an issue of whether it had been constructed in violation of the city building ordinances. No evidence was received from which the court could determine the exact date it was built or what the requirements of the building ordinances were at that time. Consequently, the court did not undertake to settle any issue about this addition and granted no relief to either side. Since the court did not make any declaration relative to the entryway, the matter is moot.

[14] The ordinances attacked are directed to the preservation of the public safety and health, and are well within the scope of the police power.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

116 Cal.App.2d 670

WILSON et al. v. SANCHEZ et al.

Civ. 15134.

District Court of Appeal, First District,
Division 2, California.

March 13, 1953.

Suit by purchasers against vendor, for reformation of contract for sale of realty, specific performance thereof, declaratory relief, possession and damages. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment for vendor, and purchasers appealed. The District Court of Appeal, Goodell, J., held that evidence sustained finding that the written contract correctly expressed intentions of parties.

Judgment affirmed.

1. Reformation of Instruments ⇨45(1)

A person seeking to reform written instrument by introduction of extrinsic evidence must produce clear and convincing proof, or something more than preponderance of evidence. Civ.Code, § 3399.

2. Appeal and Error ⇨1009(4)

Whether extrinsic evidence relied upon as grounds for reformation of written instrument is clear and convincing is for determination of trial court and not an appellate court. Civ.Code, § 3399.

3. Reformation of Instruments ⇨45(1)

In absence of clear and convincing evidence to contrary, written instrument is presumed to express true intent of parties, particularly where instrument was drafted by attorney representing party seeking to alter terms of instrument.

4. Reformation of Instruments ⇨45(3)

In suit by purchasers against vendor for reformation of contract for sale of realty, evidence sustained finding that written contract correctly expressed intentions of parties. Civ.Code, § 3399.

5. Vendor and Purchaser ⇨191

Where executory contract for sale of realty contained no express or implied provision relative to right of possession, such right followed legal title, which remained in vendor.

6. Specific Performance ⇨96, 114(4)

Purchasers who failed to tender sum of \$1,000, payment of which was a condi-

tion precedent to right of possession, and who failed to allege such performance on their part in their action against vendor, were not entitled to specific performance of contract to convey realty. Civ.Code, § 3392.

7. Declaratory Judgment ⇨385

In suit by purchasers against vendor for declaratory relief as to parties' rights under contract for sale of realty, wherein vendor filed cross complaint alleging that purchasers claim of interest in property was without right, judgment decreeing that purchasers had no right, title or interest in or to realty was sufficient declaration of rights of parties.

8. Reformation of Instruments ⇨47

In suit by purchasers against vendor for reformation of contract for sale of realty, specific performance thereof, declaratory relief, possession and damages, conclusions that purchasers were entitled to neither reformation nor specific performance removed from case all questions of right to possession and damages for withholding.

Fred B. Hart, Oakland, for appellant.

Paul D. Morse, Oakland, for respondent.

GOODELL, Justice.

This is an appeal from a judgment in favor of the defendant in a suit seeking (a) the reformation of a contract, (b) the specific performance thereof, (c) declaratory relief, (d) possession, and (e) damages.

Respondent is the owner of an improved piece of real property in Oakland at the corner of Adeline and 36th Streets. On March 27, 1950 she agreed in writing to sell it to appellants for \$6500 "payable as follows: the sum of \$1,000 within six months from date, to be evidenced by a promissory note payable six months from date and bearing no interest; and the balance thereof at the rate of \$50.00 per month, first payment to be made 30 days after the said sum of \$1,000 is completed and paid, and subsequent payments of \$50.00 per month * * * until the whole of said \$6500.00 shall have been paid." On March

29, 1950 appellants signed a promissory note for \$1000 payable to respondent "six months after date".

The complaint alleges: "That it was the intention of these parties and they agreed that the written contract should contain * * * a provision that the initial payment of \$1,000.00 be made 6 months after delivery of possession to plaintiffs, and possession to be delivered plaintiffs immediately after removal of defendant from said premises and not more than 60 days from and after date of the contract * * *. That by mistake time of payment of said \$1,000.00 * * * was made to read 6 months after date of contract whereas it should read 6 months after plaintiffs had possession of said premises; which errors were unknown to plaintiffs or either of them when the contract was signed; that defendant did on June 24, 1950, inform plaintiffs of said error as to time of payment and did offer to agree to correction thereof on condition plaintiffs would increase said monthly payments to \$100.00 and make said payments begin as of date of delivery of possession to plaintiffs". These allegations were denied.

The court found that the "written contract correctly expressed the intentions of the parties" and that it "failed to mention when plaintiffs were to receive possession of said premises and that defendant had at all times and now has possession of the same. *That it was the intention of said defendant at all times that plaintiffs were not to have possession of said premises until plaintiffs had made said initial payment of \$1,000.00; that defendant has never agreed to give possession of said real property until said sum of \$1,000.00 should be paid.*" (Emphasis added.)

[1, 2] As said in *Moore v. Vandermast, Inc.*, 19 Cal.2d 94, 96, 119 P.2d 129, 130, "Although plaintiff's contentions upon this appeal are stated in various ways, the basic point upon which he relies is that the evidence is insufficient to support the findings of the trial court." The opinion then goes on to state the rule governing such cases, as follows: "In this connection it should be noted that where one seeks to reform a written instrument by the introduction of

extrinsic evidence, the courts have generally required clear and convincing proof, or something more than a preponderance of the evidence, as the basis for such an invasion of the parol evidence rule. [Citations.]" Whether the evidence is clear and convincing is for the trial court to determine, not an appellate court. *Ward v. Waterman*, 85 Cal. 488, 503, 24 P. 930; *Speer v. Kittle Mfg. Co.*, 117 Cal.App. 717, 719, 4 P.2d 575; *Alvarez v. Ritter*, 67 Cal. App.2d 574, 578, 155 P.2d 83.

Section 3399 Civil Code reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, * * *."

The building on the property is very old. The second floor was occupied by the owner, respondent Lupe Sanchez Hernandez, and her son Ernest Sanchez. The lower floor was unoccupied and in an uncompleted condition, and before it was boarded up was somewhat exposed to the elements since it appears that trespassers could and did enter it in the night-time. It had been in that condition for about two years and Ernest testified that he had paid out about \$1600 toward the downstairs work which had never been completed.

Respondent was content to continue living upstairs, but Ernest was anxious to move the family to other quarters, and had taken steps to find them. Appellant James Wilson, who is a cement mason, in passing the place one day engaged in conversation with Ernest and was told by him that the place was for sale. Appellant was shown through, with the result that negotiations were carried on by Ernest, without any authority from his mother, for the sale of the property to appellants for \$6500.

Respondent does not read or write English, and speaks it so poorly that a Spanish interpreter had to be called in when she testified. Appellant James Wilson neither reads nor writes, but his wife does. Ernest's schooling did not go beyond the 9th grade. And so it appears at the outset, in

this case where the evidence has to be clear and convincing, that neither of the two principal contracting parties can read or write the language in which the contract was drawn. It appears, further, that the respondent took no part in the negotiations but finally "gave in" and signed her name to the contract of sale negotiated by her son. While it is true that appellant James Wilson cannot read or write, the contract was drawn up by his regular attorney, who has practiced for many years and represents appellants in this litigation. Respondent had no attorney.

It would appear that appellants' theory was and is that respondent (who unquestionably became bound by her son's acts and conduct, by ratification) was to sell the place "as is" and that appellant Wilson was to do the work necessary to make the lower floor habitable so that when repaired and rebuilt, it would make a home for appellants and probably provide another apartment which they could rent. During the trial appellants' counsel said: "what we are interested in is getting possession so that we can go in there and finish the property and put it in habitable condition." However this may be, there is not a word in the contract as drawn which expresses any such idea and it is conceded by appellants that it is entirely silent as to when possession was to be given. It contains no provision binding appellants to do anything in the way of repairs or rehabilitation of the property. Respondent and her son both testified that appellants were not to have possession until the money was paid.

Appellants' attorney, when questioned as to why he did not write into the contract the provisions which he now seeks by reformation to have written therein testified:

"Q. Now, Mr. Hart, isn't that contract, the way you have described it, exactly the way you were asked to draw it? A. It is and it isn't.

"Q. Will you answer yes or no and explain? A. Upon the assumption he was to be given immediate possession, as we understood at the time, or, he said, 'Most any day; possibly one week; twelve days; not more than sixty days.'

"Q. Answer the question yes or no. Is that contract the way you were instructed to draw it? A. The contract—so far as possession is concerned; it is the way it was intended to be drawn excepting there is one condition in there in reference to possession; possession and the \$1,000.00, in my mind, were tied up together.

"Q. Just answer the question yes or no and then if you want to, explain; explain, but I think I am entitled to a yes or no answer * * * I don't want to be unfair, but I would like to have the question answered that way. A. Yes and no. It was on the theory that possession be given immediately; no, if possession was not to be given immediately. That is the way I would answer that.

"Q. Why was it you didn't put in anything about possession in the contract? A. Because there was a doubt as to the date on which—or, the time on which the possession was to be given, so I just left it out * * *. I drew up the contract I thought they wanted, and I just told them to sign it."

[3] In the *Vandermast* case, *supra*, both parties to the lease were represented by lawyers, while here only one party was so represented *but that party is the one seeking the reformation based on unilateral mistake*. See *Miller v. Lantz*, 9 Cal.2d 544, 548, 71 P.2d 585. In the *Vandermast* case the court says 19 Cal.2d at page 98, 119 P.2d at page 130: "In the absence of clear and convincing evidence to the contrary, a written instrument is presumed to express the true intent of the parties. [Citations]. *This is particularly true where, as here, the instrument was drafted by an attorney representing the party seeking to alter the terms of the written instrument.*" (Emphasis added.)

[4] The court's finding that the "written contract correctly expressed the intentions of the parties" is unquestionably supported by the evidence.

While appellants' counsel admits that the contract is silent as to possession, he argues that this was an executory contract (which it is) and that since the appellants were to make their home on the property and to pay

for it in small monthly installments, there is an implication that they were entitled to immediate possession, citing *Turney v. Collins*, 48 Cal.App.2d 381, 390, 119 P.2d 954, 959, and other cases dealing with executory contracts. This argument is consistent with appellants' theory as we have already set it forth. But turning from theory to the contract itself, nothing is to be found therein about appellants' intention to make it their home. It is as silent on that subject as it is on the subject of repairs, improvements and rebuilding which under appellants' theory were supposed to be done by appellants.

The rule with respect to possession is stated in 25 Cal.Jur. p. 692, § 171, as follows: "Upon a sale of real property the right to possession follows the legal title unless it appears that the parties intended such right to be determined by the contract of purchase. Accordingly in the absence of agreement to the contrary a vendor is entitled to retain possession until the legal title passes to the purchaser." And § 172 (25 Cal.Jur. p. 693) reads: "As a general rule a vendor retains the right to possess the property sold so long as the contract remains executory. The purchaser is not entitled to possession, pending performance, unless such right is expressed in, or may be inferred or implied from the contract, or unless a right of possession appears from surrounding circumstances."

[5] The case appellants cite, *Turney v. Collins*, indeed recognizes this rule in the following passage: "In this state the rule is well established that in determining where the right of possession rests the courts will not be guided alone by the abstract principle that possession follows the legal title. *If the executory contract of sale contains no express or implied provision relative to the right of possession, the abstract principle will be followed.*" (Emphasis added.) The language just emphasized as applied to this case means that the right of possession follows the legal title which in this instance remained in respondent. This is so since the court distinctly found "That it was the intention of said defendant at all times that plaintiffs were not to have possession of said prem-

ises until plaintiffs had made said initial payment of \$1,000.00." In the face of such finding there is no ground on which it can be claimed that the contract of sale contains any "implied provision relative to the right of possession."

[6] With respect to appellants' prayer for specific performance, it is self-evident that the court could not very well make a decree requiring that appellants be admitted to possession while at the same time it denied reformation because the payment of the \$1000 was a condition precedent to the right of possession. Moreover, appellants have never attempted to even tender the \$1000, and they do not allege performance on their part. § 3392, Civ.Code. In this connection the court found:

"That plaintiffs have not at any time offered to pay said sum of \$1,000.00 to said defendant and did not offer at the time of trial to pay said sum of money and have not paid the same or any part thereof; that more than six months have passed since the date of said contract and that said contract provides that time is of the essence;" and concluded: "That plaintiffs have not done or offered to do equity and are not entitled to specific performance of said contract to convey realty and are not entitled to recover damages from said defendant."

[7] With respect to appellants' prayer for declaratory relief: respondent filed a cross-complaint alleging that appellants asserted an interest in the property but that their claim was without right and praying that they be enjoined and debarred from asserting any right, title or interest therein. The answer thereto set up appellants' claim for reformation and specific performance. The court found against appellants on these issues and made conclusions of law: "That the failure of plaintiffs to pay the sum of \$1,000.00 to defendant within a period of six months from the date of said contract constitutes a breach of said contract on the part of plaintiffs and relieved said defendant from all further liability under the terms of said contract to perform said contract or convey said real property or to place a deed to plaintiffs in escrow and terminated all rights of plaintiffs under

said contract." The judgment decrees that "plaintiffs have no right, title or interest" in or to the property, which is a sufficient declaration of the rights of the parties.

[8] With respect to appellants' prayer for possession and for damages for withholding possession, the conclusions that appellants were entitled to neither reformation nor specific performance, remove from the case all questions of right to possession and damages for withholding.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



117 Cal.App.2d 40

PEOPLE v. SUMNER.

Cr. 4928.

District Court of Appeal, Second District,
Division 3, California.

March 26, 1953.

Prosecution for bookmaking. From a judgment of the Superior Court of Los Angeles County, William B. Neeley, J., suspending sentence on a verdict of conviction and granting defendant probation, defendant appealed. The District Court of Appeal, Vallée, J., held that the evidence was sufficient to support the conviction.

Judgment affirmed.

1. Gaming ☞73

"Bookmaking" is the making of a book of bets.

See publication Words and Phrases, for other judicial constructions and definitions of "Bookmaking".

2. Gaming ☞98(3)

Evidence was sufficient to support conviction of bookmaking as against contention that there was no proof connecting defendant with bookmaking paraphernalia found in his residence.

Bob G. Sumner, in pro. per.

Edmund G. Brown, Atty. Gen., and
Michael J. Clemens, Deputy Atty. Gen., for
respondent.

VALLÉE, Justice.

Defendant was convicted of bookmaking. His motion for a new trial was denied. Imposition of sentence was suspended and he was placed on probation. He appeals from the judgment, an order granting probation is now a final judgment, Pen.Code, section 1237(1), as amended in 1951, and from the order denying his motion for a new trial. His sole point is that the evidence is insufficient to support the conviction.

In the afternoon of February 22, 1952, two police officers entered a two-story residence in Los Angeles. The officers knocked and after a delay of about 15 seconds they were admitted through an inner door by defendant. One of the officers immediately ran upstairs to a small room in which he extinguished a fire in a wastebasket. He removed small pieces of partially burned paper from the wastebasket. These pieces of paper were betting markers, or parts of betting markers, used for the purpose of recording bets on horse races; with bets on horses running that day, whether the horse won or lost, and the amount won or lost, recorded on them.

While the officers were on the premises the telephone rang several times. On one of these occasions one of the officers answered and said: "Hello." A male voice said: "John. Toot Toot Tootsie, one to place, one to show." The officer replied "O. K." Toot Toot Tootsie was a horse running at Santa Anita that day. "John" was the name of the bettor. "One to place" and "one to show" was a bet of one dollar to place and one dollar to show on Toot Toot Tootsie.

In a bureau drawer in defendant's bedroom the officers found an "owe sheet." The "owe sheet" contained fictitious names of persons who owed money to a bookmaker and to whom he owed money as a result of bets on horse races.

Defendant did not testify or offer any evidence in his own behalf.

[1,2] "Bookmaking" is "the making of a book of bets." *People v. Coppla*, 100 Cal.App.2d 766, 768, 224 P.2d 828, 830. The evidence we have related is sufficient to support the conviction. The argument appears to be that there was no proof connecting defendant with the bookmaking paraphernalia. The delay in opening the door; the presence of betting markers in the house occupied by defendant; the reasonable inference that defendant set the fire and attempted to burn the betting markers; the telephone call of the person seeking to make a bet; the fact that the telephone rang several times while the officers were in the house; the finding of the "owe sheet" in defendant's bureau drawer; the failure of defendant to take the stand and explain the incriminating circumstances—these facts were sufficient to warrant the trial court in concluding that defendant was engaged in bookmaking. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



116 Cal.App.2d 869

**ALHAMBRA-SHUMWAY MINES, Inc. v.
ALHAMBRA GOLD MINE CORP.**

Civ. 8135.

District Court of Appeal, Third District,
California.

March 24, 1953.

Action was brought to rescind mining lease. The Superior Court of El Dorado County entered an order appointing a receiver, and the defendant appealed. The District Court of Appeal, Peek, J., held that evidence was insufficient to justify appointment of receiver.

Order reversed.

See also, 109 Cal.App.2d 119, 240 P.2d 340.

1. Receivers ⇌8

Appointment of a receiver rests in large measure in sound discretion of trial court, but such power is not entirely uncontrolled and must be exercised with due regard to facts presented in each particular case. Code Civ.Proc. § 564, subs. 1, 7.

2. Receivers ⇌6

Ordinarily, if there is any other remedy besides appointment of a receiver, and the other remedy is less severe in its results and will adequately protect the rights of the parties, court should not appoint receiver. Code Civ.Proc. § 564, subs. 1, 7.

3. Receivers ⇌6

If an injunction will protect all rights, to which applicant for appointment of a receiver appears to be entitled, receiver will not be appointed. Code Civ.Proc. § 564, subs. 1, 7.

4. Mines and Minerals ⇌52

In order for plaintiff to invoke power of court under statute for appointment of receiver for mining property leased to defendant it was necessary for plaintiff to show its joint interest with defendant in mining properties involved in action, that properties were in danger of being lost, removed, or materially injured, and that plaintiff's right to possession was probable. Code Civ.Proc. § 564, subd. 1

5. Mines and Minerals ⇌52

In action to rescind mining lease, wherein plaintiff sought appointment of receiver on ground that it was necessary to protect mining properties from being lost or materially damaged, evidence was insufficient to justify appointment of receiver. Code Civ.Proc. § 564, subd. 1.

6. Mines and Minerals ⇌52

In action to rescind mining lease, it was improper to appoint receiver merely to shut down operations of mining properties and permit no person to trespass thereon, since same result could have been accomplished by injunctive process. Code Civ.Proc. § 564, subd. 1.

Entenza & Gramer, Beverly Hills, Jerome Weber and Jess Whitehill, Los Angeles, for appellant.

Daniel J. Higgins, Auburn, for respondent.

PEEK, Justice.

This is an appeal by defendant from an order appointing a receiver pendente lite of certain real and personal property consisting of three mining properties owned by plaintiff and situated in El Dorado county, which provided in part that "said receiver shall shut down all operations of said mine and mill and shall not permit any person to trespass upon said property."

Defendant's attack thereon is essentially that the court was not authorized under the showing made to appoint a receiver and hence acted arbitrarily and in abuse of its discretion in so doing.

Plaintiff's complaint which was filed on February 17, 1951, alleges that it is the owner of the mine and equipment; that on January 1, 1947 the officers who were then in control of the corporation entered into a lease for a term of ten years; that on March 31, 1948, the same officers extended the lease for an additional term of ten years and consented to the assignment thereof to the defendant corporation which has been in possession ever since said date; that the mine constituted substantially all of plaintiff's property; that such officers and defendant withheld information from the stockholders of the execution of said lease and that said stockholders had no knowledge thereof until the month of May, 1950; that the stockholders endeavored to hold a meeting but were prevented by the directors and officers until court action was taken; that a new board of officers has now been elected; that at a meeting held on February 8, 1951, a majority of said stockholders voted to reject said lease and on February 10, 1951 gave notice to defendant of their action and demanded a return of possession of said property but that defendant refused so to do. It is further alleged by plaintiff on information and belief that during such time defendant has taken for its own use large deposits of metal, the value of which is unknown to plaintiff. The complaint concludes with an offer to rescind said lease upon such terms and conditions as to the court may seem just and equitable

and that an accounting of the parties be had under the direction of the court.

Defendant's answer to said complaint denied the material allegations thereof and asserted that it had made full compliance with the terms of said lease; that it had furnished plaintiff with a statement of the quantity of ore and minerals removed by defendant from said property and had paid plaintiff the amount of all royalties shown to be due. The answer also denied that the directors or officers of plaintiff corporation had withheld information from the stockholders or that the stockholders had no knowledge of the execution of said lease and amendments thereto, and alleges affirmatively that the holders of more than a majority of the stock of plaintiff corporation had approved of said lease. Defendant further alleged that the plaintiff's offer to rescind was not made in good faith but was made only for the purpose of casting a cloud upon defendant's title and right to possession and to extract ore from said premises, and that said acts and statements on the part of plaintiff were the result of a conspiracy existing between certain of its officers and stockholders and certain other persons to prevent performance by defendant of said lease and to bring about a breach thereof in order that said persons might acquire for themselves a lease of said property as improved by defendant. It was further affirmatively charged by defendant that plaintiff's action was not filed timely; that plaintiff's cause is barred by its laches; that a majority of the stockholders of plaintiff corporation have for more than four years acquiesced in defendant's occupancy of said mine and urged and encouraged defendant in dewatering and developing said mine and the installation of equipment and machinery, and that plaintiff is now estopped to question the existence or validity of said lease. The complaint also was attacked on the ground that there was a fatal misjoinder of parties plaintiff in said action.

On June 29, 1951 plaintiff filed its notice of motion for the appointment of a receiver and in support thereof filed an affidavit by George B. Crane, president of plaintiff corporation. His affidavit charged that defendant had maintained armed guards on the

property who were instructed not to allow any of plaintiff's representatives to enter the same; that defendant has used plaintiff's machinery and failed to keep and maintain the same in good repair; that defendant corporation is insolvent and that unless a receiver be appointed to take possession of real and personal property defendant would continue to remove ores and minerals without an accounting and further damage plaintiff's equipment. In this regard it was averred specifically that defendant corporation had failed to pay real and personal property taxes; that defendant had become delinquent and failed to pay unemployment taxes and the Department of Employment had filed a claim of lien for the same; that defendant corporation had become delinquent and failed to pay wages and salaries to certain employees; that certain employees had taken over possession of plaintiff's machinery in order to recoup back wages, and that defendant was delinquent and had failed to pay certain fire insurance premiums on said property.

In opposition thereto one O. H. Griggs, president of defendant corporation filed his affidavit wherein it was averred that defendant corporation had occupied the property continuously from the inception of the lease and expended over \$85,000 in protecting, dewatering and otherwise improving the property. In particular it was averred that the mine had been shut down by order of the United States government in 1941 and that said shut down was carried out by plaintiff corporation without regard to preservation or care of the mine or the machinery or equipment; that during the following five years the mine became filled with water and the underground workings were so deteriorated that at the inception of the lease it was impossible to get into the mine to make an examination, all of which necessitated extensive reconstruction of the mine. Affiant further averred that plaintiff had received its royalties for all materials extracted from the property; that the defendant corporation had paid all personal and property taxes due; that the claim of \$400 filed by the Department of Employment was disputed and thereafter

settled for the sum of \$275; that the defendant corporation was not delinquent nor had it failed to pay wages or salaries to any of its employees except to its manager with whom a special agreement had been made. Affiant denied that the defendant corporation had failed to pay fire insurance premiums or that any lien had been filed against plaintiff's real or personal property. He further averred that by reason of a custom milling contract, executed shortly prior to the receivership hearing, plaintiff was entitled to receive seventy-five cents per ton for all ores milled and that plaintiff would receive regular monthly fees or royalties from such operations which he estimated to be in an amount between four and five hundred dollars a month. Griggs also charged that more than a majority of plaintiff's stockholders had inspected defendant's activities and had expressed approval of defendant's performances; that on information and belief he charged that plaintiff corporation in bringing said action did not have the approval of a majority of the stockholders; that more than ninety per cent of said stockholders did not know of the filing of the present action by plaintiff, and that proxies obtained by George B. Crane, president of plaintiff corporation, for the meeting held on February 8, 1951, were not given to him for the purpose of filing the present suit.

The power to appoint a receiver is conferred upon the court by the enumerated provisions of Section 564 of the Code of Civil Procedure, and according to respondent's brief the portions of said section pertinent to the questions presented herein are as follows:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or funds, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; * * *

"7. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

[1-3] Under said section the appointment of a receiver rests in a large measure in the sound discretion of the court. However, such power is not entirely uncontrolled and must be exercised with due regard to the facts presented in each particular case. And because the remedy of receivership is so drastic in character, "Ordinarily, if there is any other remedy, less severe in its results, which will adequately protect the rights of the parties, a court should not take property out of the hands of its owners. *A. G. Col Co. v. Superior Court* [196 Cal. 604, 238 P. 926]; *Fischer v. Superior Court*, 110 Cal. 129, 42 P. 561; *Dabney Oil Co. v. Providence Oil Co.*, 22 Cal.App. 233, 133 P. 1155; 53 C.J., p. 25." *Golden State Glass Corp. v. Superior Court*, 13 Cal.2d 384, 393, 90 P.2d 75, 79. Or, as stated in the *Dabney* case, *supra* [22 Cal. App. 233, 133 P. 1158], "Where an injunction will protect all the rights to which the applicant for the appointment of a receiver appears to be entitled, a receiver will not be appointed." (Citing cases.)

[4] In order for plaintiff to invoke the power of the court under subsection 1 it was necessary for it to show its joint interest with defendant in the property; that the same was in danger of being lost, removed or materially injured, and that plaintiff's right to possession was probable. Although the complaint and answer pose a question as to the validity of the lease with the resulting question as to the propriety of plaintiff's action, we shall assume, but only for the purpose of this opinion, that such interest does exist, and if we further assume that the court believed plaintiff's right to possession was probable and even though we concede for the purpose of this opinion that the record justifies such conclusion, nevertheless it must appear further that it was necessary to protect the property from being lost, removed or materially damaged thereby securing it to plaintiff in case of a judgment in its favor. Therefore, this court is first presented with the prob-

lem, did plaintiff by a preponderance of the evidence, sustain the burden of proof so cast upon it?

The evidence produced by plaintiff in support of the order consisted, as stated, in the affidavit of Crane, his testimony, and that of two other witnesses given at the hearing. However, as noted, the allegations contained in his affidavit relative to the default of defendant regarding certain taxes and insurance were shown to be unfounded, by the affidavit of O. H. Griggs, president of the defendant corporation and also by his testimony. Also Crane's charge that defendant was delinquent in wages to its employees was not supported. Although the testimony did show that defendant was in arrears in the salary paid to its superintendent yet the testimony of the superintendent who was called as a witness by plaintiff was that he had an agreement with defendant that the arrears in his salary were to be paid to him out of income received by defendant from its custom milling. The other witness called by plaintiff merely testified that he had paid money for such milling directly to defendant's superintendent and that he had made an agreement with defendant concerning the custom milling.

[5] Hence it cannot be said that such affidavits or testimony were sufficient to warrant the issuance of the order under the provisions of subsection 1. Nor can the provisions of subsection 7 be invoked to support the order since the case is clearly within the provisions of subsection 1. *Dabney Oil Co. v. Providence Oil Co.*, *supra*.

[6] It is apparent from the order that its only purpose is, as stated therein, to "shut down the operations of said mine and mill" and permit no person to trespass on the property. Since the same result could have been accomplished by the injunctive process, as in the *Golden State Glass Corp.* and *Dabney* cases, the rule enunciated in those cases must apply.

The order is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

116 Cal.App.2d 843

PEOPLE v. GONZALES et al.**Cr. 4940.**District Court of Appeal, Second District,
Division 1, California.

March 23, 1953.

Defendant was convicted in Superior Court, Los Angeles County, John J. Ford, J., of unlawful possession of narcotics, and he appealed from order denying motion for new trial, and from sentence. The District Court of Appeal, Drapeau, J., held that evidence sustained conviction.

Order affirmed; appeal from sentence dismissed.

1. Poisons ☞4

Unlawful possession of narcotics may be constructive as well as actual, and it is for trial court to draw the inference.

2. Criminal Law ☞409

In prosecution for unlawful possession of narcotics, wherein defendant contended that his admission was secured by promise of immunity by arresting officers, evidence sustained finding that no promises to defendant were in fact made.

3. Poisons ☞9

Evidence sustained conviction for unlawful possession of narcotics.

4. Criminal Law ☞260(11)

Finding of trial court will not be set aside if evidence is legally sufficient to uphold it.

5. Criminal Law ☞1023(10)

Appeal could not be taken from sentence. Pen.Code, § 1237.



Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted by a trial judge of two counts of unlawful possession of narcotics—marihuana and heroin. He appeals from a "sentence" that he be confined in the county jail for one year, time to be served concurrently as to both counts. He

also appeals from an order denying his motion for a new trial.

Defendant and his fiancée were arrested while riding in an automobile. Heroin and marihuana were found upon the person of the lady when she was searched at the police station.

She first said the narcotics were hers. Then she said they were defendant's. Defendant said they were his.

On the trial the lady testified that the narcotics were hers, and defendant testified to the same effect. But the judge did not believe them.

Defendant argues that because the narcotics were in the actual possession of his fiancée he could not be guilty of possession, that his admission was secured by promise of immunity by the arresting officers, and that the evidence fails to establish that he knew that the articles were narcotics.

Each argument is without merit.

[1] Possession may be constructive as well as actual. And it is for the trial court to draw the inference. *People v. Graves*, 84 Cal.App.2d 531, 191 P.2d 32.

[2] The officers denied making any promises to defendant. Their testimony was sufficient to support the finding that no promises were in fact made. In such circumstances this court will not reverse such a finding. *People v. Sparks*, 82 Cal.App.2d 145, 185 P.2d 652.

[3, 4] And the finding of guilty controls defendant's argument that the proof failed to establish that he knew the heroin and marihuana were narcotics. *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433.

In each instance the evidence supports the finding of the trial court; and in each instance it is to be remembered, as has so often been said, that the finding of the trial court will not be set aside if the evidence is legally sufficient to uphold it. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778.

[5] The order denying motion for new trial is affirmed. The appeal from the sentence is dismissed. Penal Code, § 1237; *People v. Tallman*, 27 Cal.2d 209, 215, 163 P.2d 857.

WHITE, P. J., and DORAN, J., concur.

116 Cal.App.2d 853

WOLFF v. DOOLAN.

Civ. 19389.

District Court of Appeal, Second District,
Division 1, California.

March 24, 1953.

Rehearing Denied April 9, 1953.

Hearing Denied May 21, 1953.

Action for child support on ground that defendant was father of plaintiff's child. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment adverse to plaintiff and denied her motion for new trial, and plaintiff appealed. The District Court of Appeals, Doran, J., held that evidence was sufficient to sustain determination that defendant was not father of plaintiff's child.

Appeal from order dismissed; judgment affirmed.

1. Bastards ⇐79

Where plaintiff brought action for child support, charging defendant with being the father of her minor child, portion of judgment for defendant which recited that plaintiff's former husband was the father of her child was mere surplusage and in no way affected position of plaintiff. Civ.Code, § 196a.

2. Bastards ⇐92

Even if judge trying suit for child support on theory that defendant was father of plaintiff's child may have been under impression that there was an indisputable presumption that plaintiff's former husband was the father, it would be assumed that after briefs were submitted on such question judge's impression was corrected, and no error could be predicated thereon when evidence was sufficient to sustain judge's determination that defendant was not the father. Civ.Code, § 196a.

3. Bastards ⇐65

In action for child support on ground that defendant was father of plaintiff's child, evidence was sufficient to sustain determination that defendant was not in fact father of child. Civ.Code, § 196a.

4. Bastards ⇐92

In action for child support on ground that defendant was father of plaintiff's child, questions of fact and conflicts in evi-

dence were for determination by trial judge. Civ.Code, § 196a.

Will H. Winston, Long Beach, for appellant.

Albert D. White, Long Beach, for respondent.

DORAN, Justice.

This is an appeal by plaintiff from the judgment and also from an order denying plaintiff's motion for a new trial.

As stated in plaintiff's opening brief,

"This is an action for child support under Civil Code Section 196a, and attorney's fees and Court costs, the plaintiff claiming that the defendant is the father of a minor child born to the plaintiff, and requesting that the defendant be ordered to pay plaintiff the sum of \$50.00 per month for the support of the minor child." At the trial, plaintiff's attorney took the position as stated, viz., "I think there is only one question involved that we haven't agreed on, and that is whether or not there is the likelihood of the former husband being the father of the child, and I think that is the only question."

It is contended on appeal that the evidence is insufficient to support the judgment; that the court erred in denying plaintiff's motion for a new trial and, "That the court erred in making its conclusion of law" that said minor child, Robert H. Wolff, is the child of plaintiff Dorothy I. Wolff, and the said Roy Wolff".

[1] With regard to appellant's last mentioned contention it should be noted that the conclusions of law recited "that the defendant, William Howard Doolan, is not the father of said minor child, Robert H. Wolff". The further conclusion "that said minor child, Robert H. Wolff, is the child of plaintiff, Dorothy I. Wolff, and said Roy Wolff", is mere surplusage, and in no way affects the position of appellant in the within action. Incidentally, Roy Wolff is not a party to the action.

The record reveals, as recited in the court's findings that the child was born May 17, 1945; "That said Roy Wolff and Dorothy I. Wolff were married January 31, 1931,

that a complaint for divorce was filed by the said Roy Wolff against Dorothy I. Wolff on March 9, 1945, in the Superior Court of the State of California, in and for the County of Los Angeles; that an Interlocutory Decree of Divorce was rendered to said Roy Wolff against the said Dorothy I. Wolff on April 11, 1945, and that the said marriage was dissolved by a Final Decree of Divorce on April 19, 1946; that said complaint for divorce was filed two (2) months and nine (9) days before date of birth of said child; that said Interlocutory Decree of Divorce was rendered one (1) month and eight (8) days before the birth of said minor child; that said Final Decree of Divorce was rendered eleven (11) months after birth of said child."

With regard to appellant's contention that the evidence is insufficient it is argued, as recited in appellant's brief, that "At the very outset the appellant feels that the Honorable Trial Court has an expressed misconception and misinterpretation of the law pertaining to this type of a case, and in support of that appellant cites the Court to page 23 of the Reporter's Transcript, wherein the Court stated that he wanted some points on the issue or question of 'whether or not the evidence is sufficient to override the presumption that the husband of Dorothy Wolff is the father of the child. I would like to have some authorities on that. I was reversed on a case somewhat similar to this. As I recall it, they even went so far as to prove that the blood was the same and that he was the father of the child. I found that he was and was reversed by the Appellate Court because the Court said that it was, as I recall it, an indisputable presumption that the husband was the father; so I would like some authority on that.'

"So it is immediately apparent that the Court was under the impression that there is in the State of California 'an indisputable presumption that the husband was the father'; and that presumption the plaintiff was not able to overcome because the Court held that it was indisputable. It is not the law in the State of California that there is an indisputable presumption that the husband is the father."

[2] The trial judge may have been under such impression at the time said remarks were made but it may be assumed that after the briefs were submitted on the question that the judge's impression was corrected.

[3,4] The record reveals that the evidence was sufficient. It is of course well settled that the questions of fact are for the trial judge to determine. Conflicts in evidence are common and decision in such circumstances is exclusively with the trial judge.

The order denying the motion for a new trial is not an appealable order, and is therefore, dismissed.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



116 Cal.App.2d 849

DOWLING v. FEDELE.

Civ. 4811.

District Court of Appeal, Fourth District,
California.

March 23, 1953.

Application for writ of supersedeas to stay execution of judgment pending an appeal therefrom. The District Court of Appeal, Per Curiam, held that where appellant, who had filed timely notice of appeal and undertaking to stay execution pending appeal, showed good faith by acting, within 16 days after sureties on undertaking were declared insufficient, to deposit with court cash in amount of judgment and trial court costs, but notwithstanding his action, stay of execution granted him on day he made deposit was vacated that day by another judge of same court, appellant was entitled to writ of supersedeas.

Writ granted.

1. Appeal and Error ⇨479(2)

Where there has been failure on part of appellant to perfect stay of execution in trial court within time allowed by law, District Court of Appeal may, in its discretion and under proper circumstances, order such stay of execution through issuance of writ of supersedeas.

2. Appeal and Error ⇨479(1)

Where appellant, who had filed timely notice of appeal and undertaking to stay execution pending appeal, showed good faith by acting, within 16 days after sureties on undertaking were declared insufficient, to deposit with court cash in amount of judgment and trial court costs, but, notwithstanding his action, stay of execution granted him on day he made deposit was vacated that day by another judge of same court, appellant was entitled to writ of supersedeas. Code Civ.Proc. § 948.

Woodrow Wilson, Los Angeles, for petitioner.

Johnson & Johnson, San Diego, for respondent.

PER CURIAM.

This is an application for a writ of supersedeas to stay the execution of a judgment pending an appeal therefrom. The judgment was entered in the superior court of San Diego County on November 6, 1952, in favor of this respondent and against this petitioner. The action involved a sale of personal property and the judgment, as entered, was for \$9,486.52 and \$89 costs, or a total of \$9,575.52. A motion for a new trial was denied on December 23, 1952, and a notice of appeal was filed on December 31, 1952.

On January 2, 1953, this petitioner filed his undertaking to stay execution pending appeal. On January 6, 1953, this respondent excepted to the sufficiency of the sureties on that undertaking. A hearing on the qualification of the sureties was set for January 20, 1953, and continued to January 28. It was then partially heard and continued to February 4, on which date the trial judge made an order finding the sureties insufficient.

On February 20, 1953, in attempted compliance with section 948 of the Code of Civil Procedure, this petitioner deposited \$9,575.22 in cash with the clerk of the court in lieu of the undertaking and on that date the trial judge signed an order staying execution of the judgment until after determination of the appeal, with a further order setting aside and recalling any writ of execution theretofore issued. On the same day, February 20, this respondent procured from another judge of the same court an order vacating and setting aside this order of the trial judge staying execution and recalling any writ issued. Thereafter, this respondent caused another writ of execution to be issued and levied upon the money thus deposited in court by this petitioner.

The petition herein alleges, among other things, that this respondent is a resident of the state of Wisconsin and has no property in this state; that his counsel has expressed the intention of obtaining possession of the money and sending it to the respondent in Wisconsin; that the respondent is indebted to the State of California in an amount in excess of \$2,300 for unpaid taxes; that under a claim of secondary liability the State of California has caused liens to be placed on the petitioner's property; and that the petitioner is informed and believes that the respondent is insolvent.

An order to show cause was issued by this court, including an order suspending all further proceedings on said judgment until the further order of this court, and commanding the judges, clerks and officers of the superior court to retain and safely keep the sum of \$9,575.22 thus deposited by this petitioner until the further order of this court. In his answer and reply to the petition for a writ the respondent alleges that two or three of the dates above mentioned are wrong by a day or two, but this is immaterial here. He also denies that he intends to take the money out of the state or that he is insolvent. As affirmative defenses he alleges that on February 25, 1953, he filed cost bills after judgment amounting to \$528.46, and that the order of the trial judge staying execution

was properly set aside since the deposit of the money in court by this petitioner was not made within the time allowed by law, and since a sale of personal property under execution was in process of being completed before the order staying execution was issued. It is further contended that there is no showing that petitioner's failure to perfect his undertaking in the trial court was caused by accident, surprise, inadvertence or excusable neglect, and no showing of the required good faith on the part of the petitioner in attempting to file his undertaking on appeal.

[1] While it may be conceded that there was a failure to perfect the stay of execution in the trial court within the time allowed by law this court may, in its discretion and under proper circumstances, order such a stay of execution through the issuance of a writ of supersedeas. *Kim v. Chinn*, 20 Cal.2d 12, 123 P.2d 438, 439. The court there said: "Whether the circumstances justify the issuance of the writ lies in the sound discretion of the court, and where it appears that petitioner has in good faith attempted to comply with the law and the respondent will not suffer injury, liberality should characterize the exercise of that discretion to the end that the *status quo* may be maintained and the fruits of the appeal preserved."

[2] We think that a sufficient showing of good faith on the part of the petitioner here appears. He filed his undertaking immediately after filing notice of appeal, and the order finding the sureties insufficient was made more than a month later. He deposited the cash in court 16 days later, and the deposit of that amount of money would seem to be a rather strong indication of good faith. It would appear from the record before us that there is a real possibility that this petitioner might later be entitled to an offset against the judgment, in any event, on account of the necessity of paying off certain liens filed, which should be paid by the respondent. There is a sufficient showing of accident, surprise, inadvertence or excusable neglect, and it would appear that the respondent will suffer no real injury if a sufficient

amount is deposited in court to cover his claims if he eventually prevails.

It is ordered that the previous order of this court, directing the judges, clerks and officers of the superior court to retain possession of the sum of \$9,575.22 thus deposited with the clerk for the purpose of paying the judgment when and if it becomes final, shall remain in full force and effect until the further order of this court. It is further ordered that if within ten days from the receipt of a copy of this order the petitioner shall deposit with the said county clerk a further sum of \$1,000 for the purpose of covering any interest and added costs, to be retained by the county clerk as an addition to the former deposit and for the same purpose, the petitioner shall be entitled to the issuance of the writ prayed for. It is further ordered that on the receipt by this court of notice from the county clerk that he has received said additional sum of \$1,000, a writ of supersedeas will issue staying any execution on said judgment.



CROWLEY v. THOMSON.*

Civ. 19384.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1953.

Hearing Granted May 14, 1953.

Partnership dissolution proceeding. The Superior Court, Los Angeles County, *J. A. Smith, J.*, entered a decree dissolving the partnership and distributing the assets, and defendant appealed. The District Court of Appeal, *McComb, J.*, held, *inter alia*, that since there was no necessity for selling partnership assets in order to constitute fair distribution of assets, the trial court did not err in decreeing the return of his capital contribution to each partner.

Affirmed.

Fox, J., dissented.

* Subsequent opinion 262 P.2d 1.

1. Appeal and Error ⇨907(3)

Where appeal was upon judgment roll alone, findings would be conclusively presumed to be supported by evidence.

2. Partnership ⇨340

Generally, decree dissolving partnership should direct sale of assets and division of proceeds, but where there are no debts necessitating sale, and division of assets in kind is fair to all parties, such division may be ordered.

3. Partnership ⇨340

Where there was no necessity for selling partnership assets in order to constitute fair distribution of assets between partners, court did not err in decreeing return to each partner of his capital contribution. Corporations Code, § 15018(a).

4. Mines and Minerals ⇨100

Where partnership formed for redrilling of oil well provided that questions of policy, control, management and operation of partnership should be determined by mutual consent of both partners, and one partner contributed \$9,000 and the other \$3,000 plus an oil lease, upon dissolution, return of their contributions to respective partners was proper, and lease would not be valued at \$6,000 as of date of assignment to partnership, and decrease in its value would not be charged against each partner equally, in absence of evidence that lease was of such value at time of assignment to partnership.

5. Partnership ⇨313, 346

An action for dissolution of partnership and accounting is an action in equity, and provision that plaintiff is entitled to recover his costs is within discretion of trial court. Code Civ.Proc. § 1032(c).

6. Appeal and Error ⇨984(2)

Action of trial court in awarding costs in partnership dissolution proceeding will not be disturbed where there is no showing of abuse of discretion. Code Civ.Proc. § 1032(c).

7. Partnership ⇨346

Trial court in partnership dissolution proceeding did not abuse discretion in permitting plaintiff to recover his costs. Code Civ.Proc. § 1032(c).

Freda B. Walbrecht, Holbrook & Tarr and Leslie R. Tarr, Los Angeles, for appellant.

Boone & Satchell, Long Beach, for respondent.

McCOMB, Justice.

Defendant appeals from a decree (1) dissolving a partnership between himself and plaintiff, and (2) distributing the partnership assets.

[1] Since the appeal is upon the judgment roll alone the findings will be conclusively presumed to be supported by the evidence. (Estate of Roberts, 67 Cal.App. 2d 380, 382, 154 P.2d 416. These findings so far as material here may be summarized as follows:

Plaintiff and defendant entered into a partnership agreement on July 5, 1950, which had for its purpose the redrilling of an oil well known as "Bowles No. 1", and the production and sale of oil and gas therefrom. Pursuant to the provisions of the agreement plaintiff contributed \$9,000 and defendant \$3,000 which sums were deposited in the California Bank subject to withdrawal by their joint signatures. On July 5, 1950, defendant and his wife, pursuant to the partnership agreement assigned to the partnership their right, title and interest in a lease designated as the Zephyr Oil Co. lease, reserving unto themselves a seven and one-half per cent overriding royalty. Plaintiff withheld his consent to proceeding with redrilling "Bowles No. 1" pursuant to the provisions of paragraph Seventh (a) of the partnership agreement, which reads as follows: "(a) All questions of business policy of the partnership as well as questions respecting the control, management and operation of the partnership, its assets and affairs, the amount and kinds of insurance to be carried, and the like, shall be determined in accordance with the mutual consent and approval of both of the partners."

Thereafter plaintiff instituted the present action for the dissolution of the partnership and distribution of partnership assets to which defendant filed a cross-complaint.

After trial the court ordered (1) the partnership should be dissolved, (2) plaintiff should be returned his original capital investment of \$9,000, (3) defendant should be returned his contribution of \$3,000, less some items of expense which the court allowed as partnership expenses, and (4) the oil lease assigned to the partnership by defendant and his wife should be returned to defendant.

Questions: First: Did the trial court err in decreeing the return to each partner of his capital contribution?

[2] *No.* The rule is accurately stated in *Swarthout v. Gentry*, 62 Cal.App.2d 68, at page 83, 144 P.2d 38, 46, thus:

"The general rule is that the decree should direct a sale of assets and division of proceeds, as that is regarded as the fairest course to be pursued. But where there are no debts necessitating a sale, and a division of assets in kind is fair to all parties, it may be ordered."

[3] In the instant case there was no necessity of selling the partnership assets in order to constitute a fair distribution of the assets between the parties. Hence the trial court properly applied the rule promulgated in section 15018(a) of the Corporations Code which reads:

"Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits." (See also *Tiffany v. Short*, 22 Cal. 2d 531, 533, 139 P.2d 939.)

[4] There is no merit in defendant's contention that the lease which he contributed to the partnership should be valued at \$6,000 as of the date of its assignment to the partnership, and that if at the time of the dissolution of the partnership it was worthless, plaintiff charged with half of the loss, for the reason that there is no finding

that the lease was of the designated value and the trial court ordered its return to defendant as part of his contribution to the partnership assets. It is evident that at the time defendant contributed it to the partnership he knew of the provisions of paragraph Seventh (a) of the partnership agreement set forth above, and that accordingly the lease might or might not be of value in the event the partnership did not proceed to recondition the well.

Second: Did the trial court err in allowing plaintiff his costs upon the dissolution of the partnership?

[5-7] *No.* An action for dissolution of a partnership and an accounting is an action in equity and a provision that plaintiff is entitled to recover his costs under the provision of the Code of Civil Procedure, section 1032(c), is within the discretion of the trial court, whose action will not be disturbed where, as in the instant case, there is no showing of an abuse of discretion. (*Owen v. Cohen*, 19 Cal.2d 147, 155 [6], 119 P.2d 713).

Affirmed.

MOORE, P. J., concurs.

FOX, Justice.

I dissent.

The oil lease which the parties contemplated developing was assigned to and accepted by the partnership upon its formation. It was therefore a capital asset of the partnership. It was of undetermined value, but whatever its actual or potential value it came to naught on August 26, 1950, when the time to drill expired. Since the lease was partnership property its loss was a partnership loss, just as its increase in value would have been a partnership asset. The loss of the lease was not different from the loss of any other partnership property, e. g., the cash which the parties had also contributed to this venture.

By the terms of their agreement, each of the parties had a one-half interest in the partnership and was to share equally the

profits and losses.¹ To distribute, upon dissolution, the assets in kind and thus return to defendant the lease which had become valueless through no fault of his is both inequitable and contrary to the partnership agreement since this throws the entire loss on one of the parties. That the parties should share equally this loss, even in the absence of any agreement therefor, finds support in section 15018(a) of the Corporations Code quoted in the majority opinion. It is there provided that "Each partner * * * must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits." See *Kirkpatrick v. Smith*, 113 Cal.App.2d 409, 248 P.2d 534, and cases there cited.

The first portion of the cited code section is not here applicable because it deals with the distribution of profits and surplus after repayment of capital contributions and advances, and in the absence of any agreement between the parties. In this case there are no profits or surplus, and the parties agreed to share profits and losses equally. *Swarthout v. Gentry*, 62 Cal. App.2d 68, 83, 144 P.2d 38, 46, relied on in the majority opinion, justifies a division of assets in kind only if such division "is fair to all parties". It is manifestly unfair to require one partner to take as a part of his share of the partnership assets a lease which has no value.

The majority opinion points out that defendant knew the provisions of paragraph 7(a) of the partnership agreement and accordingly knew the lease might not be of any value in the event the partnership did not recondition the well. Conceding this to be true, it does not follow that such loss should be borne by the defendant for the lease no longer belonged to him alone, but to the partnership.

1. Paragraph 5 of the partnership agreement reads as follows:

"Interest In The Partnership And Share Of The Profits And Losses Thereof.

(a) Each partner shall have an equal one-half interest in the partnership.

(b) The parties hereto shall share equally in the profits, if any, of the partnership, and, except as hereinbefore oth-

I would reverse the judgment and direct the trial court to enter a judgment dividing equally between the parties the money remaining in the bank after payment of the partnership debts and the costs of this litigation.



116 Cal.App.2d 864

Ex parte SHACKELFORD.

Cr. 4963.

District Court of Appeal, Second District,
Division 3, California.

March 24, 1953.

Husband brought habeas corpus proceedings to secure his discharge from custody after he was found guilty of contempt of court. The District Court of Appeal, Wood, J., held that reception of evidence by commissioner while the husband was absent constituted a denial of due process of law entitling husband to discharge.

Petition granted, and husband discharged.

1. Contempt ☞40, 51

A contempt of court proceeding is of a criminal nature and summary character.

2. Contempt ☞61(1)

One charged with contempt of court was entitled to be confronted by witnesses, to have opportunity to cross-examine them, and to examine documentary evidence.

3. Contempt ☞61(6)

Findings in contempt of court proceeding are to be strictly construed in favor of accused

erwise provided, the losses, if any, of the partnership shall be borne by and charged against the interest of each partner in the same proportion, and if the partnership assets be insufficient to fully discharge any such loss or other obligation of the partnership, each partner shall be liable for one half thereof."

4. Contempt $\S$ 66(7)

Presumption in favor of regularity of proceedings and judgment does not apply in contempt matters.

5. Constitutional Law $\S$ 273

Where court entered order restraining husband from transferring or disposing of community property, and contempt proceedings were brought against him on ground that he violated order, and commissioner went out to inspect husband's home and place of business, and before husband and his attorney arrived commissioner received evidence regarding contents of truck driver's note addressed to husband and evidence as to what truck driver had told husband about calling for food, denial of rights of husband to confront and examine truck driver was a denial of "due process" of law and it was improper to find him guilty of contempt of court.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Process".

Porter & Ragland, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, S. Ernest Roll, Dist. Atty. and Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

PARKER WOOD, Justice.

Petition for writ of habeas corpus. On October 27, 1952, in the case of Mary Ann Shackelford v. Flanders L. Shackelford, the superior court made an order (1) that defendant move from the family home and give possession thereof to plaintiff on or before December 1, 1952, and (2) restraining him from transferring or disposing of any community property, except in the ordinary course of business or for necessities of life. He was present when the order was made and heard it pronounced. An order was made requiring him to appear on December 17, 1952, and show cause why he should not be adjudged guilty of contempt of court in failing to comply with said order of October 27th. He was

adjudged guilty and sentenced to five days' imprisonment and fined \$500—to serve one day in jail for each two dollars of the fine unpaid. During the hearing upon the order to show cause, before Commissioner John F. Aiso, the commissioner asked the attorneys for plaintiff and defendant to stipulate that he might make an inspection of the said home and the place of business of defendant. The findings of the commissioner show that he asked for such a stipulation but do not show whether the stipulation was made. In his affidavit herein the commissioner states that "he requested and received the oral stipulation." It is also to be observed that it is not shown in the findings or at all whether the alleged stipulation provided that the inspection should be made in the presence of the parties and their counsel. The parties and their counsel did go to the premises, and it will be assumed that there was a stipulation that an inspection might be made in the presence of the parties and their counsel. (It seems that the inspection was to be made for the purpose of determining whether certain furniture was in the home.)

The commissioner, the plaintiff, her attorney and two witnesses (Dent and Black) went in plaintiff's automobile to said home and, according to the affidavit of the commissioner, they arrived at the home two or three minutes before the defendant and his attorney arrived there. According to the affidavit of the witness Dent, the following things occurred at the home before defendant and his attorney arrived: all the persons who went in plaintiff's automobile entered and examined the home; she (Dent) was requested to get certain books and papers and she went to her home, which is next door, and brought to the Shackelford home certain books and papers and the commissioner examined them; a truck driver drove up and came to the door of the home, and the commissioner talked to him; she then left the home.

The commissioner stated in his affidavit that: he inspected the home in the presence of the parties and their counsel; that no testimony or evidence was given or received on the trip to or returning from the home; that no witness testified in said

matter out of the presence of "affiant [defendant]" and his counsel; that witness Dent brought certain books and papers to the commissioner at the home in the presence of defendant and his counsel, and he (commissioner) informed said witness that he could not consider the documents; his findings and recommendation (a copy of which is attached to his affidavit) were based upon the evidence given in court and the inspection of the home and place of business," and upon no other evidence.

A question in the order to show cause proceeding was whether the defendant (petitioner herein) had removed furniture from the home. It is stated in the findings of the commissioner, among other things, that: "There was on door at arrival [at the home] a note reading: 'I come by but you were not home. Davis the truck man. 1235 Naomi Ave., PR 4954. (signed) U. Davis' and while referee [commissioner] was there this truck man drove up, stating defendant told him last Friday to call for food to be delivered to his concession."

Petitioner's attorney (who went to the home with petitioner) stated in his affidavit that he and petitioner were not present when the commissioner found the truck driver's note, or when the commissioner talked to the truck driver, or when the commissioner examined the records and papers presented to him by witness Dent; and that they have never seen said records or papers.

The petitioner asserts in his petition that, when he and his attorney were not present, the commissioner inspected the home and the witness Dent exhibited the books and papers to the commissioner; and that the commissioner's recommendation to the court was influenced by evidence received when petitioner and his attorney were not present.

[1-5] Although the commissioner states in his affidavit that his findings and recommendation were based only upon the evidence given in court and upon the inspection of the home and place of business, it does appear that his findings contain (1) a statement as to contents of a note which was on the door of the home when the

commissioner arrived, and (2) a statement as to what the truck driver said that defendant had told the truck driver on Friday about calling for and delivering food. It is conceded that the commissioner arrived at the house at least two or three minutes before defendant and his attorney arrived. It is also conceded that the witness Dent exhibited certain books and papers to the commissioner. The affidavits are not in accord, however, as to whether the commissioner examined the books and papers. Dent stated that the commissioner examined the documents before the defendant and his attorney arrived. The commissioner stated that the documents were exhibited to him in the presence of defendant and his attorney, and that he informed Dent that he could not consider them. Irrespective of whether the commissioner examined the books and papers, it does appear that, in addition to inspecting the premises, he received evidence regarding the contents of the truck driver's note, and evidence as to what the truck driver had told the defendant about calling for and delivering food. The fact that the commissioner included in his findings the matters regarding the note and oral statement of the truck driver makes it clear that the commissioner considered that such additional evidence was material in determining whether the defendant was guilty of contempt of court. It is to be assumed that said findings had an important bearing upon the recommendation which he made as to guilt and punishment. The evidence received regarding those matters was not within the scope of an inspection of the home for the purpose of determining whether certain furniture was therein. A contempt of court proceeding is of a criminal nature and summary character. *Hotaling v. Superior Court*, 191 Cal. 501, 504, 217 P. 73, 29 A.L.R. 127. The petitioner (defendant) was entitled to be confronted by the witnesses, to have an opportunity to cross-examine them, and to examine the documentary evidence. It does not appear that he was accorded those rights. The findings in a contempt of court proceeding are to be strictly construed in favor of the accused and the presumption in favor of the regu-

larity of proceedings and judgment does not apply in contempt matters. *Groves v. Superior Court*, 62 Cal.App.2d 559, 568, 145 P.2d 355. Receiving such additional evidence without according the petitioner such above-mentioned rights of confrontation and examination was a denial of a fair hearing, and amounted to a denial of due process of law.

Reference should be made to another finding of the commissioner. That finding is that "defendant is found to be an unadulterated liar." There was no issue before the commissioner as to the general reputation of the petitioner for truth. If the petitioner made any statements, with respect to material matters, which were not true, it would have been proper to find that specific statements were not true. This finding as to character, under the circumstances herein, was gratuitous and intemperate, and indicates that the commissioner did not appreciate his judicial responsibility. It cannot be said that the commissioner's findings were prepared carefully. As above shown, it appears that the finding regarding the stipulation was incomplete.

The petition for a writ of habeas corpus is granted, and the petitioner is discharged.

VALLÉE, J., concurs.

SHINN, Presiding Justice.

I concur. The record does not contain a copy of any affidavit accusing petitioner of violating the order. The commitment recites that he had knowledge of the order, had ability to comply with it and had not done so. As a basis for an adjudication of contempt this was the statement of a conclusion. It was necessary that petitioner be accused of some specific act or omission. The presumption of regularity does not apply in contempt matters and it will not be presumed that the proceeding was initiated by a sufficient affidavit. See *Groves v. Superior Court*, 62 Cal.App.2d 559, 568, 145 P.2d 355.

Petitioner was sentenced to five days in the county jail, fined \$500 and ordered to serve one day in the county jail for each two dollars thereof remaining unpaid. He alleges in his petition that he has no money

or property, that this fact was in evidence in the hearing before the commissioner, and that therefore he will have to serve 255 days in the county jail.

Ordinarily, when confinement in jail is deemed advisable the order therefor should provide for the release of the accused whenever he renders substantial compliance with the judgment or order which he has disobeyed. The punishment of petitioner was grossly harsh and excessive. If every violator of a temporary order in a divorce case were sent to jail for eight months, there would be no room in the jails for criminals.



116 Cal.App.2d 779

STEIN et al. v. DRAKE.

DRAKE v. STEIN et al.

Civ. 19250.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1953.

Plaintiff filed petition for order confirming award of an arbitrator. The Superior Court of Los Angeles County entered a judgment confirming award, and defendants appealed. The District Court of Appeal, Moore, P. J., held that Superior Court invaded rights of defendants by approval of award before court first determined under arbitration statute that a valid, enforceable contract existed.

Judgment reversed.

1. Arbitration and Award ☞12

Though generally submission agreement is a prerequisite to commencement of a valid arbitration proceeding, yet where parties have executed arbitration agreement, they undoubtedly may use it as a submission agreement as soon as controversy arises. Code Civ.Proc. §§ 1280-1293.

2. Contracts ☞284(1)

Arbitration clause providing that as between parties, all questions as to rights

and obligations of parties arising under terms of construction contract, plans, and specifications, were subject to arbitration, and that in case of dispute, either party might make demand for arbitration by filing demand in writing with the other, was sufficiently complete to be enforceable. Code Civ.Proc. §§ 1280-1293.

3. Contracts ⇨284(1)

A common-law arbitration agreement is revocable until time of final award.

4. Contracts ⇨284(1)

Arbitration agreement providing that as between parties thereto, all questions as to rights and obligations of parties arising under terms of construction contract, plans, and specifications were subject to arbitration, and that in case of dispute either party could make a demand for arbitration by filing demand in writing with the other party, was irrevocable, save on such grounds as exist at law or in equity for revocation of any contract. Code Civ.Proc. §§ 1280-1293.

5. Contracts ⇨292½

Section of arbitration statute providing that party aggrieved by failure of another to perform under written agreement for arbitration "may" petition superior court for order directing that arbitration proceed is not mandatory, but is merely one more remedy for settling a controversy where one party fails to carry out agreement to arbitrate, and failure of one party to name an arbitrator does not remove controversy from that section. Code Civ.Proc. §§ 1282, 1283.

See publication *Words and Phrases*, for other judicial constructions and definitions of "May".

6. Contracts ⇨292½

In any proceeding for enforcement of contract for arbitration of dispute arising under it, claim that contract is invalid or has been rescinded places controversy on conscience of court, which must determine equitable issues raised by defendant. Code Civ.Proc. §§ 1280-1293.

7. Contracts ⇨292½

It is only after finding has been made that under written contract of arbitration a party is in default in performance thereof,

that court will order parties to contract to proceed in accordance therewith. Code Civ.Proc. §§ 1280-1293.

8. Contracts ⇨292½

Repudiation of arbitration contract by one of the parties does not enable the other to proceed without leave of court. Code Civ.Proc. §§ 1280-1293.

9. Arbitration and Award ⇨72

Superior court invaded rights of defendants by approval of arbiter's award under arbitration contract before court first determined under arbitration statute that a valid, enforceable contract existed. Code Civ.Proc. § 1282.

10. Arbitration and Award ⇨31

Arbitrators are not bound to strict adherence to legal procedures.

11. Arbitration and Award ⇨52

Arbitrators are not required to find facts, give reasons for their awards, or describe processes by which they arrived at their decisions. Code Civ.Proc. §§ 1280-1293.

12. Arbitration and Award ⇨29

Arbitrators must be guided by basic arbitration agreement of litigants. Code Civ.Proc. §§ 1280-1293.

13. Arbitration and Award ⇨56

Where defendants agreed in clear and unambiguous language of contract to transfer specific parcel of realty and policy of title insurance to plaintiff for faithful performance of certain services by plaintiff, it was improper for arbitrator to award plaintiff a certain sum in cash. Code Civ. Proc. §§ 1280-1293.

14. Arbitration and Award ⇨66

Every presumption is in favor of award of arbitrator. Code Civ.Proc. §§ 1280-1293.

15. Arbitration and Award ⇨63

Mere unsound reasoning by arbitrator in reaching a conclusion within scope of proper arbitration will not invalidate result. Code Civ.Proc. §§ 1280-1293.

16. Arbitration and Award ⇨76

An award of an arbitrator is properly vacated when arbitrators exceed their powers. Code Civ.Proc. §§ 1280-1293.

Arthur F. Larrabee, Los Angeles, for appellants.

Nat C. Recht, Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an appeal from a judgment entered upon an order confirming an arbitrator's award. The questions for decision are (1) the sufficiency of an arbitration clause in a written contract providing that "all questions as to the rights and obligations of the parties arising under the terms of the contract, the plans and specifications are subject to arbitration"; (2) the revocability of such a clause, and (3) the sufficiency of compliance with the requisite statutory formalities.

Facts.

Appellants and respondent contracted on March 18, 1951 for the substantial alteration of premises owned by appellants at Los Angeles. Respondent was to perform the work "in a good, workmanlike and substantial manner," to "commence work hereunder within 2 days after receipt of written notice from the owner so to do," and "in any and all events to complete the same within 70 days after commencement." As consideration for respondent's performance, in lieu of money, appellants agreed to transfer a parcel of realty to respondent by deed guaranteed by "Policy of Title Insurance in the amount of \$7,500 as per terms and conditions" in a designated escrow. Time was declared to be of the essence. The following arbitration clause was adopted as paragraph 16 of the contract:

"As between the parties hereto, all questions as to the rights and obligations of the parties arising under the terms of the contract, the plans and specifications are subject to arbitration. In case of dispute either party hereto may make a demand for arbitration by filing such demand in writing with the other. One arbitrator may be agreed upon, otherwise there shall be three, one named in writing by each party within five days after demand is given, and a third chosen by the two appointed. Should either party refuse or neglect to appoint said arbitrator or to furnish the arbitrators with any papers or information

demanded he or they are empowered by both parties to proceed ex parte. If there be one arbitrator his decision shall be binding; if there be three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect. The Arbitrators, if they deem that the case demands it, are authorized to award to the party whose contention is upheld such sums as they shall deem proper for the time, expense and trouble incident to the appeal, and if the appeal was taken without reasonable cause, damages for delay. The arbitrators shall fix their own compensation, unless otherwise agreed upon, and shall assess the costs and charges of the arbitration upon either or both parties. No one shall act as arbitrator who is in any way financially interested in this contract or in the business affairs of either Owner or Contractor * * *." At the end of May 1951, a dispute arose and respondent ceased work on the project. On July 3, 1951, the parties executed an "arbitration agreement" by which two arbitrators were designated: Attorney Earl J. Opsahl by appellants, and George Heller by respondent. Appellants withdrew Opsahl's name and the attempt at settlement failed. Appellants' new counsel then notified respondent that "the agreement heretofore entered into is cancelled inasmuch as [Drake] has failed to do the work in a workmanlike and substantial manner." On July 21 Drake's demand for arbitration was rejected and Heller proceeded to act as sole arbiter and as such made a purported "arbitration award" that the Steins pay Drake \$5,149. He awarded himself \$200 as a fee for his own services, one-half to be paid by appellants, the balance by respondent. The main award was based on findings that "the contract price for the work to be done * * * [was] Seventy-five Hundred Dollars"; that the owners had agreed to pay \$100 additional for certain changes; that "prior to the time the work was to have been completed the contractor was ordered to discontinue any further work on the job"; that the reasonable cost to complete the job in accordance with the plans and specifications will be \$2,451.

Three days later Drake filed a petition in the Superior Court for an order confirming the award. Judgment in accordance with the terms thereof was entered but was vacated on appellants' motion on December 4, 1951 on account of Drake's failure to plead compliance with the contractor license laws as set forth in section 7031 of the Business and Professions Code. On respondent's amended petition the trial court confirmed the award and included \$1000 for attorney's fees. Appellants' motions (1) to vacate the award and (2) for a new trial were denied.

Sufficiency and Revocability of the Agreement.

[1,2] Appellant contends that paragraph 16 was not sufficiently complete to be enforceable and that moreover the contract "had been cancelled or revoked by [the Steins] upon equitable or legal grounds." Although appellant is correct in contending that generally a submission agreement is a prerequisite to the commencement of a valid arbitration proceeding, see 3 Am. Jur., Arbitration and Award, sec. 16; 5 Cal.Jur.2d, Arbitration and Award, sec. 24; Kagel, Labor and Commercial Arbitration Under the California Arbitration Statute, 38 Cal.L.Rev. 799, 803-5, yet "where the parties have executed an arbitration agreement, they undoubtedly may use it as a submission agreement as soon as the controversy arises." 5 Cal.Jur.2d, supra. It is apparent from the inspection of the contract that paragraph 16 is properly interpreted as both a "future disputes agreement", see Sturges, Commercial Arbitrations and Awards, sec. 26 et seq., within section 1280 of the Code of Civil Procedure, and a complete though broad "submission agreement." The issues to be submitted to arbitration under the latter were to include "all questions as to the rights and obligations of the parties arising under the terms of the contract, the plans and specifications."

[3] Could appellants, as they claim, have "cancelled" a contract containing such a clause? Section 1280 of the Code of Civil Procedure states that "an agreement in writing to submit an *existing controver-*

sy to arbitration pursuant to section 1281 of this code, shall be valid, enforceable and irrevocable". This leaves open the theoretical argument that there can be an agreement to arbitrate *not* "pursuant to section 1281 of this code"; i. e. under "common-law arbitration." In that event, the agreement to arbitrate would be revocable until the time of the final award. See 3 Am.Jur., Arbitration and Award, sec. 59; 6 C.J.S., Arbitration and Award, § 33; 5 Cal.Jur.2d, Arbitration and Award, sec. 4.

Since the 1927 amendments and additions to the Code of Civil Procedure, Stats. 1927, p. 404, adopting the Draft State Arbitration Act, no California case has expressly decided whether or not a written contract can be the basis of common-law, as well as statutory, arbitration. Those decisions which have considered the matter have only done so in the form of innocuous dictum. See *Silva v. Mercier*, 33 Cal.2d 704, 708, 204 P.2d 609; *Rives-Strong Bldg., Inc., v. Bank of America, etc.*, 50 Cal.App. 2d 810, 813, 123 P.2d 942.

[4] However, the case at bar does not involve an "existing controversy agreement" but a *future disputes agreement*. Such an agreement shall be "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract". Code Civ. Proc. sec. 1280. The possible coexistence of common-law and statutory arbitration of existing controversies has no application to the facts of this case. It is clear from the explicit and unambiguous language of section 1280 that the legislative intent was to make written contracts to arbitrate future disputes irrevocable, in direct derogation of the common law. Accordingly, assuming the absence of the elements necessary to permit a rescission of the contract (see Civ.Code, secs. 1689-1691), the arbitration proviso brought the matter within the arbitration statute. Code Civ.Proc. secs. 1280-1293.

Application of Section 1282.

The next question for decision is: are the provisions of section 1282 optional or mandatory? That section provides that (1) a party aggrieved by the failure of another to perform under a written agreement for

arbitration may petition the superior court for an order directing that the arbitration proceed as provided; (2) five days' notice in writing of the hearing of such application be served upon the defaulting party; (3) if the court shall after hearing the parties be satisfied that the making of the contract is not in issue it shall direct the parties to proceed to arbitrate in accordance with their agreement; (4) if the default be in issue, the court shall direct a summary trial thereof.

[5] The provision that the aggrieved party "may petition" for an order directing arbitration to proceed leaves no doubt that the resort to section 1282 is not mandatory but is merely one more remedy for settling a controversy where one party fails to carry out his agreement to arbitrate. After such a default by one party, e. g., failure to name an arbitrator, the controversy is not removed from the operation of section 1282, *supra*. Code Civ. Proc. sec. 1283.

[6-9] The fact that appellants may have "cancelled" the contract prior to respondent's demand for arbitration does not settle the matter. Upon that question's being raised, it was the duty of the court to make a judicial finding on the issue. It cannot be determined from the clerk's transcript that no grounds existed for a rescission of the contract. In any proceeding for the enforcement of a contract for an arbitration of a dispute arising under it, a claim that the contract is invalid or that it has been rescinded places the controversy on the conscience of the court which must then determine the equitable issues raised by the defendant. It is only after a finding has been made that under a written contract of arbitration a party is in default in the performance thereof, that the court will order the parties to the contract to proceed in accordance therewith. Repudiation by one of the parties does not

enable the other to proceed without leave of the court. *Pneucrete Corporation v. United States Fidelity & Guaranty Co.*, 7 Cal.App.2d 733, 741, 46 P.2d 1000. From the foregoing it is apparent that the court below invaded the rights of appellants by its approval of the arbiter's award before it had first determined under section 1282, *supra*, that a valid, enforceable contract did exist.¹

The Cash Award.

[10-13] In view of the fatal noncompliance with section 1282, it is not necessary to examine the informal arbitration proceedings conducted by the sole arbiter to determine whether appellants are correct in asserting that the procedural requirements of section 1286² were neither complied with nor waived. It will be assumed that Mr. Heller complied substantially with that statute. Arbitrators are not bound to a strict adherence to legal procedures. They are not required to find facts, give reasons for their awards, or describe the processes by which they arrived at their decisions. *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal.2d 228, 232, 174 P.2d 441. But they are not, because of such freedom, released from the obligation to be guided by the basic agreement of the litigants. When appellants agreed in clear and unambiguous language to transfer a specific parcel of real estate and a policy of title insurance for the faithful performance of certain services by respondent it was not intended thereby to authorize the future arbitrators to award something else to respondent in case of an arbitration. But that is exactly what was done by Mr. Heller. Instead of the lot, he awarded to respondent the sum of \$7,500 in cash. He made no pretense at ascertaining the fair market value of the lot at any time. He determined that "the contract price for the work to be done [was] Seventy-five Hundred Dollars" and awarded the parties their

1. The New York Arbitration Law, substantially identical with that of California, has been similarly interpreted. *Bullard v. Morgan H. Grace Co.*, 240 N.Y. 388, 148 N.E. 559, 561. In *Finsilver, Still & Moss v. Goldberg, Maas & Co.*, 253 N.Y. 382, 171 N.E. 579, 580-581, 69 A.

254 P.2d—39½

Cal.Rep. 253-254 P.2d—49

L.R. 809, Cardozo, C. J., explains the reasons for a subsequent change in the New York statute.

2. This section makes provision for the trial procedure before the arbitrators or the arbiter agreed upon similar to that of the superior court in a civil action.

respective set-offs. Thus the Steins were left with a half-finished house and a judgment against them of \$5,149 plus arbitrator's and attorney's fees. Had the work been entirely completed, Drake would have received as full payment the lot which according to the undenied statement of appellants was worth only \$4,200 on the date when the work was to have been completed. Even with such a broad arbitration clause as paragraph 16, how could there be any doubt that Drake had only the right to a certain specific piece of property as his compensation under the contract?

[14-16] Although every presumption is in favor of the award, Popcorn Equipment Company v. Page, 92 Cal.App.2d 448, 207 P.2d 647, and mere unsound reasoning by an arbitrator in reaching a conclusion within the scope of proper arbitration will not invalidate the result, McKay v. Coca-Cola Bottling Company, 110 Cal.App.2d 672, 243 P.2d 35, an award is properly vacated when arbitrators exceed their powers. See Screen Cartoonists Guild v. Walt Disney Productions, 74 Cal.App.2d 414, 168 P.2d 983; Bierlein v. Johnson, 73 Cal.App.2d 728, 166 P.2d 644.

The judgment is reversed.

McCOMB and FOX, JJ., concur.



PEOPLE v. BECHTEL *

Cr. 4784.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1953.

Rehearing Denied March 2, 1953.

Hearing Granted March 19, 1953.

The defendant was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., for grand theft, and he appealed from judgment of conviction and orders deny-

* Subsequent opinion 260 P.2d 31.

ing motions for new trial and in arrest of judgment. The District Court of Appeal held that evidence sustained implied finding that defendant in receiving money from his victim intended to appropriate it to his own use instead of using it for specific purpose for which victim intended to give it.

Appeal from order denying motion in arrest of judgment dismissed; judgment and order denying new trial affirmed.

1. Criminal Law Ⓒ738

Intention with which an act is done is question for trier of fact.

2. False Pretenses Ⓒ49(2)

In prosecution for grand theft by false pretenses, evidence sustained implied finding that defendant in receiving money from his victim intended to appropriate it to his own use instead of using it for specific purpose for which victim intended to give it.

3. Criminal Law Ⓒ1159(2)

District Court of Appeal is foreclosed from interfering with an implied finding based on substantial evidence.

4. Conspiracy Ⓒ37

A conspiracy to commit a series of felonies does not amalgamate all of them into one offense.

5. Criminal Law Ⓒ881(4)

Because rules of pleading permit all offenses to be alleged in one indictment, defendant is not acquitted of those omitted from the pleading.

6. Criminal Law Ⓒ202(1)

In prosecution for grand theft by false pretenses, that defendant collected \$400 from victim and appropriated the payments on four separate occasions authorized conviction for four separate offenses, notwithstanding that fraudulent statements were uttered and evil intent was formed before any theft was committed.

7. Criminal Law Ⓒ198

Where one has been acquitted of a crime charged to have been committed on or about a designated date, subsequent indictment for offense of same nature alleged to have occurred on other dates does not constitute double jeopardy.

8. Criminal Law ⇨198

Where defendant was indicted for grand theft by false pretenses and was acquitted, and subsequently was indicted for grand theft by false pretenses which allegedly occurred about ten months prior to offenses alleged in prior indictment, defendant was not placed in double jeopardy.

9. Criminal Law ⇨1023(8)

Order denying motion in arrest of judgment is nonappealable.

On Petition for Rehearing.

10. Criminal Law ⇨1167(2)

Where count one of indictment alleged overt act of which defendant had previously been acquitted, and defendant in present action was not convicted under count one, defendant was not prejudiced by the allegation.

Frederic H. Vercoe; Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Ass't Atty. Gen., S. Ernest Roll, Dist. Atty., and Ralph F. Bagley, Deputy Dist. Atty., Los Angeles, for respondent.

MOORE, Presiding Justice.

By indictment filed February 14, 1951, appellant was accused of conspiracy (count I) to violate section 67½, Penal Code (offering a bribe), and by counts II through VI of grand theft. Upon pleas of not guilty, of having been once in jeopardy and of prior acquittal, trial was had and verdicts of guilty were returned as to counts II, III, IV and V and not guilty as to counts I and VI. Defendant now demands a reversal of the judgment, the orders denying motions for a new trial and in arrest of judgment on the grounds of insufficiency of evidence to support the verdicts and error in sustaining the objection to appellant's offer of proof of former jeopardy and prior acquittal.

The crimes charged against appellant arose out of his agreement to accept the sum of \$400 per week "protection money" from one Dr. Bluechel during the period between August 1949 and July 1950. The

doctor was the principal witness for the people. He testified that when appellant visited his medical office in May 1949, he stated that if the witness wished to perform illegal abortions, appellant could arrange protection for him against law enforcement agencies. Dr. Bluechel accepted the proposed program and agreed to cooperate. After subsequent negotiations, Bechtel informed him that arrangements were completed and that the doctor could proceed with his illegal activity. Appellant also made plans for the doctor to receive referral patients from a Dr. Crum's office; for the latter's nurse, Tony Ford, to take the calls and make the appointments. Appellant was to receive \$400 per week and arrange for protection with the "powers that be."

After such arrangements had been assertedly consummated, Dr. Bluechel performed illegal abortions on women referred by Miss Ford as well as for his own patients. He testified that he paid appellant the agreed sum of \$400 weekly in cash; that on appellant's visits to procure the money Bechtel told the doctor that everything was "under control"; that Mr. Woodruff of the Medical Board was being "taken care of" as well as the "powers that be in the City Hall." Dr. Bluechel testified that he relied upon such representations and pursuant thereto made the protection payments. He testified to specific \$400 payments on August 20, August 27, September 3 and September 10, 1949, the identical dates upon which the charges of grand theft are alleged in counts II, III, IV and V respectively.

On July 7, 1950, the witness was apprehended by law enforcement officers in the act of performing an illegal abortion. He confessed to having performed illegal operations after his agreement with appellant, and agreed to cooperate with the Medical Board and the Los Angeles Police Department in trapping appellant. Thereupon the doctor arranged for a meeting in his office, the police officers to be concealed and listening in an adjacent room, and a recording device to make a transcription of the conferences. Appellant came, conferred, and accepted from the witness a

roll of \$400 in currency, the serial numbers of which had been previously recorded by the officers. Defendant was apprehended upon leaving the office and the bills removed from his person. On being asked where he got the money, he replied, "I had it when I came in here."

Various and numerous law enforcement officers of the highest rank from the Los Angeles Police Department, Los Angeles County Sheriff's office, State Medical Board and the Long Beach Police Department testified that they had never had dealings with appellant; had never met him in either official or individual capacity. They were the principal officers in charge of illegal abortion investigation in the Los Angeles area.

Other witnesses established that appellant held himself out as a "fixer"; that he had stated that he could arrange protection for abortionists; that in one instance when a Dr. Kirk was arrested on suspicion of performing illegal abortions, appellant offered to "fix the case" for a sum of money.

[1-3] This brief recitation of the highlights in the evidence supports the theory of the prosecution that appellant falsely represented to Dr. Bluechel that appellant had important connections and for a \$400 weekly payment could protect the doctor from law enforcement officials, whereas in truth, appellant had no intention of so using the money, but intended to and actually did convert the sums received from Dr. Bluechel to his own use. Appellant's argument that the money represented payment to him for arranging for referral of Dr. Crum's abortion patients is contrary to the direct testimony of Dr. Bluechel to the effect that he paid the sums for protection and would not have done so but for appellant's representations. While the proof is clear that appellant stated to the doctor that protection would be furnished to make him secure against prosecution, yet assuming that appellant's promises were not the sole inducing cause of the doctor's payment of the money each week, it cannot be gainsaid that it was a material cause and hence sufficient. *People v. Chamberlain*, 96 Cal.

App.2d 178, 182, 214 P.2d 600. Under the evidence, the jury were warranted in determining that appellant received possession of the funds for the specific purpose of applying it toward protection payoffs but at the time harbored a secret intention to convert it to his own use. By virtue of such finding he was guilty of larceny by trick and device. *People v. Barnett*, 31 Cal.App. 2d 173, 175, 88 P.2d 172. On the other hand, if the jury determined that the doctor parted with both possession of and title to the funds, but was induced to do so by defendant's false representations, it properly found the accused guilty of larceny on the theory of obtaining money by false pretenses. (*Ibid.*) The intention with which an act is done is a question for the trier of fact. It was thus for the jury herein to resolve the questions of both the owner's intent and that of appellant at the time of the payment and receipt of the funds. *People v. Hewlett*, 108 Cal.App.2d 358, 368, 239 P.2d 150. Accordingly, since the jury on the basis of substantial evidence determined the falsity of appellant's representations and adopted the doctor's testimony as truth, this court, under familiar rules of appellate procedure is foreclosed from interfering with their implied finding.

No Error in Rulings on Evidence.

[4-8] It is contended that the trial court erred in refusing to permit appellant to prove, in support of his special plea of former jeopardy, that he had been previously in jeopardy and acquitted at a former trial of the offenses included within the indictment of which he now stands convicted. Appellant in fact had been acquitted on four counts of grand theft, crimes arising out of the same protection payoff arrangement with Dr. Bluechel. At that time, the trial proceeded upon an indictment which charged four separate thefts of \$400 sums on or about June 10, June 17, June 24 and July 11, 1950. Appellant's plea of former jeopardy and his insistence arise from confused thinking. Because he was accused by the prior indictment of thefts on the three specified days in June, 1950, after he had allegedly agreed with Dr.

Bluechel to guarantee protection against law-enforcing agencies, appellant now advances the theory that because the thefts in August, 1949, were subsequent to the alleged corrupt agreement they all arose out of or followed the same conspiracy and therefore his trial on the first indictment constituted former jeopardy. He accentuates his contention by the narrative that on his first trial the jury were instructed that verdicts of guilty might be returned even though the proof did "not show the precise time on which the offenses were committed" so long as the jurors were satisfied that the "offenses were in fact committed at any time before the filing of the indictment." A conspiracy to commit a series of felonies does not amalgamate all of them into one offense. Each time a bandit goes upon the highway and offends his sovereign he is guilty of the crime classified by his act. Because the rules of pleading have been so simplified as to permit all the offenses of the accused to be alleged in one indictment, he is not acquitted of those omitted from the pleading. Moreover, the dates of the crimes charged in the indictment now under review were about ten months subsequent to those for which he was acquitted. It is unreasonable to assume that on a trial for grand thefts alleged to have been committed in June 1950, a jury could have found they occurred in August, 1949. Also, the evidence received at the second trial proved a series of crimes entirely different from those charged in the former indictment and to establish which proof was introduced at the first trial. Each taking of \$400 from Dr. Bluechel constituted a distinct offense from all others, notwithstanding fraudulent statements were uttered and the evil intent was formed before any theft was committed. *People v. Rabe*, 202 Cal. 409, 414, 261 P. 303; *People v. Serna*, 43 Cal. App.2d 106, 108, 110 P.2d 492; *People v. Caldwell*, 55 Cal.App.2d 238, 251, 130 P.2d 495. Where one has been acquitted of a crime charged to have been committed on or about a designated date, a subsequent indictment for an offense of the same nature alleged to have occurred on other dates, does not constitute double jeopardy. *People v.*

Lachuk, 5 Cal.App.2d 729, 731, 43 P.2d 579; *People v. Warren*, 16 Cal.2d 103, 112, 104 P.2d 1024. In *People v. Wilson*, 79 Cal. App. 709, 250 P. 879, the defendant was acquitted of three separate counts of rape and incest, alleged to have occurred "on or about" specified dates. Thereafter the defendant was accused in a new information with similar offenses on a date within five weeks of one of the acts charged in the first indictment. Defendant's plea of double jeopardy was rejected with the observation that "The act of June 2, 1925, was a distinct and separate crime from the acts of January and July which were involved in the former trial and acquittal. * * * Though evidence of the act of June 2 may have been offered in the former trial for the purpose of showing the general conduct of the appellant, he could not have been convicted of that act in that trial because the issue was clearly drawn to the three acts specified in the indictment. * * *

The authorities from sister states cited by appellant are of no benefit to him. In *State v. Dye*, 81 Wash. 388, 142 P. 873, the first information charged defendant with rape alleged to have been committed within three years of the filing of the accusation. After acquittal, defendant was again charged with rape on a specific date within the same three-year period. Because of the method of pleading, the former acquittal was held to be an acquittal of the same charge in the later information. In *State v. Wolpers*, 121 Wash. 193, 208 P. 1904, the first information charged defendant with rape on or about May 8. The second information, filed subsequent to his acquittal of the former charge, declared a rape of the same person on or about May 1. Because of the close proximity of the dates it was held that the acquittal of the first charge served to bar any prosecution under the second information since the word "about" covered both dates.

[9] Since the order denying the motion in arrest of judgment is nonappealable and was through inadvertence included in the notice of appeal, it is dismissed. *People v. Pierce*, 110 Cal.App.2d 598, 611, 243 P.2d 585.

The judgment and the order denying the motion for new trial are affirmed.

McCOMB and FOX, JJ., concur.

On Petition for Rehearing.

PER CURIAM.

[10] The petition for a rehearing is denied. The only basis in fact for the petition is that one of the five overt acts alleged in count one of the action at bar was alleged also in the previous indictment as one of four overt acts under count one. In the case at bar counts two to six involve only acts of grand theft on dates distinct from those referred to in the corresponding counts of the prior indictment. Hence, no prejudice was suffered.



117 Cal.App.2d 1

SCRIBNER v. CARRELL.

Civ. 4604.

District Court of Appeal, Fourth District,
California.

March 25, 1953.

Action by lessor against lessee for \$1500 due under lease upon completion of certain repairs wherein plaintiff in order to avoid consequence of not having completed repairs within the specified period alleged that the parties had entered into a subsequent oral agreement extending such period. The Superior Court, Tulare County, Frank Lamberson, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained the finding that there was no such subsequent oral agreement.

Affirmed.

1. Evidence ◯417(19)

In lessor's action for \$1,500 due under lease when necessary repairs were completed, where lessor sought to avoid consequences of provision of lease that repair

work, upon which payment of \$1,500 "hinges", was to be completed by certain date, which was earlier than date repairs were actually made, by alleging subsequent oral contract extending period within which such repairs should be made, parol evidence to show that under lease, lessee was to pay upon completion of repairs regardless of when completed, and that, if repairs were not completed by specified date, lessee would have action for damages for loss resulting from delay, was properly excluded.

2. Landlord and Tenant ◯152(9)

Lessor's waiver given to permit lessee to receive loan secured by cotton crop would not be consideration for making of alleged oral agreement some two weeks before such waiver whereby lessee allegedly extended time within which lessor was required by lease to make certain repairs.

3. Appeal and Error ◯1056(1)

In action by lessor for \$1,500 due upon completion of certain repairs by certain date, wherein lessor, to avoid consequences of not having made repairs within specified period, alleged oral contract extending period for making repairs, and evidence supported finding that there was no such oral agreement, exclusion of evidence relating to matters which were of little importance unless existence of oral contract were established was not reversible error. Code Civ.Proc. § 2055.

Francis L. Smee, Visalia, for appellant.

Crowe, Mitchell & Hurlbutt, Visalia, for respondent.

BARNARD, Presiding Justice.

On December 14, 1950, the plaintiff leased 75 acres of land to the defendant for one year beginning February 1, 1951, and ending January 31, 1952. The lease provided that the rental was to be \$5,250 and acknowledged that \$3,750 had been paid when the lease was signed. It then provided that the balance of \$1,500 "shall be due and payable upon lessor's completion of repairs to the well and pumping plant which will guarantee lessee sufficient water for the

proper irrigation of said demised premises. * * * It is hereby agreed that the above well and pump work upon which hinges the payment of said Fifteen Hundred (\$1500.-00) and no/100 Dollars balance shall be completed by Lessor by February 15, 1951." Admittedly, the lessee was not given possession until February 13, 1951, and the repairs to the well and pumping plant were not completed until April 8, 1951. A demand for the payment of the \$1,500 was later made and refused. A notice was served on July 10, 1951, demanding payment of the \$1,500 within three days or possession of the premises. This action was filed on July 20, 1951, asking judgment for restitution of the premises; for the sum of \$1,500; and that the amount found due be trebled because of defendant's wilful and deliberate refusal to pay said rent or surrender possession.

The complaint set forth the lease, including the provisions above mentioned, and alleged that the defendant received possession of the premises on February 13, 1951. It then alleged that the provision of the lease requiring the completion of the well and pump work by February 15, 1951, as above quoted, was "altered and modified by an executed oral agreement" entered into on or about February 15, 1951; that by the terms of this oral agreement the defendant agreed to give the plaintiff an extension of time in which to complete the repairs to the well and pumping plant, and to pay the \$1,500 upon completion of the repairs in accordance with the oral agreement; that the defendant promised to give the plaintiff additional time in which to complete the repairs either up until the defendant was ready to start his "preirrigation" for a cotton crop, or up to the time he had completed his preirrigation and before he was ready to commence his summer irrigation; that as a consideration for the oral agreement the plaintiff agreed to use his best efforts to complete the repairs before the "preirrigation" was desired, and that if more water was desired for preirrigation he would arrange to use the pumping plant of a Mr. Rising, an adjoining owner, the defendant to pay the fuel cost and the plaintiff to pay the rent for the use of that pumping

plant; that as a further consideration the plaintiff, during the latter part of February, 1951, signed a waiver of his rent balance for the purpose of subordinating his rent claim to the lien of a crop mortgage to enable the defendant to get a "budget loan" from a bank; that pursuant to said oral agreement the plaintiff started the repairs on April 3, and completed them on or about April 8, 1951; that pursuant to said oral agreement water was used from Mr. Rising's pumping plant on the 8th, 9th and 10th days of April, 1951; and that the defendant paid the fuel cost and the plaintiff paid the other costs in connection therewith. The answer, among other things, denied all of the allegations of the complaint with respect to the making of an executed oral agreement, and denied that any amount was due to the plaintiff.

So far as material here, the court found that this lease was executed on December 14, 1950, and contained the provisions above quoted; that the defendant went into possession pursuant to the written lease on or about February 13, 1951; that it was not true that the provision of the written lease respecting the time at which the well and pump work should be completed was altered or modified by any executed oral agreement; that it was not true that the plaintiff gave the defendant any consideration for any executed or unexecuted oral agreement altering or modifying the terms of the written lease; that the plaintiff had failed to perform his obligations under the written lease in that he failed to let the defendant into the possession of the premises on February 1, 1951, notwithstanding the request of the defendant for such possession, and in that he failed to complete the repairs to the well and pumping plant by February 15, 1951, as provided for in the written lease; that it is not true that the defendant waived performance of these terms and conditions in accordance with the written lease; and that it is not true that the sum of \$1,500 is due to the plaintiff. Judgment was entered in favor of the defendant and the plaintiff has appealed.

The appellant first contends that the provisions of the lease calling for the payment of the \$1,500 balance upon the completion

of repairs to the well and pumping plant, and that this repair work upon which the payment of \$1,500 hinges "shall" be completed by February 15, 1951, are ambiguous, and that the court erred in preventing him from showing the true intent of the parties in this regard at the time the lease was signed. It is argued that these provisions are ambiguous in that a question exists as to whether they mean that the \$1,500 was not to be paid if the work was not done by February 15, 1951, or whether they mean simply that the \$1,500 would not be due until the work was actually completed, and that if it was not completed by February 15, the respondent would have an action for any actual damage caused by the delay.

Early in the trial the appellant was asked by his counsel as to whether he had had any conversation with the respondent prior to the execution of the lease with respect to "the intended making of any well and pump repairs on this property." An objection was made on the grounds that no ambiguity or mistake in the terms embodied in the written agreement had been pleaded; that there was no allegation of any oral agreement prior to the written agreement which might affect it; that any prior oral agreement was merged in the written agreement; and that evidence of any such prior oral agreement was not admissible for the purpose of varying the terms of the written agreement. This objection was sustained. It is argued that the exclusion of such evidence was error and was prejudicial since the excluded evidence would have shown that the true agreement of the parties, although ambiguously expressed, was that the respondent would pay the \$1,500 upon completion of the well and pump repairs, whether or not they were completed by February 15, 1951, and that if the repairs were not completed by that date the respondent would have an action for damages for any loss resulting from the delay.

[1] No mistake or imperfection in the written lease was put in issue by the pleadings. We see no ambiguity in the provisions in question which would call for or justify the sort of evidence which the appellant contends should have been admitted.

The lease provided not only that the \$1,500 should be due when the necessary repairs to the well and pumping plant were completed but also that the repair work, upon which the payment of the \$1,500 "hinges", was to be completed by February 15, 1951. The land was to be put in cotton and an adequate supply of water for irrigation was a necessity. The rental was large, \$70 an acre for agricultural land, and it was natural and reasonable for the parties to provide in the contract for holding back a substantial part of the rent until an adequate water supply was assured, and to fix with certainty a date when the contemplated repairs must be completed. The respondent needed the water at the proper times in order to make a crop, and it would be most unusual for him to have given the appellant an unlimited time in which to make the repairs, and to rely on the uncertainties of a damage action in the event the repairs were not completed in time to enable him to make a crop. It is suggestive that the appellant did not claim in his pleading that he was permitted to make the repairs whenever he chose, but insisted in his pleading and in trying the case that the terms of the lease had been modified or altered by a subsequent oral agreement. The written lease provides that the work "shall" be done by a certain date, and that the payment of the \$1,500 "hinges" upon the completion of the repairs by that date, and the appellant had two months after the execution of the lease in which to make such repairs. The appellant was bound by his contract and the matter sought to be proved would have resulted in an entirely different contract. No reversible error appears in this connection.

The appellant contends that the court erred in limiting his examination of the respondent under section 2055 of the Code of Civil Procedure in three respects. In the first instance, the respondent had testified in response to questions that water had been obtained from Mr. Rising's pump for a 3-day period about April 8th, and that he had paid for the fuel used in the Rising pump during that period. He was then asked whether this was not what he had

agreed to do "in your oral agreement entered into with Mr. Scribner about the 15th of February", and why he paid for the fuel. Objections to these questions were sustained, and it is argued that this prevented the appellant from showing that the respondent had requested the use of the Rising pump. In the second instance, the respondent had testified that at his request the appellant signed a waiver, referring to the waiver in favor of the bank above referred to. He was then asked whether this did not enable him to get a loan from the bank, and an objection to the question was sustained. It is argued that the appellant was thus prevented from showing that the signing of his waiver enabled the respondent to get the loan. In the third instance the respondent was asked if he had not become angry and cursed the appellant when asked to pay the \$1,500, and an objection was sustained. It is argued that the appellant was thus prevented from showing that the respondent's detention of the premises was wilful, deliberate and malicious, in support of the claim for treble damages.

[2, 3] These matters were of little importance unless the existence of an executed oral contract following the written contract was established. When the second of these questions was asked the court stated that it rested upon an assumption of a fact that was not proved; that there was a written contract here; that the real question was as to whether or not there was an executed oral contract which altered the written contract; and that "so far there has been no agreement about anything as far as I can see." The respondent had testified positively that he had not, on or about February 15, or at any other time, ever promised or told the appellant that he could have additional time in which to repair the pumping plant, and had never at any time told the appellant that he would pay the balance of the rent as soon as the appellant made the repairs. The appellant's testimony on this matter was indefinite and unsatisfactory and was brought out only

after his counsel asked him some 25 or 30 questions. He finally testified that the sum and substance of the oral agreement he claimed was made on February 15 was to the effect that the respondent had agreed to give him all the time he wanted or needed to fix the pump, that no time for doing so was fixed, and that the respondent had agreed to pay the \$1,500 whenever the pump was fixed. The appellant also testified that his talk with the respondent about the waiver in favor of the bank was some two weeks after February 15, when it is claimed the oral agreement was made. This waiver was the one usually required and given where a grower receives a loan secured by a cotton crop. It could hardly have been a consideration for the making of an oral agreement some two weeks before. The fact that the respondent may have found it advisable to get additional water could not be controlling. In connection with the third of these incidents it was stipulated that the appellant had intentionally refused to pay the \$1,500, on the advice of counsel, because of the fact that it was not required by the written lease. It clearly appears that the appellant was holding possession of the property and refusing to pay on a claim of right under the lease, and not because of any malice. The court's finding that there was no later oral executed agreement is amply sustained by the evidence, and it clearly appears that none of the rejected evidence here in question could have affected the result.

It also appears, without conflict, that possession of the land was not given to the respondent on February 1, as agreed, because a potato crop grown on the land the previous year had not been harvested; that the appellant had a share interest in that crop; that the respondent asked the appellant for possession of the land on February 1; and that the appellant then told the respondent that he would have to wait until they could dig the potatoes.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

116 Cal.App.2d 786

LE FEVRE et ux. v. BORWICK et al.
Civ. 19301.

District Court of Appeal, Second District,
Division 2, California.
March 20, 1953.

Action to quiet title to realty. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for plaintiffs on ground of adverse possession and payment of taxes, and defendant administrator appealed. The District Court of Appeal, McComb, J., held that fact that plaintiff caused to be filed a petition for letters of administration in estate of record owner was merely inconclusive evidence supporting defendants' claim that plaintiff had acknowledged title in the estate, and trial court's finding to contrary was binding.

Affirmed.

1. Adverse Possession ¶57

Appeal and Error ¶1010(1)

In action to quiet title on ground of adverse possession, fact that plaintiffs caused to be filed a petition for letters of administration in estate of record owner was merely inconclusive evidence supporting defendants' claim that plaintiffs had acknowledged title in estate, and court's finding to contrary was binding.

2. Adverse Possession ¶49

Plaintiff would not be precluded from acquiring title by adverse possession by fact that during period of redemption tax title was in state. Revenue and Taxation Code, §§ 4216, 4226.

3. Adverse Possession ¶49

A person may obtain title by adverse possession where such party claims title against the entire world excepting the government.

4. Adverse Possession ¶95

In action to quiet title on ground of adverse possession and payment of taxes, evidence established that plaintiffs had paid taxes levied and assessed against the property during the five years next preceding commencement of action, as required by statutes. Revenue and Taxation Code, §§ 4216, 4226.

5. Quieting Title ¶44(3)

In quiet title action by plaintiffs claiming adverse possession, evidence of inequity was insufficient to bar plaintiffs' claim by doctrine of unclean hands. Revenue and Taxation Code, §§ 4216, 4226.

6. Adverse Possession ¶67

Title by adverse possession of necessity implies that plaintiff has entered upon property in question wrongfully, but that lapse of time has changed his tortious act into a lawful act.

Warren M. Goodwin and Max Bergman,
Los Angeles, for appellant.

Walter S. Home, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to quiet title to a parcel of real property, defendant Borwick, as the administrator of the estate of Elva J. Wakeman, hereinafter referred to as defendant, appeals.

Facts: Elva J. Wakeman at the time of her death in December, 1922, owned a parcel of real property at 1640 East 49th Street, Los Angeles. Alva G. Rice was appointed administrator of decedent's estate. He died in September, 1926, without having completed the administration of the estate. A new administratrix was appointed in March, 1951. The taxes due on the property for the fiscal year 1930-31 were not paid, with the result the property was sold to the state for non-payment of taxes.

On July 1, 1936, a tax deed was executed by the County Tax Collector to the State of California. Thereafter the state took over the control and management of the property and collected rents from the occupants until the end of February, 1946.

On February 29, 1946, plaintiffs opened a five-year payment plan for the installment payment of the delinquent taxes on the property pursuant to sections 4216-4226 of the Revenue and Taxation Code by paying to the tax collector twenty per cent

of the then delinquent taxes, penalties and costs. The State of California notified the tenant, who was in possession of the property at the time and who was paying rent to the state, that it would no longer collect any rent. Plaintiffs then began collecting rents from the occupants of the property from March 1, 1946 until August, 1951.

During the same period of time plaintiffs paid the tax collector the annual installments of the delinquent taxes which became due under the said five-year plan. On February 16, 1950, plaintiffs made the final payment and the property thereupon automatically ceased to be tax deeded to the state. Prior to the commencement of the present action plaintiffs paid the taxes which were levied and assessed against the property for the fiscal years 1946-47, 1947-48, 1948-49, 1949-50 and 1950-51. Taxes which were levied and assessed for the years 1951-52 were not fully paid by plaintiffs until January 7, 1952, which was after the commencement of this action on October 10, 1951.

On February 26, 1951, a petition by Lois Anderson Wray dated and verified February 21, 1951, before Roy LeFevre as a notary was filed in the estate of Elva J. Wakeman, praying for issuance to her of letters of administration as successor to the administrator who had died in 1926.

It is conceded that in filing such petition, Mrs. Wray acted on behalf of plaintiffs. The trial court found as follows:

"That the plaintiffs and cross-defendants Dan G. LeFevre and Esther J. LeFevre, husband and wife, as joint tenants, have been in the actual continuous and adverse occupation and exclusive possession of the land described as follows:

"The East 43 feet of Lot 25 of Rugby Ross Tract, as per map recorded in Book 3, Page 24 of Maps, in the office of the County Recorder of Los Angeles County, also known as 1640 East 49th Street, in the City of Los Angeles, County of Los Angeles, State of California, under a claim of title for more than five years succeeding the last day of February, 1946, and have paid all the taxes, state, county or

municipal, which have been levied and assessed upon such land.

"That by reason of such possession of said land for such period and the payment of such taxes, the plaintiffs have acquired a title thereto by prescription being sufficient against all."

Questions: First: Did the filing of a petition for letters of administration in the Estate of Wakeman by Mrs. Wray at the instigation of plaintiffs constitute acknowledgement by plaintiffs that the title to the property in question was in the estate and not in plaintiffs?

[1] *No.* Such fact was merely evidence supporting defendants' claim that plaintiffs had acknowledged title in the estate but was not conclusive, and the trial court's finding to the contrary is binding upon this court. (See *Zolezzi v. Michelis*, 86 Cal. App.2d 827, 832, 195 P.2d 835; *Treager v. Friedman*, 79 Cal.App.2d 151, 170, 179 P.2d 387.

McCracken v. City of San Francisco, 16 Cal. 591, *Parker v. Swett*, 40 Cal.App. 68, 180 P. 351, and *Colorado P. L. Co. v. Clinton E. Worden Co.*, 132 Cal.App. 720, 23 P.2d 314, are each factually distinguishable from the present case and therefore not here applicable.

Second: Did the fact that during the period of redemption the tax title was in the State of California prevent plaintiffs from having an adverse possession sufficient to give them title by adverse possession?

[2,3] *No.* *McManus v. O'Sullivan*, 48 Cal. 7, 15, clearly states the rule that a person may obtain title by adverse possession where such party claims title against the entire world excepting the government. (See also *Lord v. Sawyer*, 57 Cal. 65, 67, and *Allen v. McKay & Co.*, 120 Cal. 332, 338, 52 P. 828.)

Enos v. Murtaugh, 47 Cal.App.2d 269, 117 P.2d 905, *People v. Maxfield*, 30 Cal. 2d 485, 183 P.2d 897, and *Jaffray v. Mies*, 80 Cal.App.2d 291, 181 P.2d 672, are factually distinguishable from the instant case. In the case first cited it was held that plaintiff had obtained title by adverse possession against a mortgage executed by his mother while she was in actual possession

of the property. In the second case the action was between the state and the redemptioner, while in the third case the evidence failed to prove that plaintiff had held the property hostile to the owner of record or anyone else.

Third: *Did the evidence show that plaintiffs had paid taxes which were levied and assessed against the property during the five years next preceding the commencement of the action?*

[4] *Yes.* It is contended by defendants that plaintiffs did not pay the taxes levied and assessed against the property for the year 1951-52 until January 7, 1952, whereas the action was commenced on October 10, 1951. Section 2605 of the Revenue and Taxation Code (amended in 1949) provides that the taxes levied and assessed for the fiscal year 1951-52 should not become due until November 1, 1951, and that payment of the taxes so levied and assessed could not be made prior thereto. It is conceded that plaintiffs paid all taxes levied on the property for the fiscal years 1946-47, 1947-48, 1948-49, 1949-50 and 1950-51 prior to the commencement of the action and as plaintiffs' possession ripened into title not later than March 1, 1951, their inability to pay the taxes for the fiscal year 1951-52 prior to the commencement of the action did not defeat the title so acquired. (*Meier v. Meier*, 71 Cal.App.2d 502, 507 [6], 162 P.2d 950; *Ortiz v. Pac. States, Properties*, 96 Cal.App.2d 34, 39 [7], 215 P.2d 514.)

Fourth: *Was plaintiffs' claim barred by the doctrine of unclean hands?*

[5,6] *No.* The record is devoid of any evidence that plaintiffs acted inequitably toward defendants. It discloses that Mr. LeFevre attempted to get the attorney for the former administrator of the Estate of Elva Wakeman to act as attorney for Mrs. Wray, and that such attorney refused to act; that he had not heard from the heirs for 15 or 20 years; that he made an attempt to locate the heirs and he talked to the former attorney and wrote to the husband of the deceased at the last address he had and received no answer.

Having exhausted his means of finding the heirs, he mailed the notices of filing

of the petition to their last known addresses. There is no inequity shown by such evidence. Title by adverse possession of necessity implies that plaintiff has entered upon the property in question wrongfully, but that the lapse of time has changed his tortious act into a lawful act. (*Packard v. Moss*, 68 Cal. 123, 131, 8 P. 818; *Treager v. Friedman*, 79 Cal.App.2d 151, 170 [6], 179 P.2d 387.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



116 Cal.App.2d 813

HOUSING AUTHORITY OF CITY OF LOS ANGELES v. SHOECRAFT et al.

HOUSING AUTHORITY OF CITY OF LOS ANGELES v. RECORD SEARCHING TITLE CO. et al.

Civ. 19342, 19343.

District Court of Appeal, Second District,
Division 3, California.

March 20, 1953.

As Corrected March 24, 1953.

Rehearing Denied April 6, 1953.

Hearing Denied May 14, 1953.

Actions by city housing authority to condemn fee title to realty for use as site for construction and operation of low-rent housing project. The actions were consolidated for trial, and the Superior Court of Los Angeles County, Alfred L. Bartlett, J., made separate findings and entered interlocutory judgments in favor of authority, and defendants appealed. The District Court of Appeal, Vallée, J., held that action taken by the city council constituted approval of the slum clearance project and the construction of improvements on the site cleared, in compliance with statute.

Interlocutory judgments affirmed.

1. Municipal Corporations ⇐302(1)

Action by council in adopting ordinance approving development, construction, and operation of low-rent housing project or projects, and in approving by resolution the city housing authority's proposal for acquisition of various sites for such proj-

ects, constituted approval of a specific project proposed by authority, in compliance with statute establishing and empowering the authority. Health and Safety Code, §§ 34310, 34312, 34313, 34315(d), 34325.

2. Municipal Corporations ⇨327

Where evidence showed that contract between city housing authority and federal government with respect to low-rent housing project was in existence on effective date of constitutional provision requiring approval of majority of electors of city as prerequisite to establishment of any low-rent housing project, such provision did not operate as a bar to the project, which had not received such approval. Health and Safety Code, § 34200 et seq.; Const. art. 34.

3. Municipal Corporations ⇨302(1)

In view of definition of term "housing project" in the Housing Authorities Law, city council resolution which expressly declared that approval of housing projects on sites proposed by city housing authority was given pursuant to designated section of Housing Authorities Law, constituted approval of slum clearance on the sites approved, as well as the construction of improvements on them. Health and Safety Code, §§ 34212, 34313.

4. Eminent Domain ⇨169

Code of Civil Procedure provision, which is to effect that right of eminent domain may be exercised to provide low-rent housing, does not require that authority must fix rents for various units in housing project in advance of instituting an action to condemn. Code Civ.Proc. § 1238, subd. 21(b); Health and Safety Code, § 34200 et seq.

5. Eminent Domain ⇨169

If Code of Civil Procedure provision which is to effect that right of eminent domain may be exercised by city housing authorities to provide low-rent housing, requires determination, prior to institution of condemnation proceedings, of what income groups project will cater to and what income is necessary to permit person to live in decent housing without overcrowding, city housing authority resolution re-

lating to maximum net family income limits for tenancy constituted such a determination. Code Civ.Proc. § 1238, subd. 21(b); Health and Safety Code, § 34200 et seq.

6. Municipal Corporations ⇨861

Public housing projects for low-income families, and slum clearance, are public uses and purposes for which public money may be expended and private property acquired. Health and Safety Code, § 34200 et seq.

G. G. Baumen, Los Angeles, for appellants.

Paul, Hastings & Janofsky, Leonard S. Janofsky, Loeb & Loeb, Allen E. Susman and Herman F. Selvin, Los Angeles, for respondent.

VALLÉE, Justice.

Appeals by a number of the defendants from the interlocutory judgments in two actions brought by plaintiff to condemn the fee title to real property for use as a site for the construction and operation of a low-rent housing project. The actions were consolidated for trial. Separate findings were made and interlocutory judgments entered. The appeals are submitted on settled statements; one set of briefs; and will be decided in one opinion.

The complaints are each in three counts. The first alleges that the public interest and necessity require the acquisition of the property for use as a site for the construction and operation thereon of a low-rent housing project to provide living accommodations for persons of families who lack the amount of income necessary to enable them to live in decent, safe, and sanitary dwellings without overcrowding. The second alleges that the public interest and necessity require the acquisition of the property for slum clearance. The third alleges the public purpose to be slum clearance and development of low-rent public housing. The parties stipulated as to the market value of the property.

The court found that the public interest and necessity require the acquisition of the fee title to the property. It further found

the property is being acquired for the following public purposes: (a) for use as a site for the construction and operation thereon by plaintiff of a low-rent housing project, as alleged in the first count of the complaints; (b) to demolish, clear, or remove buildings from the area in which said real property is situated, which area is detrimental to the safety, health and morals of the people by reason of the dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating thereon; and, (c) for both of those purposes. It also found that prior to the commencement of the actions the commissioners of plaintiff duly and regularly adopted a resolution which declared that the acquisition of the property is necessary for the public purposes found, and that the project had been approved by the city council of the city of Los Angeles. It further found that: within the area of operation of plaintiff "there are persons who lack the amount of income which is necessary to enable them to live in decent, safe and sanitary dwellings without overcrowding"; the area in which the property is situated "is detrimental to the safety, health and morals of the people by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating thereon"; and, the project is planned and located in the manner which will be most compatible with the greatest public good and the least private injury.

Pursuant to the Rules on Appeal, Rule 7(a), the settled statements say the points raised by defendants on the appeals are: 1.) Plaintiff is without power to condemn the property since it has not complied with the applicable statutory requirements, which are conditions precedent to such power and the exercise thereof; 2.) There was no showing by plaintiff that the taking is necessary for any authorized or lawful use.

Plaintiff is a public corporation. Health & Safety Code, § 34310. It is empowered to engage in the development, construction, and operation of low-rent public housing projects, subject to the requirement that the governing body of the city of Los

Angeles approve any project by resolution. *Idem.* §§ 34312, 34313. It has the power to acquire, pursuant to the Code of Civil Procedure, any real property "*which it deems necessary for its purposes* * * * after the adoption by it of a resolution declaring that the acquisition of the real property described in it is necessary for such purposes." *Idem.* §§ 34325, 34315(d). Italics added. Section 1238, subd. 21, of the Code of Civil Procedure provides that the right of eminent domain may be exercised in behalf of any work or undertaking of a housing authority "(a) to demolish, clear or remove buildings from any area which is detrimental to the safety, health and morals of the people by reason of the dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating in such areas; or (b) to provide dwellings, apartments or other living accommodations for persons or families who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding."

[1] Defendants first assert that the project has not been approved by the city council of Los Angeles. The evidence established that it had been approved. One of these actions was commenced April 20, 1951, the other May 11, 1951. On August 8, 1949, the council adopted an ordinance by which it approved the development, construction, and operation of a low-rent housing project or projects consisting of approximately 10,000 dwelling units. On August 17, 1950, plaintiff sent a letter to the council stating it had selected twelve sites, among them a site on the properties sought to be condemned in these actions. The letter listed the sites and a map of each was attached. On November 16, 1950, plaintiff sent a letter to the council in which it advised that one site had been abandoned and the boundaries of several others revised. The letter requested that the proposal of plaintiff to acquire the land comprising the eleven sites described on attached maps, including the site involved here, be approved. On November 22, 1950,

the council, by resolution, approved the proposal of plaintiff. These acts of the council constituted approval of the project in compliance with the statute.¹ Housing Authority of City of L. A. v. City of L. A., 38 Cal.2d 853, 243 P.2d 515; Drake v. City of Los Angeles, 38 Cal.2d 872, 243 P.2d 525.²

[2] Defendants next assert that the project is barred by Article XXXIV of the Constitution, added in 1950, which requires approval of a majority of the electors of a city as a prerequisite to the establishment of any low-rent housing project. The point has no merit. Article XXXIV specifically excludes from its operation any project "where there shall be in existence on the effective date hereof (December 24, 1950), a contract * * * between any state public body and the Federal Government in respect to such project." Stat.1951, p. CXXIV. The evidence shows that such a contract between plaintiff and the federal government was in existence on the effective date of Article XXXIV. See *Blodget v. Housing Authority of Kern County*, 111 Cal.App.2d 45, 243 P.2d 897.

[3] It is next asserted that this project cannot be considered a slum clearance project because there is no evidence that the city council approved a slum clearance project. The approval of the council expressly declared that it was given pursuant to section 8(b) of the Housing Authorities Law. (Now Health & Saf.Code, § 34313.) The approval was of a "housing project" as that term is defined in the Housing Authorities Law. At the time the project was approved, that Law in relevant part defined a "housing project" as "(1) to demolish, clear or remove buildings from any slum area; * * * or (2) to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income

* * *. The term 'housing project' also may be applied to the planning of the buildings and improvements; the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith." 2 Derring's Gen.Laws, Act 3483, § 3(i), 1949 Supp. Now Health & Saf. Code, § 34212. It is patent that the action of the council carried with it approval of slum clearance on the sites approved as well as the construction of improvements on them.

[4,5] As we have noted, section 1238 subd. 21(b) of the Code of Civil Procedure provides that the right of eminent domain may be exercised to provide dwellings, apartments, or other living accommodations for persons or families "who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding." Defendants contend it was necessary in order that plaintiff have judgment that it prove "what income was necessary for persons to earn to permit them to live in decent housing without overcrowding." They argue that plaintiff presented no evidence "as to what rent actually will be charged in this specific project and what income groups the project will cater to and what income is necessary to permit a person to live in decent housing without overcrowding." They concede that plaintiff "is to determine who are the persons who lack the amount of income which is necessary to enable them to live in decent housing." Section 1238 does not prescribe a procedural condition precedent to maintainance of the action. It merely enumerates the public uses for which the right of eminent domain may be exercised. *Reclamation Dist. No. 551 v. Superior*

1. The Housing Authorities Law was incorporated in the Health and Safety Code in 1951. Stat.1951, ch. 710, § 1, p. 1947. At the time these proceedings were had, section 34313 of the Health and Safety Code was in Stat.Ex.Sess.1938, ch. 4, § 8, p. 14, as amended by Stat. 1945, ch. 766, § 1, p. 1450.

2. The details of the proceedings had and the actions taken by plaintiff and the city council of Los Angeles are set out in *Drake v. City of Los Angeles*, Cal.App., 238 P.2d 1032.

Court, 151 Cal. 263, 267, 90 P. 545. The clause in question is descriptive of one of the public uses for which plaintiff may exercise the right. The intimation that plaintiff must fix the rents for the various units in a project in advance of instituting an action to condemn, borders on the preposterous. Many factors enter into the fixing of rents, and they vary from time to time. The statute does not require such a determination. If, as defendants contend, it was essential that plaintiff determine in advance of beginning the actions "what income groups the project will cater to and what income is necessary to permit a person to live in decent housing without overcrowding," such determination was made. It appears without contradiction that on June 19, 1950, the commissioners of plaintiff adopted a resolution determining the maximum net family income limits for admission to the project, which were found to be at least 20% below the income level at which families can afford decent, safe, and sanitary housing accommodations, and the maximum net family income limits for continued occupancy, which were found to be at the level at which families can afford such housing accommodations.

[6] Defendants next say their property is not sought for any authorized or lawful public use. The contention is wholly without merit. Defendants call the public housing program "socialized housing," and say it is "predicated upon Article 6 of the Constitution of the Union of Soviet Socialistic Republics." Whatever one's philosophical, social, or political views on the subject may be, this question has long since been laid to rest. *Housing Authority of Los Angeles County v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794, held without equivocation that public housing projects for low-income families and slum clearance are public uses and purposes for which public money may be expended and private property acquired.

Pursuant to section 956a of the Code of Civil Procedure plaintiff made application to this court to produce as additional evidence the resolution of its commissioners,

adopted June 19, 1950, fixing maximum income limits. The motion is denied.

The interlocutory judgment in each action is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



BEYERBACH v. JUNO OIL CO. et al.*

Civ. 4602.

District Court of Appeal, Fourth District,
California.

March 25, 1953.

Rehearing Denied April 22, 1953.

Hearing Granted May 21, 1953.

Stockholder's derivative action to compel specific performance by third parties of certain oil agreement. The Superior Court, Tulare County, Frank Lamberson, J., entered judgment dismissing the action, and plaintiff appealed. The District Court of Appeal, Griffin, J., held, inter alia, that since plaintiff had not complied with the order requiring him to post security for costs, dismissal of the action was proper, though plaintiff's application for reduction of amount and change as to form of the undertaking was pending.

Affirmed.

1. Corporations ⚡214

Where stockholder in derivative action against third parties failed to comply with order requiring security for costs insofar as the corporation was concerned, dismissal of the action was proper.

2. Corporations ⚡210, 211(3)

In order to enable stockholder to sue for the corporation or his associate stockholders, where rights of corporation are involved, he must allege that directors declined to sue or refused to permit him to sue in name of corporation, and corporation must be a party, or action should be dismissed.

* Subsequent opinion 265 P.2d 1.

3. Corporations ⚡210

Corporation would be obliged to protect its interests in stockholder's derivative action, and to see that an improper judgment was not rendered against it. Corporations Code, § 830.

4. Corporations ⚡210

Corporation was not only a "proper party", but a "necessary party" to derivative action.

See publication Words and Phrases, for other judicial constructions and definitions of "Necessary Party" and "Proper Party".

5. Corporations ⚡214

Court did not abuse its discretion in requiring stockholder to furnish security for cost in sum of \$1,000 as to corporation which was named as defendant in stockholder's derivative action. Corporations Code, § 834.

6. Corporations ⚡214

Trial judge may consider extent and nature of trial and amount of prospective attorneys' fees and costs, and use his own experience in fixing that value, and, therefore, difference between \$400 suggested by stockholder who brought derivative action and \$1,000 fixed by court as amount which should be filed as security for costs was not so great as to make action of trial court an abuse of discretion. Corporations Code, § 834.

7. Corporations ⚡214

Trial court in stockholder's derivative action did not abuse its discretion in requiring that stockholder furnish security for costs in form of cash or bond or bond issued by surety company authorized to issue such bonds. Corporations Code, § 834; Code Civ.Proc. §§ 1041, 1057.

8. Corporations ⚡214

Where time within which to comply with court's order requiring stockholder in derivative action to post security for costs had expired, order dismissing action was proper, though stockholder's application for reduction in amount and change as to form of undertaking was pending. Corporations Code, § 834.

Zeutzius & Steffes, Los Angeles, and Jamison & Jamison, Porterville, for appellant.

Burford & Hubler, Porterville, for respondent Juno Oil Co.

Harry E. Templeton and Jessie Miller, Los Angeles, for respondent Maurice Henderson.

Guy Knupp, Jr., Porterville, Harry E. Templeton and Jessie Miller, Los Angeles, for respondent Violet V. Carpenter.

GRIFFIN, Justice.

Plaintiff, as a stockholder of the Juno Oil Co., a corporation, brought this derivative action for specific performance on behalf of the corporation and named the corporation, Maurice Henderson, and Violet V. Carpenter, administratrix of the estate of Scott Carpenter, deceased, as defendants. The action was to compel defendant Henderson and the administratrix to assign to the corporation a certain oil and gas lease denominated the Norris Oil Company lease, valued by plaintiff at one million dollars. A copy of this lease was attached to the complaint and made a part thereof by reference.

The complaint contains three causes of action. In substance, the first cause alleges that shortly prior to the incorporation of the Juno Oil Co., on February 26, 1948, an oral agreement was entered into between the plaintiff and defendant Maurice Henderson, Walter Gerhardt, John Gerhardt, and Scott Carpenter (now deceased) whereby it was agreed that a corporation would be formed for the purpose of acquiring, holding and operating oil and gas leases in Santa Barbara County and San Luis Obispo County, which oil and gas leases plaintiff and defendants were to obtain and assign to said corporation in exchange for its capital stock; that plaintiff obtained two such oil and gas leases known as the "Bryan" and "Conklin" leases; that defendants Henderson and Carpenter, on February 26th, and prior thereto, were negotiating for a lease with Norris Oil Company covering 80 acres in the Cuyama Valley; that pursuant to said agreement a corporation was formed and plaintiff trans-

ferred his leases to the corporation; that Henderson and Carpenter and the two Gerhardts agreed that as soon as they received the lease from the Norris Oil Co. for which they were negotiating, they would transfer it to the Juno Oil Co. and, as payment for the transfer of said lease and the leases owned by plaintiff, stock of the Juno Oil Co. would be issued to plaintiff, Carpenter, and the other defendants, but that Henderson and Carpenter never assigned the Norris Oil Company lease to the Juno Oil Co. although numerous demands were made upon them to do so; that a written demand was made on the Board of Directors to compel the transfer of said lease to the Juno Oil Co.; that the defendant directors refused to comply therewith, and in so acting and in failing to act, the defendants conspired to deprive Juno Oil Co. of its property, money and other assets.

The second cause of action adopts substantially the same allegations and alleges that defendants are estopped from refusing to assign the lease. The third cause of action realleges the first cause of action and then alleges that defendants, other than the corporation, had received \$75,000 from said lease; that this sum was for the use and benefit of the corporation; that demand was made for its payment to the corporation and that they refused to comply with said demand. It also alleges that Henderson, Carpenter, and the Gerhardts constituted a majority of the Board of Directors of the Juno Oil Co. and conducted its affairs and that they conspired to deprive that company of its proper assets.

On August 17, 1950, defendant Henderson filed a written motion, under the provisions of section 834 of the California Corporations Code, to require plaintiff to furnish security for the reasonable expenses, including attorneys' fees which might be incurred by him in this action, upon the grounds therein stated, i. e., (1) that there is no reasonable probability that the prosecution of the cause of action alleged in the complaint against this defendant would benefit the corporation or its shareholders; and (2) that this defendant did not participate in the transaction complained of in any capacity. Similar motions were made on

behalf of the other defendants, including the Juno Oil Co. Supporting affidavits were filed in which the defendants alleged generally that Beyerbach represented to them that he had acquired two oil leases; that the cost of their acquisition was the sum of \$900; that Carpenter and the Gerhardts would pay him two-thirds of the cost of their acquisition, if he would hold the leases as trustee for them and would assign the leases to a corporation to be thereafter organized; that for this consideration plaintiff was to be issued one-third of the stock and the remainder would be apportioned among the other individual defendants in the proportion that each of them would contribute to the cost of the acquisition of the leases; that this was done and after the formation of the corporation 60,000 shares were issued, 20,000 to Beyerbach, and 10,000 to the remaining individual defendants. A copy of the minutes of the first meeting of the incorporators was made a part of the affidavit so indicating. It is then alleged that the individual defendants never, at any time, agreed with plaintiff or anyone else to assign or transfer any interest in any lease which they then owned or possessed to the plaintiff or to the Juno Oil Co. It was indicated therein that defendant Henderson and Scott Carpenter did then each own a one-half interest in the Norris Oil Company lease, but it is alleged that at no time did they agree to transfer it or any interest therein to the plaintiff or to the Juno Oil Co., and it is specifically alleged that Carpenter was at no time agent for any of the individual defendants, and that the Gerhardts had no interest in the Norris Oil Company lease whatsoever.

The motions were heard before Judge Eymann, assigned. Oral evidence was also introduced. Plaintiff testified to a certain claimed conversation with Carpenter and Henderson before they went to Nevada and stated that they then agreed to assign the Norris lease to the corporation to be formed; that relying upon this agreement he turned in his leases to the corporation.

Henderson testified he only said to Beyerbach, "I don't think I will put my half in

there" and that Carpenter said "he wanted a little more time to think it over."

It does appear from plaintiff's showing that when defendant Juno Oil Co. was organized in Nevada, plaintiff and Carpenter availed themselves of the services of one Sampson, who was one of the organizers and first directors of the corporation and, by resolution at the first meeting of the incorporators a transfer syndicate was designated the statutory resident agent of the Juno Oil Co. of Nevada. Attached to plaintiff's affidavit is a letter from plaintiff to Sampson dated July 23, 1949, in which he asks Sampson if he remembered that all of his leases and the lease owned by Carpenter and Henderson were to be assigned to the corporation. A letter in answer to plaintiff's letter was received in evidence indicating that the minutes of the company showed that Carpenter was to turn in to the company a certain lease; that he did not have it with him; that he was to have it properly executed and recorded and return it to the corporation in Nevada, together with the minutes of a meeting to be held in California regarding it.

After reviewing the evidence the court took the motions under submission, and on August 27, entered a minute order that "Beyerbach deposit in court, either in the form of cash or a bond or bonds of a surety company authorized to issue such bond", for the purpose indicated, security in the sum of \$5,000 each as to Henderson and Carpenter, and \$1,000 each as to the remaining defendants, including the Juno Oil Co. The court ordered that plaintiff comply with the order within thirty days from August 28, or the action would be "dismissed as to any or all defendants for whom such security has not been given". There was no compliance within that time and on September 24, 1951, plaintiff secured an ex parte order granting 30 additional days within which to make such deposit. On October 22, another judge granted an additional 30 days from October 22, 1951. On October 26, plaintiff filed a "motion for order changing the amount and form of security required to be deposited" by him in which he requested that the amount of security be decreased to \$2,000 each for

Henderson and Carpenter, and \$400 each for the remaining defendants, including the Juno Oil Co. A further request was made that he be permitted to file an undertaking executed by two or more persons, as required by section 1030 of the Code of Civil Procedure and in the form provided by sections 1041 and 1057 thereof, and that such security might be furnished on or before December 1, 1951. An affidavit was made in support of this motion. On October 30, 1951, the individual defendants filed a notice of motion to dismiss plaintiff's action on the ground that the plaintiff failed to deposit with the clerk the security required by the order of the court dated August 27, 1951, within the time allowed by law, and upon the further ground that the purported order of October 22, 1951, extending the time of said plaintiff to any date beyond the 26th day of October, 1951, was beyond and in excess of the jurisdiction of the court. Both of these motions were continued for hearing to November 19, 1951, and were at that time taken under submission. On November 27, 1951, the defendants filed a notice of motion to dismiss the action upon the ground that plaintiff had failed to deposit with the clerk of the court the security required by the order dated August 27, within the time allowed by law. On December 14, 1951, a minute order was entered, granting the motion of defendants to dismiss the action on the ground that plaintiff had failed to deposit security for costs and attorneys' fees within the time as expressly extended by the court. On December 19, the court denied plaintiff's motion to change the amount and form of security and the previous motions of defendants, dated October 30, were denied by the trial court on December 19, 1951, and on that same day judgment of dismissal was entered as to all defendants, including the Juno Oil Co. This appeal is from the judgment of dismissal.

Plaintiff has dismissed his appeal under Rule 19(b) of the Rules on Appeal, as to Arthur Carpenter, Walter Gerhardt and John Gerhardt, who were sued as directors of the oil company, and is proceeding against the Juno Oil Co., Maurice Henderson individually and Violet V. Carpenter,

as executrix of the last will and testament of Scott Carpenter, deceased.

It is plaintiff's first contention that section 834 of the Corporations Code is unconstitutional as being discriminatory, insofar as it requires a plaintiff, in a derivative action, to furnish security for costs and attorneys' fees to a *third person* who holds money or property rightfully belonging to a corporation and who wrongfully refuses to turn such money or property over to the corporation. Secondly, that the court erred and abused its discretion in ordering that plaintiff furnish to each of the defendants Henderson and Carpenter security for costs and attorneys' fees in the sum of \$5,000. Third, that it abused its discretion in ordering that plaintiff furnish to defendant Juno Oil Co. security for costs and attorneys' fees in the sum of \$1,000. Fourth, that it abused its discretion in requiring, by the terms of said order, that security be furnished "in the form of cash or a bond or bonds issued by a surety company authorized to issue such bonds", and that it likewise erred in denying plaintiff's motion for an order changing the amount and form of the security to be deposited by plaintiff. Fifth, that it erred and abused its discretion in granting the motion of defendants Henderson, Carpenter, and the Juno Oil Co. to dismiss plaintiff's action, and in dismissing it on the ground that appellant had not timely furnished security in the amount and form prescribed in the original order, when plaintiff's motion to change the amount and the form of such security was still pending.

[1] It is apparent that plaintiff failed to comply with the court's order in depositing the required security of \$1,000, insofar as the Juno Oil Company, a corporation, was concerned, to prevent a dismissal of the action as to it. If a dismissal of the action as to the corporation was proper and was justified under the facts related, then there is no necessity of determining the constitutionality of that section and the merits of the trial court's action in reference to the individual *third party* defendants since the corporation would no longer be a party to the action.

[2] Under the decisions it has been universally held that in order to enable a stockholder to sue for the corporation or his associate stockholders, where the rights of the corporation are involved, he must allege that the directors declined to sue or refused to permit him to sue in the name of the corporation, and the corporation *must* be a party (plaintiff or defendant); that the failure to make the corporation a party is not a mere defect of parties but leaves the stockholder without a cause of action, the party entitled to the relief not being before the court; and that if the plaintiff fails to do so, his action should be dismissed absolutely. *Shawhan v. Zinn*, 79 Ky. 300; *White v. First National Bank*, 252 Pa. 205, 97 A. 403; *Bruschke v. Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N.E. 417; *Cullum v. General Motors Acceptance Corporation*, Tex.Civ.App., 115 S.W.2d 1196; *Starr v. Heald*, 28 Okl. 792, 116 P. 188; *Pourroy v. Gardner*, 122 Cal.App. 521, 10 P.2d 815; *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788; *Gorham v. Gilson*, 28 Cal. 479; *Shenberg v. DeGarmo*, 61 Cal. App.2d 326, 143 P.2d 74; 13 Am.Jur. p. 496, et seq., Secs. 450-459, 461. See, also, 6A Cal.Jur. pp. 819, 820, sec. 464, where it is said:

"Since an action by a stockholder is entertained only on behalf of the corporation and on a corporate cause of action, and plaintiff stockholder must allege the refusal of the corporation to commence the action, the corporation should be made a party defendant, although relief is asked against individual defendants only and no complaint is made as against the corporation."

In 18 C.J.S., Corporations, § 570-b, p. 1293, it is said:

"The corporation is a proper and indispensable party to a suit brought by one or more stockholders for its benefit. A failure to make it a party is not a mere defect of parties; it leaves the stockholder without a cause of action and the court without jurisdiction. In such case the suit should be dismissed, or if a decree is rendered it may be set aside."

In *Beach v. Cooper*, 72 Cal. 99, 13 P. 161, it was stated that at no stage of the proceedings can the corporation defendant be dismissed from the case without working a discontinuance.

The question of whether the provisions of section 834 of the Corporations Code were intended to apply to third party defendants insofar as security may be demanded of a derivative stockholder plaintiff, is not raised in this action and it will not be necessary to determine that question. (See discussion thereof in 37 Cal. Law Review, p. 399.)

Since the constitutionality of section 834 as applied to the corporation is not raised we will merely refer to *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, as upholding its constitutionality insofar as it pertains to the contract clause and due process clause of the Federal Constitution. But see, dissenting opinion of Mr. Justice Carter in *Hogan v. Ingold*, 38 Cal.2d 802, 824, 243 P.2d 1, as to its constitutionality involving the equal protection of the law clause.

[3-6] The argument that the court abused its discretion in requiring the plaintiff to furnish security in the sum of \$1000 as to the corporation, because it was only a nominal party to the action, and the argument that the litigation required nothing to be done by it in addition to what would be required to be done by the other defendants are without foundation. The corporation would be obliged to protect its interests in the case and see that an improper judgment was not rendered against it. Section 830, Corporations Code. It was not only a proper party but a necessary party to the action and the court had no jurisdiction to proceed to trial and enter judgment, either for or against it, without it being made a party to that action. The difference in the sum of \$400 suggested by plaintiff and the \$1000 fixed by the court, cannot be said to be unreasonable or an abuse of discretion in view of the fact that the trial judge may consider the extent and nature of the trial and amount of the prospective attorneys' fees and costs, and use

his own experience in fixing that value. *County of Riverside v. Brown*, 30 Cal.App. 2d 747, 749, 87 P.2d 60; *Wood v. Gordon*, 112 Cal.App.2d 374, 376, 246 P.2d 84.

[7] As to plaintiff's fourth claim it is argued that the court erred in requiring a cash bond or a bond issued by a surety company, when plaintiff was able and willing to post an undertaking executed by personal sureties. Section 1057 of the Code of Civil Procedure does provide generally that in any case where an *undertaking* or bond is authorized or required by any law of this state, the officer taking the same must require the surety to do certain things. Section 1041 of the Code of Civil Procedure prescribes the form and sufficiency of such undertakings where a party desires to give an *undertaking* and where the statute of this state provides that one may be given. It is accordingly argued by plaintiff that since there is no statute which deprives a person of the right to furnish a bond or undertaking executed by personal sureties, the court erred in not allowing plaintiff to do so in this case.

Section 834 of the Corporations Code provides that:

"If the court determines, after hearing the evidence adduced by the parties at the hearing, that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the nature and amount of security to be furnished by the plaintiff * * *." (Italics ours.)

The court did determine that it should be "in the form of cash or a bond or bonds issued by a surety company authorized to issue such bonds." The court did not authorize the giving of an undertaking by personal sureties and plaintiff offered no such undertaking for approval. Section 834 is a special act pertaining to the prescribed subject matter. Our codes are full of provisions making special rules applicable to different classes of cases and it has never been supposed that such provisions are invalid merely because the procedure in each case is not in all particu-

lars exactly the same as in every other case. Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L.R.A., N.S., 682. Any criticism as to the wisdom or folly of that part of section 834 of the Corporations Code giving the court the right to determine the nature of the security should be addressed to the legislature and not be made the subject of judicial legislation.

[8] As to point five, whether plaintiff failed to furnish security within the time prescribed by law or within the time prescribed by the original order, it appears that plaintiff secured two orders extending his time in which to deposit security as ordered on August 27. The first one, on September 24, gave plaintiff 30 days additional time, and the second one, signed on October 22, gave him 30 days from that date or, to November 21, in which to comply. No further application was made and no order was granted extending the time beyond that date. On November 26, five days after the expiration date, defendants moved to dismiss, for noncompliance, and on December 19, a judgment of dismissal was entered. It is true that an application for reduction in amount and as to form of the undertaking was pending during this latter period, but no request was therein made for further extension of time to comply with the original order. Therefore, the court's order dismissing the action, particularly as to defendant Juno Oil Co., a corporation, was proper. Since such order was authorized and said corporation was thereafter and is now no longer a party thereto, plaintiff is not authorized, in behalf of the corporation as alleged, to proceed in his own name against the other defendants. The trial court would have no jurisdiction to proceed, and the action against the other defendants should be dismissed. 18 C.J.S., Corporations, § 570, p. 1293, and cases heretofore cited. It therefore becomes unnecessary to consider the other points raised.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

116 Cal.App.2d 736

TRUCHON v. TOOMEY.

No. 15692.

District Court of Appeal, First District,
Division 1, California.

March 18, 1953.

Hearing Denied May 14, 1953.

Proceeding for writ of mandate to compel registrar of voters to register petitioner to vote. The District Court of Appeal, Bray, J., held that where petitioner had pleaded guilty to felony and was admitted to probation, and later withdrew guilty plea and entered not guilty plea, and case was dismissed and record was expunged under Section 1203.4, Penal Code, petitioner was not "convicted" of any infamous crime as would disfranchise petitioner.

Writ granted.

1. Elections ⇨90

Any felony is an "infamous crime" within constitutional provision disfranchising any person convicted of any infamous crime. Const. art. 2, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Infamous Crime".

2. Elections ⇨90

Petitioner seeking writ of mandate to compel registrar of voters to register petitioner who had pleaded guilty to a felony and who was admitted to probation, and who later withdrew guilty plea and entered not guilty plea, and whose case was dismissed and whose record was expunged under statute, was not "convicted" of any infamous crime as would disfranchise petitioner. Const. art. 2, § 1; Pen.Code, § 1203.4.

See publication Words and Phrases, for other judicial constructions and definitions of "Convicted"

3. Elections ⇨94

That Legislature in pardon statute specifically provided that pardon by Governor included restoration of right to vote was not conclusive that Legislature intended that after release from probation defendant's right to vote should not be restored, merely because probation statute did not specifically mention restoration of right to vote. Const. art. 2, § 1; Pen. Code, §§ 1203.4, 4852.01 et seq., 4852.17.

Kenneth C. Zwerin, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Dion R. Holm, City Atty. of City and County of San Francisco, Lawrence S. Mana, Deputy City Attorney, San Francisco, for respondent.

BRAY, Justice.

Petition for writ of mandate to compel the San Francisco Registrar of Voters to register petitioner to vote.

Question Presented.

Does article II, section 1, California Constitution, disfranchise a person who, having been convicted of a felony, has successfully completed his probation, and, under the provisions of section 1203.4 of the Penal Code, has been released from all penalties and disabilities resulting from the crime of which he was convicted?

Facts.

Petitioner in 1946 pleaded guilty to violation of section 220, Penal Code (assault with intent to commit rape), a felony. He was admitted to probation conditioned upon serving 90 days in the county jail. May 14, 1951, he withdrew his plea of guilty and entered a plea of not guilty. The cause was dismissed and the record was expunged as provided in section 1203.4, Penal Code.

Was Defendant "Convicted" within the Meaning of the Constitutional Provision?

"* * * no person convicted of any infamous crime, * * * shall ever exercise the privileges of an elector in this State * * *". Const., art. II, § 1.

"* * * defendant * * * shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." Penal Code, § 1203.4.

[1] In Matter of Application of Westenberg, 167 Cal. 309, 139 P. 674, it was held that all felonies are infamous crimes. "Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies,

as the punishment therefor is imprisonment in the state prison." 167 Cal. at page 319, 139 P. at page 679. Petitioner contends that as to crimes not infamous because of their nature but deemed felonies because punishable by imprisonment in the state prison, such crimes cannot be held infamous unless actually the defendant serves time in such prison, that it is not the possibility of imprisonment that makes the crime infamous but the actuality of it. He contends that the Legislature carried this logic into section 644 of the Penal Code, the habitual criminal act. There a person cannot be declared an habitual criminal, no matter how many previous convictions he has suffered, unless he actually has been confined in a state prison the requisite number of them. We feel, however, that under article II of the Constitution a felony is an "infamous crime" and that the determination of the matter before us turns on the meaning of the word "convicted," as there used.

[2] While the Legislature has provided in section 1203.4 of the Penal Code for release from all disabilities, it there and elsewhere has provided certain exceptions. Thus, in the section itself, it is provided "that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted * * *."

Section 309, Vehicle Code, provides that the termination of probation shall not affect any revocation or suspension of any license of the probationer and his prior conviction shall be considered for the purpose of suspending or revoking any license on the ground of two or more convictions.

Section 12011.5 of the Education Code provides that for the purposes of certain sections of that code, "A plea or verdict of guilty or a finding of guilt by a court in a trial without a jury is deemed to be a conviction * * *."

There are a number of cases in California considering the exceptions to the release from disabilities. On the effect of section 1203.4 the California cases have not been uniform. In Meyer v. Board of Medical Examiners, 34 Cal.2d 62, 206 P.

2d 1085, the court in a 4 to 3 decision held that even though proceedings under section 1203.4 had been taken, there was a conviction supporting the board's suspension of the physician's license. It pointed out that it has been held that probation does not wipe out the conviction in the following respects: (1) It is a prior conviction as to subsequent convictions. *People v. Hainline*, 219 Cal. 532, 28 P.2d 16; *People v. Barwick*, 7 Cal.2d 696, 62 P.2d 590. (2) It may be offered for impeachment purposes in a subsequent prosecution. *People v. James*, 40 Cal.App.2d 740, 105 P.2d 947. (3) It may be considered for the purpose of suspending a driver's license. Veh.Code, § 309; *Ellis v. Department of Motor Vehicles*, 51 Cal.App.2d 753, 125 P.2d 521. (4) In a second prosecution for failure to provide for a minor child not only the prior conviction may be raised "but all matters inherent in such conviction were admissible in evidence * * *." 34 Cal.2d at page 67, 206 P.2d at page 1088. *People v. Majado*, 22 Cal.App.2d 323, 70 P.2d 1015.

"As the release of the 'penalties and disabilities' clause of the probation statute has been so qualified in its application, it does not appear that it was thereby intended to obliterate the record of conviction against a defendant and purge him of the guilt inherent therein (cf. *Sherry v. Ingels*, supra, 34 Cal.App.2d 632, 94 P.2d 77) or to 'wipe out absolutely' and for all purposes the dismissed proceeding as a relevant consideration and 'to place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him.' *People v. Mackey*, 58 Cal. App. 123, 130, 208 P. 135, 138. From this standpoint, appellant's theory that the import of the probation statute and the dismissal proceeding is to expunge the record of the crime, *Sherry v. Ingels*, supra; *People v. Mackey*, supra, cannot prevail." *Meyer v. Board of Medical Examiners*, supra, 34 Cal.2d 62, 67, 206 P.2d 1085, 1088.

It is admissible in evidence in a civil proceeding to show that he pleaded guilty

to the offense, as an admission against interest. *Vaughn v. Jonas*, 31 Cal.2d 586, 191 P.2d 432.

For purposes of impeachment of a witness by proof that he was convicted of a prior crime it has been held that the witness has been "convicted" even though his case is on appeal from that conviction, *People v. Ward*, 134 Cal. 301, 66 P. 372; likewise, for purposes of pleading a former conviction, *People v. Clapp*, 67 Cal.App.2d 197, 153 P.2d 758.

In *In re Phillips*, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, it was held that for purposes of disbarment an attorney was convicted even though the attorney had been released from penalties and disabilities by proceedings under section 1203.4, on the ground that the Legislature could not infringe upon the judicial power of the court to discipline its own officers. The decision in the *Meyer* case was based upon that of the *Phillips* case. In those cases the court was dealing with the question of whether the Legislature intended to relieve from the penalties and disabilities imposed, the defendant's right to practice law or medicine, and held that it did not so intend. Moreover, in *Suspension of Hickman*, 18 Cal.2d 71, 113 P.2d 1, not mentioned in the *Meyer* case, it was held that suspension of an attorney's license to practice law on conviction of attempted grand theft, a felony, must be terminated because petitioner was given probation and later the charge was dismissed under section 1203.4. It was held, 18 Cal.2d at pages 73, 74, 113 P.2d at page 2: "* * * the criminal proceedings were suspended prior to and without the imposition of judgment and sentence and no judgment of conviction was ever entered. * * * there is now no criminal proceeding pending against the petitioner * * *."

It thus appears that in California as in New York the word "conviction" has been used with varying meanings.¹

The interpretation of "convicted" in article II has never been made. However, a similar provision in the New York Consti-

1. See *People v. Fabian*, infra, 192 N.Y. 443, 85 N.E. 672, 18 L.R.A., N.S., 684.

tution has. Section 2 of article 2 of the 1894 New York Constitution provided that the Legislature should "enact laws excluding from the right of suffrage all persons convicted of bribery or any infamous crime." The Legislature then provided that no person convicted of a felony might vote. In *People v. Fabian*, 192 N.Y. 443, 85 N.E. 672, 18 L.R.A.,N.S., 684² the New York Court of Appeals was required to construe the word "convicted" as it appeared in the constitutional provision as it applied to Fabian who had been found guilty of burglary in the first degree, a felony, but sentence suspended. The court pointed out that under the common law witnesses who had been convicted of infamous crimes were disqualified from testifying, but were not deemed to have been thus convicted unless the record established the rendition of a judgment upon the verdict.³ It then stated that the provision in the 1894 Constitution contemplating the disfranchisement of convicts was similar to that in both the preceding 1846 and 1822 Constitutions. Referring to the framing of the original Constitution of 1822 the court said, 192 N.Y. 443, 85 N.E. at page 674, 18 L.R.A.,N.S., at page 686: "This disqualification of witnesses as a consequence of crime was one with which the courts at that day, and consequently the public, must have been most familiar, and it seems to me quite natural that the members of the constitutional convention should have had it in mind, and that when they spoke of 'persons convicted' they meant persons against whom a judgment of conviction had been rendered. It would hardly be reasonable to authorize the disfranchisement of a voter simply because a verdict had been found against him (upon which judgment might have been or might yet be arrested), and yet require proof that the verdict had been followed by a judgment in order to effect the disqualification of a witness.

"Upon reason, apart from authority, it will hardly be contended that a man should be deprived of the right of suffrage by

a less conclusive judicial pronouncement against him than is required to disqualify him or affect his credibility as a witness. * * * In discussing the rule which thus renders a witness incompetent, in the case of *Faunce v. People*, 51 Ill. 311, the Supreme Court of Illinois has said: 'An examination of the adjudged cases in the various states of the Union, where substantially the same laws are in force, will show that it is not the commission of the crime, nor the verdict of guilty, nor the punishment, nor the infamous nature of the punishment, but the final judgment of the court, that renders the culprit incompetent. It is true that writers and judges have loosely said that a party is convicted on the finding of a verdict against him. It is true in a sense that he has been convicted by the jury, but not until the judgment is rendered is he convicted by the law; and the statute only, like the common law, refers to the conviction imposed by the law.' It may readily be conceded that the words 'convicted' and 'conviction' are often employed with reference to the verdict in a criminal case, as distinguished from the judgment, without affecting the validity of this argument as to the meaning of 'convicted' in the constitutional provision under consideration and in the legislative enactments adopted in pursuance thereof."

The court then discusses the fact that the word 'conviction' in the statutes of that state has been used with varying meanings, and states: "This use of the term, with varying meanings, even in the same statute, and extending right down to the immediate present, certainly demonstrates that there is no fixed signification which the courts are bound to adopt, and leaves us the utmost freedom of inquiry as to what was intended when the Legislature was empowered to disfranchise convicted citizens. * * * 'where disabilities, disqualifications, and forfeitures are to follow upon a conviction, in the eye of the law, it is that conviction which is evidenced by sentence and judgment, and that where sentence is

2. Approved in *Lewis v. Carter*, 220 N.Y. 8, 115 N.E. 19, and in *People ex rel. Marcey v. Lawes*, 254 N.Y. 249, 172 N. 254 P.2d—41

E. 487, not dealing, however, with disfranchisement.

3. See also *People v. Ward*, supra, 134 Cal. 301, 307, 308, 66 P. 372.

suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.'” (The above statement well applies to the California cases on the effect of section 1203.4.)

After considering many cases in which the word “convicted” is construed and pointing out that the word has been given both a narrow and a broad interpretation, the court holds that for the imposition of the disability of disfranchisement the word must be interpreted in its broad sense of verdict, or plea, of guilty followed by judgment and sentence.

In *In re Ringnald*, D.C., 48 F.Supp. 975, the petitioner applied for naturalization. Objection was made that he had been convicted in Orange County, California, of a felony, negligent homicide, Veh.Code, § 500. He had been given one year probation at the end of which time the case had been dismissed in proceedings under section 1203.4, Penal Code. In overruling the objection the court stated that the view which obtains in federal courts is, 48 F.Supp. at page 977, “that when we speak of a ‘conviction’ from which disabilities flow, we refer to a conviction followed by the imposition of a sentence, which is the judgment in a criminal case. And where imposition of the sentence is stayed, there is no final judgment.” The court states that the probation period is not a sentence, and that there is a difference between the *fact* of conviction and the *judgment* of conviction.

In *re Anderson*, 34 Cal.App.2d 48, 92 P.2d 1020, 1022, involved the construction of article VII of the Constitution, which empowers the governor to grant pardons “after conviction.” The petitioner was found guilty of a felony by a jury. Before sentence the governor pardoned him. The court held that the word “conviction” in that article should be accorded its normal popular meaning and “should be interpreted as meaning the verdict of guilty, and that sentence and judgment are not necessary to constitute a conviction.” It cited a number of out-of-state cases interpreting the same word in the pardon section of the particular state constitution. It also relied

on *Ex parte Brown*, 68 Cal. 176, 8 P. 829, construing the word “conviction” in the statute permitting admission to bail pending appeal, where application for bail was made after verdict but before sentence and judgment; *People v. Ward*, supra, 134 Cal. 301, 66 P. 372, construing “convicted” in section 2051, Code of Civil Procedure, permitting impeachment of a witness convicted of a felony where the witness had been found guilty by a jury but not sentenced; *McKannay v. Horton*, 151 Cal. 711, 91 P. 598, 600, 13 L.R.A., N.S., 661, where the specific question was whether after verdict and judgment but while an appeal was pending a person was “convicted of a felony” within the meaning of a charter provision providing for removal from office in case of such conviction. The court held he was. In the *Anderson* case the court distinguished the ruling in *In re Ricciardi*, 182 Cal. 675, 189 P. 694, where it was held by a 4 to 3 decision that during pendency of an appeal, there was no such conviction as would justify disbarment of an attorney by stating, 34 Cal.App.2d at page 54, 92 P.2d at page 1023: “That case, while recognizing that the ordinary meaning of the term ‘conviction’ does not include judgment or sentence, held, because of the peculiar consequences that would follow from a contrary construction under the facts of that case, that the term must be given a technical meaning.”

One of the out-of-state cases referred to in the *Anderson* case, supra, is *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699, where, although it was held that for purposes of pardon “conviction” in the Massachusetts Constitution meant return of a guilty verdict by a jury, the judge called attention “to the broader meaning which attaches to the term when it is employed for disqualifying purposes, precisely as it seems to me the word ‘convicted’ is employed in the constitutional provision and legislation before us in the present case.” *People v. Fabian*, supra, 192 N.Y. 443, 85 N.E. at page 675, 18 L.R.A., N.S., at pp. 686-687.

The word “conviction” obviously has two meanings, one narrow and the other broad, as under the common law, the King

could pardon at any time, even prior to trial.⁴ The provision in article VII, section 1, of our Constitution⁵ restricting the pardoning power of the governor to "after conviction," is, of course, a limitation of the power to pardon. Therefore, in construing such limitation, the word "conviction" must be interpreted in its narrowest sense. Also, whatever situation exists that requires that a pardon be granted, likewise requires that it be applied at the earliest possible moment, within the limitation imposed. On the other hand, when considering the impositions of penalties and disabilities, particularly such a serious disability as that of disfranchisement, it is important that such imposition be made only when the proceeding causing it to be imposed is finally completed. Just as in 1822 when the New York Constitution was adopted, the People of New York had in mind as set forth in *People v. Fabian*, supra, a broad definition of the word "conviction," in the disfranchisement section, so, too, must the People of California have been similarly minded when they placed in the Constitution of 1849 practically the same provision. Art. II, § 5, Const. of 1849.

In *In re Anderson*, supra, 34 Cal.App.2d 48, 92 P.2d 1020, 1023, we pointed out that in *In re Riccardi*, supra, 182 Cal. 675, 189 P. 694 "because of the peculiar consequences that would follow" from a narrow interpretation of the word "convicted," in considering the disbarment of an attorney before his conviction became final, the court was required to give the word a broad interpretation. In view of the serious consequences which would follow here from a narrow interpretation, the broad one is required.

Thus, there is no real conflict between the decision in *In re Anderson*, supra, and ours. There, because the limitation of the pardoning power was being considered, the philosophy of the narrow interpretation of that limitation was necessarily applied. In our case, as the imposition of a serious disability is being considered, the philos-

ophy of the broad interpretation must necessarily be applied.

The attorney general suggests that our interpretation would result in the situation that a person on probation would continue to be entitled to vote and that neither the People nor the Legislature intended this result. Fundamentally, there does not appear anything wrong in not taking away the franchise of a person on probation who is behaving in such manner that on the termination of his probation by proceedings under section 1203.4 he would be entitled to continue to vote. If he fails to fulfill the terms of his probation it can be revoked and then because of sentence, the Constitutional inhibition would apply.

[3] In 1943 the Legislature adopted a procedure for restoration of rights and application for pardon. Penal Code, § 4852.01 et seq. In section 4852.17 it provided that a pardon by the governor entitles one to exercise all "civil and political rights of citizenship, including but not limited to: (1) The right to vote * * *." The attorney general points out that the probation statutes contain no such provision, and contends, therefore, that it appears that the Legislature intended that only a pardon can restore the right to vote. We fail to follow this reasoning. In the first place, it is the Constitution and not the Legislature which denies the right to vote. Secondly, we are dealing with the question of the taking away of that right, not its restoration. Thirdly, as pointed out before, the philosophy concerning pardons is different from that concerning the imposition of disabilities. Fourthly, section 4852.01 et seq. deal only with pardons granted after a person has been convicted of a felony and "released from the State prison or other State institution or agency to which he was committed * * *." Penal Code, § 4852.01. Fifthly, the exceptions to the removal of penalties and disabilities which the Legislature expressly imposed left very few from which a probationer could be relieved. If it be held, contrary to any expression, that the Leg-

4. See *Jones' Blackstone*, Vol. 2, p. 2572, § 381, and p. 2647, § 449.

5. It was also in the Constitution of 1849, art. V, § 13.

islature also intended to except restoration of the right of franchise, a proceeding under section 1203.4 would restore very little to the probationer.

In 22 So. Cal. Law Rev. 476, there is an interesting article upon the effect of section 1203.4 in the respects here considered. It points out that the Legislature intended to release a defendant from all civil penalties and disabilities, except those specifically excepted, and disbarment. Restoration of franchise rights is not excepted. The disbarment exception has been made by the courts on the principle that the Legislature has no power to infringe upon the inherent power of the courts to discipline its officers and therefore the section will not apply. It points out, too, "The general rule where conviction results in civil penalties and disabilities is that conviction takes the technical meaning of verdict plus judgment." P. 477; see also 23 So. Cal. Law Rev. 109, and 2 Stanford Law Rev. 221.

The pleadings concede that except for the claimed disability petitioner is a qualified elector of the City and County of San Francisco. Let the peremptory writ of mandate issue directing respondent to register petitioner as an elector of the City and County of San Francisco, State of California.

PETERS, P. J., and FRED B. WOOD, J., concur.



116 Cal.App.2d 681

**UNION BANK & TRUST CO. et al. v.
GORDON.**
Civ. 19231.

District Court of Appeal, Second District,
Division 3, California.
March 13, 1953.

Hearing Denied May 7, 1953.

Suit by special administrator of estate of a decedent to quiet title to realty, wherein defendant filed a cross-complaint naming a per-

son other than plaintiff as cross-defendant. The Superior Court of Los Angeles County entered a judgment that cross-defendant and defendants each owned undivided one-half interest in the realty and plaintiff appealed from such judgment and from order denying motion to vacate the judgment. The District Court of Appeal, Vallée, J., held that cross-defendant who remarried with knowledge of divorce decree obtained by her husband in sister state was estopped to deny validity of such decree.

Judgment reversed with directions.

1. Divorce ⇐172

A spouse who remarries with knowledge of and in reliance on a decree of divorce secured by the other spouse is estopped from contesting validity of decree.

2. Divorce ⇐330

A woman who remarried with knowledge of divorce decree obtained by her husband in sister state was estopped to deny validity of such divorce, and application of estoppel rule was not prevented by statutory provision that divorce obtained in another jurisdiction shall be of no effect in California if both parties to marriage were domiciled in California when divorce proceeding was commenced. Civ. Code, § 150.1.

3. Marriage ⇐54

A "putative marriage" is one which has been solemnized in due form and celebrated in good faith by both parties but which by reason of some legal infirmity is either void or voidable.

See publication Words and Phrases, for other judicial constructions and definitions of "Putative Marriage".

4. Marriage ⇐54

On dissolution of a putative marriage property which the de facto spouses have acquired as a result of their joint efforts is to be treated as accumulation of valid marriage.

5. Husband and Wife ⇐273(1)

Where defendant married a second husband with knowledge of divorce decree obtained by her first husband in sister state, and cross-defendant married defendant's first husband without knowledge that such divorce decree was not valid, and cross-de-

fendant and defendant's first husband lived together as husband and wife and acquired property by their efforts, entirety of such property vested in cross-defendant upon death of defendant's first husband and defendant had no interest in such property.

6. Appeal and Error ⇨1176(1)

Where judgment was to be reversed, and person against whom reversal would work took no issue with suggestion made in opening brief by party in whose favor reversal would work that, in event of reversal, it should be with directions to render judgment in her favor, party against whom reversal would work would be deemed to have acquiesced in suggestion.

Stahlman & Cooper, Loeb & Loeb, Grant B. Cooper, Harry L. Gershon and Herman F. Selvin, Los Angeles, for appellants.

Kenny & Morris, Robert W. Kenny, Los Angeles, for respondents.

VALLÉE, Justice.

Plaintiff, as special administrator of the estate of Leo Gordon, sued Elsie Gordon to quiet title to various parcels of realty. Elsie Gordon answered and filed a cross-complaint, naming Sara Gordon as cross-defendant, in which she prayed that title be quieted in her. Sara Gordon answered the cross-complaint. The judgment decreed that Sara Gordon, subject to administration of the estate of Leo Gordon, and Elsie Gordon, is each the owner of an undivided half interest in the property. Elsie Gordon moved the court to vacate the judgment and to have another and different judgment entered. The motion was denied. Elsie Gordon appeals from the judgment and from the order denying her motion.

The facts which are undisputed are these:

1. December 21, 1921—Leo Gordon and Sara Gordon were married in New York. One child was born to them, Lucille.

2. June 3, 1927—Sara obtained a decree of separate maintenance against Leo in New York.

3. March 26, 1928—Leo moved to Los Angeles where he was domiciled at all times until his death.

4. May 31, 1929—Leo sued Sara for divorce in Nevada. Sara was served by publication in Nevada and personally served in New York, but did not answer or appear in the action. Sara was never in Nevada.

5. July 22, 1929—A final decree of divorce was granted Leo in the Nevada action.

6. July 29, 1929—Leo married Elsie Gordon in California. At the time of their marriage Elsie knew that Leo had been divorced from Sara in the manner described above. Leo and Elsie lived together in California as man and wife until Leo's death. One child was born to them, Arlene.

7. September 6, 1936—Sara married Milton Lewis in New York. Within two years of the marriage, Elsie learned of it. Elsie testified that thereafter, in reliance on the foregoing facts and the failure of Sara to challenge the validity of the Nevada decree, she continued to cohabit with Leo as his wife and to work with him in their business until his death. She also testified she would have done none of these things had Sara at any time successfully challenged the validity of the Nevada decree prior to Leo's death.

8. November 14, 1939—Leo and Elsie were without funds or assets.

9. Between August 29, 1947, and July 31, 1949—The property which is the subject of this litigation was purchased at various times during this period by Leo and Elsie solely with funds accumulated by them through their joint efforts after November 14, 1939. The property was conveyed to and intended to be held by them in joint tenancy, and was held by them as joint tenants until Leo's death.

10. October 17, 1949—Sara obtained a decree of the Supreme Court of New York annulling her marriage to Milton. The bill, filed by Sara, alleged that she and Milton "were duly married" in New York on September 6, 1936; that their marriage was the second marriage for both of them; and that

Milton had induced her to marry him by fraud and misrepresentation as to his financial means to support her and Lucille, the daughter of Sara and Leo. The New York court found that Sara and Milton "were duly married" on September 6, 1936, in New York and that said marriage was the second marriage for both of them. The decree annulled the marriage on the alleged ground of fraud.

11. May 9, 1950—Leo died in the county of Los Angeles. He left a will dated November 21, 1943, which was admitted to probate on January 5, 1951, in which he bequeathed and devised all of his property, one-half to Elsie, and one-fourth each to Lucille and Arlene. Plaintiff was appointed special administrator of the estate.

The court found that; At all times since December 21, 1921, Leo was the lawful wedded husband of Sara; the marriage of Leo and Elsie was void; Elsie never was the lawful wedded wife of Leo; the Nevada decree obtained by Leo was void; Sara is not estopped or barred by laches to assert her claim to the property involved by reason of the invalidity of the Nevada decree; the property was purchased by Leo and Sara during their marriage solely out of their community property; Leo, during his lifetime, conveyed an undivided half interest in the property to Elsie. The judgment decreed that Sara, subject to administration of Leo's estate, and Elsie, is each the owner and entitled to the possession of an undivided half interest in the property.

The contest is actually between Elsie and Sara. Elsie asserts, as ground for reversal, that on the undisputed facts Sara is estopped to attack or assert the invalidity of the Nevada decree, and that she (Elsie) is the owner of the property in its entirety. We have concluded her contention must be sustained.

[1] It is axiomatic that one who is silent when he ought to speak cannot speak when he ought to be silent. See Code Civ. Proc. § 1962, subd. 3. It is established doctrine in this state that a spouse who remarries with knowledge of and in reliance

on a decree of divorce secured by the other spouse, is estopped from contesting the validity of the decree. In the recent case of *Wendell v. Wendell*, 111 Cal.App.2d 899, at page 902, 245 P.2d 342, at page 344, the court said: "The law is well settled in this state that one who remarries with knowledge of and in reliance on a divorce secured by the other spouse, is estopped to deny the validity of the divorce. *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 P. 988 [Ann. Cas.1917E, 122]; *Kelsey v. Miller*, 203 Cal. 61, 263 P. 200; *In re Kyle*, 77 Cal.App.2d 634, 176 P.2d 96; *Rediker v. Rediker*, 35 Cal.2d 796, 221 P.2d 1, 20 A.L.R.2d 1152."¹ *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 P. 988, held that a wife, divorced by her husband in a court of a state other than that of his residence, was estopped from attacking the decree because of her subsequent marriage to another. The rule was reaffirmed in *Kelsey v. Miller*, 203 Cal. 61, 86-87, 263 P. 200. See also *Hensgen v. Silberman*, 87 Cal.App.2d 668, 197 P.2d 356; *In re Adoption of D. S.*, 107 Cal.App.2d 211, 214, 236 P.2d 821; *Appeal of Richardson*, 132 Pa. 292, 19 A. 82; *Woodson v. Colored Grand Lodge of K. of H.*, 97 Miss. 210, 52 So. 457; *Harper v. Fears*, 168 Miss. 505, 151 So. 745, 93 A.L.R. 341; *Joy v. Miles*, 190 Miss. 255, 199 So. 771; *Moore v. Robinson*, 139 S.C. 393, 137 S.E. 697; Annotation 28 A.L.R. 1126.

The accepted rule is declared in the Restatement as follows: "The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarriage."

"Comment: * * * a spouse who treats as valid a decree of divorce by remarriage is precluded from subsequently disputing the validity of the decree although he neither obtained the decree nor was personally before the court which rendered it. Illustrations: 1. A obtains a divorce in a state where neither he nor

1. The Supreme Court unanimously denied a hearing.

his wife is domiciled. B, his wife, knowing that the decree has been granted, marries another man. A dies. B is barred from claiming a widow's share in A's estate." (Restat. Conflict of Laws, § 112.)

To refuse to permit Sara to contest the validity of the Nevada decree does not mean that the courts of this state recognize the Nevada decree as valid, but only that it is not open to her in this action to say it is void. *Watson v. Watson*, 39 Cal.2d 305, 246 P.2d 19; *Bernheimer v. Bernheimer*, 103 Cal.App.2d 643, 647, 230 P.2d 17.

Sara urges that Civil Code section 150.1, enacted in 1949, Stat.1949, c. 1292, p. 2275, prevents application of the estoppel rule. Section 150.1 reads: "A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced." The section prohibits the giving of force or effect to the divorce. In holding that a spouse is estopped from asserting that a decree of divorce is invalid a court does not give any force or effect to the decree. It assumes the decree is invalid and of no force or effect. It merely says that because of the particular circumstances the spouse is precluded from asserting its invalidity.

The doctrine of estoppel is not inconsistent with section 150.1. The section merely declares a rule of nonrecognition which has always existed in California. It has been invariably held that a foreign divorce decree procured on simulated residence has no force or effect in this state. *Crouch v. Crouch*, 28 Cal.2d 243, 250, 169 P.2d 897, and cases there cited. The rule of estoppel has never been considered by the courts of this state to be inconsistent with the rule that a foreign divorce decree obtained on simulated residence has no force or effect. In applying the rule of estoppel the courts have assumed that the decree was invalid and therefore of no force or effect. *Harlan v. Harlan*, 70 Cal. App.2d 657, 161 P.2d 490. We cannot hold that a mere statutory declaration of what had theretofore been a rule of deci-

sion is so inconsistent with the rule of estoppel as to preclude application of the latter rule.

Massachusetts and New Jersey have had nonrecognition statutes for many years. Notwithstanding those statutes, the courts of those states apply the rule of estoppel, when the circumstances are appropriate. *Langewald v. Langewald*, 234 Mass. 269, 125 N.E. 566, 39 A.L.R. 674, a libel by a wife for divorce, is in point. A statute of Massachusetts provided that if an inhabitant of that commonwealth went into another state or country to obtain a divorce for a cause which occurred while the parties resided in Massachusetts, or for a cause which would not authorize a divorce which by its laws, such divorce should be of no force or effect in Massachusetts. Rev.Laws, 1920 c. 152, § 35. The defendant husband had obtained a divorce in Wyoming under circumstances which rendered it of no force or effect under the Massachusetts statute. The wife had voluntarily appeared in the Wyoming action, agreed to a property settlement, and had taken advantage of the decree by accepting the payments which it ordered the husband to make to her. The Massachusetts court said the decree was of no force or effect in that commonwealth, but held that the statute did not impair the doctrine of estoppel, saying, 125 N.E. 568: "Having done this, the wife, as was said in *Loud v. Loud*, 129 Mass. 14, 19, 'cannot treat' the husband's 'subsequent marriage and cohabitation with another woman as a violation of his marital obligations to herself. The defense is allowed (to the husband), not upon the ground of a strict estoppel, but because her own conduct amounts to a connivance at, or acquiescence in, his subsequent marriage.' *Chapman v. Chapman*, 224 Mass. 427, and cases cited at [page] 435, 113 N.E. 359, L.R.A.1916F, 528; *Bidwell v. Bidwell*, 139 N.C. 402, 412, 52 S.E. 55, 2 L.R.A.,N.S., 324, 111 Am.St.Rep. 797; *Nichols v. Nichols*, 25 N.J.Eq. 60; *Fairchild v. Fairchild*, 53 N.J.Eq. 678, 34 A. 10, 51 Am.St.Rep. 650; *Andrews v. Andrews*, 176 Mass. 92, 96, 57 N.E. 333." The libel was dismissed. See also U. S. v.

21.91 Acres of Land in Hampden County, Mass., D.C.Mass., 50 F.Supp. 797. *Andrews v. Andrews*, 176 Mass. 92, 57 N.E. 333, cited by Sara, is not analogous. The question of estoppel by remarriage was not involved. The court did not hold that an estoppel would never lie, but only that in the circumstances of that case an estoppel had not been established. As will be noted the *Andrews* case was cited as authority for the holding in the *Langewald* case. It was distinguished in *Chapman v. Chapman*, 224 Mass. 427, 113 N.E. 359, 361, L.R.A.1916F, 528, in which a wife, who had remarried after rendition of an assertedly invalid divorce decree, was held estopped to assert its invalidity. *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 P. 988, was cited as authority for the holding.

Sleeper v. Sleeper, 129 N.J.Eq. 94, 18 A.2d 1, applied the rule of estoppel notwithstanding a nonrecognition statute. The bill was by a wife for separate maintenance and to void an earlier Nevada divorce decree obtained by her husband. The wife had appeared in and contested the Nevada action. About two years after the Nevada decree the husband remarried. A New Jersey statute provided that full faith and credit should be given to a decree of divorce by a court of competent jurisdiction in another state when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in other specified New Jersey statutes. One of the other specified statutes required, as a condition upon the privilege of instituting a suit for divorce in New Jersey, *bona fide* residence there for a period of at least two years next preceding the commencement of the suit. The husband had not resided in Nevada the required two years. The suit for separate maintenance was filed four and one-half months after the husband remarried. The court held, 18 A.2d 4: "New rights had arisen on the assumption of a legal status which Mrs. Sleeper, over a long period, allowed to stand unchallenged notwithstanding full opportunity to challenge. Whether or not the facts inci-

dent to, and the circumstances under which she entered into and vigorously conducted her defense in, the Nevada suit would, by themselves, bar the relief now sought is not determined; but those facts and circumstances, followed by her long inaction and the intervention of the new marriage contracted in good faith after a suitable waiting period, do, in our opinion, serve to place her in laches and to bar her from the relief prayed in her bill."

The earlier case of *Hollingshead v. Hollingshead*, 91 N.J.Eq. 261, 110 A. 19, a decision by a New Jersey trial court, cited by Sara, is factually dissimilar. The suit was by a wife for maintenance. The wife had previously secured a decree of divorce in Nevada. The question was one of pleading. The pleading alleged that the husband had caused the wife to secure the divorce by fraud and duress. The court held that if the husband's alleged fraud and duress were proved it precluded any estoppel which might have arisen from the fact that the wife, who was attacking the Nevada decree, had herself procured it. It was expressly recognized that an estoppel would lie in appropriate situations, the court saying, 110 A. 24: "The true rule, then, would seem to be that, where a suitor comes into equity and asks for relief, notwithstanding a foreign decree of divorce, which, if valid, would be a bar to his or her suit, which decree is void for lack of jurisdiction, but which was obtained by the present complainant, equity will examine into all the facts, and will accord or refuse its aid upon general equitable principles, according to whether or not it deems it conscionable so to do. Among the facts and circumstances which are or may be material factors in such a controversy are * * * whether there are children by such second marriage; whether the complainant has 'accepted the benefits' of the divorce, such as alimony, or by marrying again; * * *." To claim that the *Hollingshead* case is an authority in support of Sara, in the case at bar, is to ignore the distinction the New Jersey court clearly indicated in its opinion in that case.

[2] We hold that Civil Code section 150.1 does not prevent application of the rule of estoppel.

At no time subsequent to the date of the Nevada decree and prior to the death of Leo did Sara question, or take any action to assert the invalidity of, that decree. She acquiesced in it and married Milton. She made no complaint or protest, no claim of invalidity, no attempt to assert any interest in the property being accumulated by Elsie and Leo. She did not seek to have, nor did she have, her marriage to Milton annulled on the ground she had not been validly divorced from Leo, but on the ground of Milton's fraud. She permitted Elsie to believe that she (Elsie) was the lawful wife of Leo, to live and care for him as a dutiful spouse, to secure the benefits and incur the obligations incident to a valid marriage, and to work and pool her earnings with his in order to contribute to their joint savings and to enhance what she was lead to believe was their community property. Sara lost nothing by Leo's death. In fact, from the time of the Nevada decree, there was a tacit relinquishment by each of all claims upon the other. Sara contributed neither money nor her industry nor prudence to the accumulation of the property in which she now claims an interest. The property was all acquired while she was married to Milton. She is estopped by every principle of law and equity from attacking the Nevada decree or asserting its invalidity.

[3, 4] A putative marriage is one which has been solemnized in due form and celebrated in good faith by both parties but which by reason of some legal infirmity is either void or voidable. On the facts it cannot be questioned that Elsie entered into the marriage and thereafter lived with Leo as husband and wife in good faith and under the *bona fide* belief that the marriage was valid. It is the law in this state that on dissolution of a putative marriage the property which the *de facto* spouses have acquired as a result of their joint efforts is to be treated as though it was the accumulation of a valid marriage. In re Estate of Krone, 83 Cal.App.2d 766, 189 P.2d 741, is in point. In the Krone case

Fanny married Isaac believing in good faith that she had been validly divorced, whereas in fact a final decree had not been entered. They lived together as husband and wife, and by their efforts accumulated property which they agreed should be joint and should go to the survivor on the death of the other. After Isaac died, his children by the first marriage claimed and were awarded half of that property. In modifying the judgment so as to award all of the property to the putative wife the court said 83 Cal.App.2d at page 769, 189 P. 2d at page 743: "[T]he preponderant holdings of the appellate courts coincide with the view that upon the dissolution of a putative marriage by decree of annulment or by death the wife is to take the same share to which she would have been entitled as a legal spouse. However, none of the authorities reviewed involved a consideration of the statute subsequently enacted whereby the surviving spouse of a valid marriage inherits the entire estate in event of intestacy. Probate Code, sec. 201. But the logic appears irrefutable that if according to statute the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit all.

"That appellant herein should be entitled to the inventoried estate is implemented by the finding that she and decedent 'were partners with joint and equal rights as partners', and that all the property of the estate was acquired by the parties during the marriage. But aside from the extraordinary services rendered by appellant she justly claims the estate by virtue of the authorities above reviewed, pursuant to section 201, *supra*. This section had not been enacted at the time of the pronouncement of the Coats [Coats v. Coats, 160 Cal. 671, 118 P. 441] and Schneider [Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386] cases and for that reason it was not mentioned in either of them, which may explain the silence of the subsequent decisions upon its provi-

sions. However, in view of the positive declarations in such later decisions it would now be contrary to established law to deny to this putative wife her rights as a surviving spouse to inherit the total of the gains of the putative marriage." And the rule is applicable in a contest between two spouses. The fact that the contest in Estate of Krone was between a putative wife and children of a first wife does not make it any less an authority. The children in the Krone case were estopped because as heirs of their ancestor, the first wife, they were in privity with her, and were thus bound by an estoppel which bound the ancestor. See Estate of Davis, 38 Cal.App.2d 579, 585, 101 P.2d 761, 102 P.2d 545; 19 Am.Jur. 811, § 155. In Mazzenga v. Rosso, 87 Cal.App.2d 790, 197 P.2d 770, 771, the first wife contended that "The rights of a 'putative wife' do not prevail over those of the 'de jure' wife upon the death of the bigamous husband." The court answered by applying the rule stated in Estate of Krone, supra, and held that the putative wife was entitled to all the property. There, as here, the property had been held in joint tenancy by the putative wife and the deceased husband.

The suggestion that Elsie must have known that the Nevada decree was invalid is without foundation in the evidence. It is contrary to her uncontradicted testimony. It cannot be said that knowledge of a laywoman that another obtained a Nevada decree of divorce, after complying with the residence requirements of that state, conclusively establishes that she knew the divorce was invalid. When we note the great difficulty courts and lawyers have had in determining when an out-of-state divorce decree is or is not valid, it would be incongruous indeed to charge a laywoman with absolute knowledge merely because she knew that a divorce decree had been rendered by a state other than that of the

residence of the parties. See Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 143 A.L.R. 1273, 87 L.Ed. 279; Williams v. North Carolina, 325 U.S. 226, 89 L.Ed. 1577, 65 S.Ct. 1092, 157 A.L.R. 1366; Sherrer v. Sherrer, 334 U.S. 343, 92 L.Ed. 1429, 68 S.Ct. 1087, 1097, 1 A.L.R.2d 1355; Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 1097, 1 A.L.R.2d 1376, 92 L.Ed. 1451. There is not a scintilla of evidence that Elsie knew that Leo had not been validly divorced from Sara. To assume that she did know would impute to her an intention to enter into a meretricious relation. Sara obviously believed the divorce was valid. A different belief cannot be attributed to Elsie. See Estate of Krone, 83 Cal.App.2d 766, 768, 189 P.2d 741.

[5] We hold, on the undisputed facts, as a matter of law, that Sara has no interest in the property, and that the entirety is vested in Elsie.

[6] Since the facts are not disputed, Elsie suggested, in her opening brief, that in the event of a reversal it should be with directions to render judgment in her favor. Sara does not take issue with the suggestion. Accordingly she is deemed to have acquiesced therein. Reininger v. Eldon Mfg. Co., 114 Cal.App.2d 240, 250 P.2d 4.

The judgment is reversed with directions to the superior court to amend the findings of fact and conclusions of law in conformity with the views we have expressed, and to render judgment adjudging that Elsie Gordon is the owner and entitled to the possession of all of the property described in the cross-complaint in its entirety, and that Sara Gordon has no right, title, or interest therein.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; EDMONDS, J., dissenting.

116 Cal.App.2d 769

KARRELL v. WATSON, Real Estate Com'r.
Civ. 19217.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1953.

Rehearing Denied April 15, 1953.

See 255 P.2d 464.

Mandamus proceedings brought to test the validity of an order of defendant revoking plaintiff's license as real estate broker. The Superior Court, Los Angeles County, directed issuance of a peremptory writ of mandate commanding the defendant to set aside his decision against plaintiff within five days, and defendant appealed. The District Court of Appeal, Moore, P. J., held that plaintiff had been guilty of such act or conduct as authorized the defendant to revoke her broker's license, and that the three year statute of limitations on disciplinary proceedings began to run not from the time when the defendant discovered evidence of the plaintiff's crime but at the time of her conviction therefor.

Reversed with directions.

McComb, J., dissented.

1. Appeal and Error ◊775

Dismissing an appeal is a serious matter, since right of litigant to have record of his cause reviewed by appellate court is sacred, having been incorporated into corpus juris of state as one more device for insuring value of citizenship and for guaranteeing that no man's asserted rights will be abridged without a meticulous, microscopic study of conduct of offending court or administrative tribunal. Rules on Appeal, rule 1(a).

2. Mandamus ◊187(8)

To dismiss ostensible appeal from peremptory writ of mandate which was in truth an appeal from judgment ordering issuance of the writ would be a denial of substantial justice. Rules on Appeal, rule 1(a).

3. Brokers ◊3

By allowing a conviction for a crime involving moral turpitude to become final against her, real estate broker committed such act or conduct as would authorize revocation of her license. Business and Professions Code, § 10177(a-f).

4. Brokers ◊3

Disciplinary proceedings are suspended and held in abeyance until criminal action has run gamut of criminal courts; and therefore statute of limitations for disciplinary proceedings against real estate broker began to run not when commissioner discovered evidence of broker's crimes but at time of broker's final conviction therefor. Business and Professions Code, §§ 10150-10152, 10177(b, f).

Edmund G. Brown, Atty. Gen., by Lee B. Stanton, Deputy Atty. Gen., for appellant.

Albert Lee Stephens, Jr., and Ralph J. Geffen, Los Angeles, for respondent.

MOORE, Presiding Justice.

The questions for decision are (1) whether the evidence before the administrative officer justified the revocation of respondent's license as a real estate broker and (2) whether the three-year statute of limitations began to run when the Real Estate Commissioner discovered evidence of her crimes or at the time of her final conviction therefor.

During 1946 respondent was a licensed real estate broker operating under a variety of fictitious names. A part of her business consisted of selling lots to veterans. The parcels were evaluated by appraisers selected by the Administrator of Veterans Affairs at sums ranging from \$1,500 to \$1,750. In order to enrich herself, Miss Karrell employed schemes for obtaining from veterans prices in excess of those established by the administrator's appraisers. For illustration, she would sell a lot through an escrow at an office distant from the lending bank to a dummy for a sum not to exceed the appraised value. Thereupon, she would effect a sale to a veteran at a price in excess of the appraised value and cause the conveyance to be made by the falsely pretending purchaser. The excess sums over the appraised values were not reported to the office of the Veterans Administration. Such methods caused the lending bank to

certify false statements to the last mentioned office which guaranteed loans solely by reason of its reliance upon the bank's certification.

Two years after such sales were made, respondent was indicted by a federal grand jury for concealing from the lending bank and the Veterans Administration the total prices demanded and received by her from the several veterans to whom she had made sales. She was duly convicted on six counts of the indictment and on February 25, 1949, judgment was entered by the District Court whereby respondent was on each count sentenced to one year in prison and fined \$1,000. However, execution of the sentences was suspended and the prisoner was placed on probation for five years on condition that she make full restitution of \$2750, the aggregate of the sums taken from the six veterans, in such installments and at such times as the Probation officer shall direct.

The judgment was based upon the fraud, dishonesty and deceit of respondent in her transactions with the veterans, the bank and the Veterans Administration, pursuant to section 1500 of the Servicemen's Readjustment Act. 38 U.S.C.A. §§ 697, 715. That act denounces as a crime the offense of knowingly causing false certificates to be made to secure benefits for veterans under the Servicemen's Readjustment Act of 1944. Appeal was taken from the judgment which was amended and affirmed, *Karrell v. U. S.*, 9 Cir., 181 F.2d 981, and certiorari was denied by the United States Supreme Court, 340 U.S. 891, 71 S.Ct. 206, 95 L.Ed. 646.

Pursuant to the established practice of appellant, no disciplinary action against respondent was undertaken during the course of the criminal action against her. However, on August 25, 1950 an accusation was filed by the Deputy Real Estate Commis-

sioner averring that Miss Karrell "has been and now is licensed by the Division of Real Estate of the Department of Investment as a real estate broker * * * has violated the provisions of section 10177(b) and section 10177(f) ¹, Division 4, Business and Professions Code * * * in that on or about February 25, 1949 * * * respondent was convicted upon her plea of not guilty of [violating] sections 697 and 715, Title 18 of U.S.C. and Regulations issued thereunder * * *." Then follow the dates of the several crimes and punishments as set forth in the judgment and the suspension thereof with the terms of her probation. Reference to section 10177(b) having been stricken from the accusation, the matter was heard before a hearing officer on July 5, 1951 when respondent and five witnesses testified on her behalf. Such officer thereupon filed his "Proposed Decision" whereby he determined all the facts hereinbefore recited and found respondent guilty, adjudging that "any rights respondent Barbara W. Karrell may have to reinstate her license, as provided in Section 10201 of the Business and Professions Code * * * be and the same are hereby revoked." The proposed decision having been adopted by the Real Estate Commissioner, it became the judgment of that officer on August 21, 1951.

Not content with such decision, on January 8, 1952, respondent filed in the Superior Court a petition for writ of mandate to test the validity of the judgment of the Real Estate Commissioner alleging such officer had proceeded without or in excess of his jurisdiction in revoking respondent's license or right to renewal thereof; that all her criminal acts had been performed more than three years prior to the filing of the accusation against her. Such is the substance of her attack upon the administrative decision. It was there successful. The court found the facts as herein recited

1. B. and P. Code, sec. 10177:

"The commissioner may suspend or revoke the license of any real estate licensee, who within three years immediately preceding has done any of the following: * * *

"(b) Been convicted of a felony or a crime involving moral turpitude, knowl-

edge of which the commissioner did not have at the time of issuing the original real estate license to him. * * *

"(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license."

and that the commissioner's decision was "in excess of his jurisdiction, contrary to law, and not supported by any evidence whatsoever as no acts or conduct of the said petitioner were either charged or proved as having been committed during a three-year period prior to the bringing of said 'Accusation' on August 25, 1950"; and that there was no evidence that the petitioner within a three-year period prior to August 25, 1950 had acted or conducted herself in a manner which would have warranted the denial of her application for a real estate broker's license, or for a renewal thereof. Thereupon the court adjudged that respondent's conviction of misdemeanors within the three-year period "because of acts committed beyond said period is not the act or conduct of the broker contemplated by said section 10177(f)" and directed the issuance of a peremptory writ of mandate commanding the Commissioner to set aside his decision against respondent within five days.

Appeal from Writ

While the Commissioner demands a reversal of the judgment, respondent seeks a dismissal of the appeal on the ground that the Notice of Appeal is from the "Peremptory Writ of Mandate" and that such notice does not comply with the Rules On Appeal² and therefore is ineffective.

[1] Dismissing an appeal is a serious matter. The right of a litigant to have the record of his cause reviewed by an appellate court is sacred. It was established by the Legislature pursuant to constitutional provision. It oftentimes means the difference between the preservation of an enviable estate on the one hand, and poverty and distress on the other; between freedom and servitude; between life and death. The privilege was incorporated into the corpus juris of the state as one more device for insuring the value of citizenship, for guaranteeing that no man's asserted

rights will be abridged without a meticulous, microscopic study of the conduct of the offending court or administrative tribunal.

[2] In the case at bar, the judgment was entered February 5, 1952. No other action was thereafter taken by the court prior to the filing of the notice of appeal. The judgment ordered a peremptory writ of mandate issue to the real estate commissioner directing him to reinstate Miss Karrell's license. The appeal is from that writ specified by the judgment, *or that part of the judgment*. Hence, the notice of appeal from the peremptory writ of mandate could reasonably have no significance other than an appeal from the judgment which directed the issuance of the writ. This conclusion is fortified by the contents of the notice which describes the peremptory writ of mandate as having "passed upon the merits of the Petition for Writ of Mandate and the Return thereto * * *". Also, the notice requested the county clerk to incorporate with the record, the findings and conclusions and the judgment, the petition for the writ, as well as both the alternative and peremptory writs. Inasmuch as the "Judgment" is the only document listed which "passed upon the merits of the Petition for Writ of Mandate and the Return" by what logic could the clerk, the adversary party or the appellate court have concluded otherwise than that the notice of appeal was intended to be an appeal from the judgment? Such a notice must be liberally construed. Rule 1, *supra*. In *Butler v. City and County of San Francisco*, 104 Cal. App.2d 126, 231 P.2d 75, the notice of appeal was from the judgment, the minute order directing judgment and the writ of mandate. The latter two items were excess baggage, served no purpose, and were therefore dismissed to keep the record straight. In *Kindig v. Palos Verdes Home Association*, 33 Cal.App.2d 349, 91 P.2d 645, the same mistake occurred and again the appeal

2. Rules on Appeal. Rule 1. "(a) An appeal from a judgment of a superior court *or from a particular part thereof* is taken by filing with the clerk of that court a notice of appeal therefrom. The notice shall be signed by the appellant or by his attor-

ney and shall be sufficient if it states in substance that the appellant appeals from a specified judgment *or a particular part thereof*. A notice of appeal shall be liberally construed in favor of its sufficiency." (Italics ours.)

from the writ and the minute order were dismissed. It follows that appellant's clerical error which was an ostensible appeal from the writ was in truth an appeal from the judgment. Hence, to dismiss it would be a denial of substantial justice.

Section 10177(f) Interpreted

[3] By section 10177 of the Business and Professions Code the Real Estate Commissioner is authorized to "suspend or revoke" the license of any licensee "who within three years immediately preceding" has (a) procured a license by fraud; (b) been convicted of a felony or a crime involving moral turpitude of which the commissioner was ignorant when the license was issued; (c) knowingly aided in the circulation of a material, false statement; (d) wilfully disregarded specified provisions of the Code; (e) unlawfully used the term realtor; (f) *acted or conducted himself in a manner which would have warranted the denial of a license*. Now, respondent has emphasized, both in her petition for the writ and in her brief on appeal, that appellant exceeded his jurisdiction in making his order of revocation, since such proceeding was barred by section 10177.

The offenses committed by respondent in 1946 are not directly involved. It is the judgment of conviction by reason of those acts which is our present concern. Respondent urges the bar of the statute because more than three years elapsed from the date of the last offense until the filing of the accusation. Appellant contends that the Legislature impliedly included in subdivision (f) conviction of a crime which, he maintains, is such an *act* or *conduct* as authorizes the Commissioner to revoke a broker's license. If the final judgment of conviction is not an *act* or *conduct* warranting disciplinary action and the crime itself is barred, then section 10177(f) does not fulfil the purpose clearly intended by the Legislature. Could the lawmakers have designed that, when a licensed broker runs counter to criminal statutes and is being processed by the courts, the Commissioner should ignore the current judicial proceedings and file an accusation against the of-

fender? Or did they intend for the Commissioner to remain quiescent until the conviction should become final whereupon the disciplinary proceeding might be based upon the "act" or "conduct" of the broker in permitting a final judgment of conviction to be entered against him?

Acts regulating the conduct of real estate brokers have been operative since 1917. Stats.1917, chap. 758, sec. 9, p. 1584. Under the 1917 act and its several amendments and successors it has been the practice for the Commissioner to refuse a license to one who has been found guilty of, and sentenced for crime or who had a reputation for dishonesty or who had made a substantial misrepresentation or false promise. Bus. & Prof.Code, sec. 10176. Likewise, strict moral behavior in his relationship to those with whom he has to deal has been a requirement of every licensee in whatever field of activity. The Real Estate Law of 1919 required that every applicant for a broker's license must be "honest, truthful and of good reputation". That remained a part of the law until its inclusion in the Business and Professions Code. Section 10150 et seq. False representations have been deemed "dishonest dealings." *Brecheen v. Riley*, 187 Cal. 121, 126, 200 P. 1042. In 1927 the act was so amended as to revoke a license where the broker had been convicted of a felony subsequent to the issuance of the license. Stats.1927, chap. 351, sec. 1, p. 581. In 1931 it was amended so that a license could be revoked for any other conduct, whether of the same or a different character than hereinabove specified, which constitutes fraud or dishonest dealing. Stats.1931, ch. 601, sec. 4, p. 1298. In 1933 the act was amended by inserting the provision that the Commissioner could revoke the license of a licensee who within three years immediately preceding "Has been convicted of a felony" of which the Commissioner had no knowledge "at the time of last issuing a license to such licensee". Stats.1933, ch. 691, sec. 7, p. 1775. In 1937 the Act added sections 8 and 12 which in 1943 were copied into the Business and Professions Code as parts of section 10177, subsections (b) and (f). Stats.1937, ch. 757, sec. 8, p. 2124; Stats.1943, ch. 127, sec.

1, p. 842. With no substantial alteration, the language currently appearing in subsections (b) and (f) of section 10177 of the Business and Professions Code was inserted in 1949. Stats.1949, ch. 826, sec. 6, p. 1572.

With such consistency and uniformity of the acts and their amendments, all aiming to protect the public against persons who are reckless with the truth or unhindered in appropriating the moneys of their patrons, is it possible that the language of section 10177 (f) is not effective to revoke the license of a broker who has been convicted of crimes involving moral turpitude occurring after receiving his license and who has thus "acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license"? Because section 10177(f) clearly authorizes the revocation of a license on any ground which would warrant the denial of an applicant's original application, a negative answer is unavoidable. See *Payne v. Real Estate Commissioner*, 93 Cal.App.2d 532, 537, 209 P.2d 419. While subsection (b) of section 10177 had not been enacted in its present form when respondent committed her crimes, yet prior to that enactment, offenses of the grade of a misdemeanor were usually disciplined under other provisions than subsections (b) and (f). Since 1937 subsection (f) has been available for disciplinary action for dishonesty or a bad reputation.

From the foregoing outline of the Real Estate Act and its evolutionary changes, it must be apparent that the contemporaneous construction of section 10177(f) given by courts and the Commissioner has served to establish its meaning. *Riley v. Forbes*, 193 Cal. 740, 745, 227 P. 768. By allowing a conviction for a crime involving moral turpitude to become final, respondent "conducted herself in a manner which would have warranted the denial of her application for a real estate license." In other words, by the final judgment she acquired a reputation for dishonesty which would have necessitated the denial of her application for a license. With the exact dates of the crimes, the revocation of the license is not directly concerned. Only the final judgment of conviction is here involved. The

charges against her have passed under the scrutiny of both trial and appellate courts. The final judgment establishes that respondent is one whose established conduct would require a rejection of her application for a license as a real estate broker.

If section 10177(f) does not apply to her, to what section of the code should the Commissioner have resorted to remove her from his rolls? Or should he have declared the law impotent and the convicted broker restored to all the rights of the innocent and the honest? After that section had been used for over fifteen years for disciplining misdemeanants, how can it now be termed inapplicable? Section 10177(b) cannot be used for the reason that at the time of her misdemeanors, subsection (b) related only to brokers convicted of felonies. Would one be so rash as to declare that notwithstanding the constant vigilance of the Legislature and the assiduous enforcement of the act, as evidenced by court decisions, the Commissioner is powerless to remove a faithless broker because he has deferred action until the affirmance of the judgment of conviction? A fair appraisal of subsection (f) forbids an affirmative reply. For any person to have suffered a final judgment for such grave offenses as those embodied in the indictment against respondent would require any Commissioner to reject the application of such person for a license. If he must under the circumstances deny a license, then under subsection (f) it was the duty of appellant to revoke the license of respondent. In view of the provisions, sections 10150-10152, for rejecting applications, it is a reasonable construction that section 10177(f) was intended to authorize the revocation of a license where the criminal acts of the licensee have merged in a judgment convicting the broker of offenses involving moral turpitude committed prior to the three-year period next preceding the filing of the accusation.

The Statute of Limitations Tolled

[4] Respondent seeks to escape the discipline ordained by statute to be applied to dishonest brokers on the ground that her crimes occurred more than three years before she was accused. A conclusive, negative answer to such contention is found in

the decisions of this state. In *Archer v. Harvey*, 164 Cal. 274, 128 P. 410, an attorney sued the distributee of his deceased client for specific performance of an agreement to convey an interest in a water right for which he was to render legal services in connection with appealing a case involving the water rights to the Supreme Court. It was held that the statute of limitations was suspended during the time preceding final decision in the water case. See also *Archer v. Edwards*, 19 Cal.App.2d 253, 256 [2], 65 P.2d 115; *Frink v. Hoke*, 35 Or. 17, 56 P. 1093, 1095. But what is of paramount importance as a precedent for guidance is the series of definite holdings of the courts of California that disciplinary proceedings are suspended and held in abeyance until the criminal action has run the gamut of the criminal courts. In *re Riccardi*, 182 Cal. 675, 189 P. 694; In *re O'Connell*, 182 Cal. 786, 189 P. 700. In *Payne v. Real Estate Commissioner*, 93 Cal.App.2d 532, 537, 209 P.2d 419, the court observed that had the commissioner acted prior to final judgment in the criminal action, the licensee would have been deprived of his right to carry on his usual business until his acquittal or until his final conviction; whereas it might have resulted that a revocation was not justifiable.

The judgment is reversed with instructions to enter judgment in favor of appellant, denying a peremptory writ.

FOX, J., concurs.

McCOMB, J., dissents.



116 Cal.App.2d 790

LARSON et al. v. THORESEN et al.

Civ. 19313.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1953.

Suit for partition of realty on which a residence and garage had been constructed pur-

suant to written contract whereunder parties agreed to contribute equally to cost of improvements and to share equally in profits, and for other relief, and the defendants filed a cross complaint. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered a judgment adverse to the plaintiffs and the plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that payment by one party of \$504.63 more than sum contributed by the other party did not disprove substantial performance of obligation to pay.

Judgment affirmed.

1. Contracts ⇨221(2)

Provisions of contract will not be construed as conditions precedent in absence of language plainly requiring such construction.

2. Contracts ⇨221(2)

Under contract pursuant to which a residence and garage had been constructed, and under which plaintiffs and defendants agreed to contribute equally to cost of improvements and to share equally in profits from sale of realty provided for by contract, obligation of one party to pay share of cost was not a condition precedent to duty of other party to cooperate in making sale, and such duties were independent, and payment by one party of \$504.63 more than sum contributed by other party did not disprove substantial performance of obligation to pay.

3. Appeal and Error ⇨931(1)

Appellate Court will resolve every doubt and conflict in favor of judgment in order to give it validity.

4. Appeal and Error ⇨1008(1)

An appellant's attack on fact finding of trial court will succeed only if finding is so arbitrary and unreasonable that it cannot be sustained.

5. Contracts ⇨294

Substantial compliance with contract pursuant to which a residence and garage had been constructed, and under which plaintiffs and defendants agreed to contribute to cost of such improvements and to share equally in profits from sale of realty provided for by contract, was full compliance in legal effect.

6. Partition 89

In action for partition of realty on which a residence and garage had been constructed pursuant to written contract whereunder parties agreed to contribute equally to cost of improvements and to share equally in profits, wherein defendant filed cross complaint for failure of plaintiffs to place realty on market for sale, an amendment was not required to justify trial court in finding realty depreciated \$2800 rather than \$2500 as alleged in answer where cross complaint prayed for general relief and plaintiffs in supplement and amendment to amended complaint alleged same values at completion and sale as those testified to by defendants. Civ.Code, § 3283.

7. Trial 393(1)

No utterance of trial judge, either in a memorandum prepared for aid of counsel or in extemporaneous remark during trial affects his formal findings and award.

Robert Wanamaker, Pasadena, for appellants.

Lee J. Myers, El Monte, for respondents.

MOORE, Presiding Justice.

This is a second appeal. See *Larson v. Thoresen*, 36 Cal.2d 666, 226 P.2d 571. The controversy arose out of a written contract dated August 5, 1947, to purchase a lot in El Monte, to construct thereon a residence and garage, to contribute equally to the cost of the improvements and to share equally in the profits realized from a sale of the premises. The lot was acquired and the building proceeded. In the course of construction the Thoresens occupied the garage while the Larsons dwelled in the residence. On completion of the house, the Thoresens moved in and the Larsons moved out. Irritation developed; ill feelings arose. And by reason of the strained relations a sale of the property was not consummated. But instead this lawsuit was launched by appellants, April 23, 1948. They demanded a partition; damages for depreciation resulting from respondents' alleged prevention of a sale; damages for their alleged ouster and exclusion by respondents; dam-

ages for alleged waste caused by respondents; and a declaration of their rights. The Thoresens answered with admissions and denials and by cross complaint sought damages in the sum of \$3,000 for the failure of appellants to perform all the terms and conditions of the contract, to furnish the requisite moneys for labor and materials and to place the property on the market for sale and to agree to a price or terms on which the property could be sold.

The trial was abortive. In lieu of a formal decision the court filed its "opinion and order" which after reviewing the pleadings and the evidence, ordered that the parties proceed vigorously at once to sell the property at private sale for not less than \$9,500—the net proceeds to be disbursed as directed in the order. The appeal having been lodged on the ineffectiveness of the "opinion and order" in directing a specific performance of the contract instead of a partition of the property as provided by the Code of Civil Procedure, § 752 et seq., it was dismissed. *Larson v. Thoresen*, supra.

In its opinion dismissing that appeal, the court held 36 Cal.2d at page 669, 226 P.2d at page 573, that the contract of August 5, 1947 was "indisputable evidence of a joint venture"; contained "no provision that either might occupy the premises or that occupancy by either was a matter of right"; that it was not a proper case for the reviewing court to make findings contrary to or supplemental of those derived by the trial court in order to make final disposition of the controversy without further proceedings in the court below; that the trial court "should have made findings" on whether respondents' occupancy was necessary to safeguard the property and should have resolved the issues "by the application of the governing principles in cases of joint venture." It was held also that section 956a of the Code of Civil Procedure is not applicable and that following the dismissal "the cause will be pending in the trial court as upon the close of the trial." 36 Cal.2d at page 670, 226 P.2d at page 573.

Following the dismissal of the first appeal, the trial court on petition of respondents appointed a receiver to sell the property with authority to pay the cost of the

sale, the receiver's compensation, all taxes due, and certain mechanics and materialmen's claims in the sum of \$1,029.01, the balance to be held by the receiver, subject to the court's order. The property was sold for \$8,200. On October 10, 1951, the parties stipulated that "the rights and interests of the parties hereto are hereby transferred to the fund arising from the sale" and that the court "may adjust and adjudicate the rights and obligations of the parties as if the said real property had not been sold." Thereupon, pursuant to stipulation a mistrial was declared and a retrial was had on all the evidence taken at the first trial and on such additional evidence as might be presented by either party. Both litigants amended their respective pleadings whereby appellants alleged damages to the extent of the rental value of the premises while occupied by respondents, and the latter upon appropriate allegations to their cross-complaint asked for adjustments of rent collected and taxes and interest paid. After trial the court made its findings and conclusions and adjudged that out of the funds in the hands of the receiver respondents should be paid \$4,673.91 and appellants, \$1,455.83.

Findings Follow the Evidence

In demanding a reversal of the judgment appellants contend that certain findings are contrary to the evidence; that some are deficient; and that while some conflict with others, some are contrary to the pleadings. While it is possible that in stating thirty findings of fact upon the

issues raised, the court might have omitted some microscopic detail here or have inserted a slightly repugnant concept there; yet upon a study of the pleadings, the exhibits and the testimony, the conclusion is unavoidable that the findings substantially, fully and harmoniously cover every phase of the controversy as presented by the pleadings and the evidence. While assertions of "unsupported findings" are made, appellants have not pointed out or cited such evidence as the court would have been obliged to adopt, necessitating findings contrary to those that were made. Neither do appellants specify any serious defects in the proof relied upon by the court.

[1,2] Their principal contention is that respondents failed to match the monetary contributions to the joint venture by several hundred dollars. Basing their dialectics upon that assertion, appellants contend that respondents cannot be heard to complain of appellants' failure to cooperate in making a sale. In effect, they argue that respondents' obligation to pay was a condition precedent to appellants' duty to cooperate. The evidence does not support such contention. Moreover, the provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. See *San Diego Construction Company v. Mannix*, 175 Cal. 548, 556, 166 P. 325; *Lucy v. Davis*, 163 Cal. 611, 614, 126 P. 490; *Antonelle v. Kennedy and Shaw Lumber Company*, 140 Cal. 309, 315, 73 P. 966. There is no such compulsion in the wording of the contract in issue.¹ A more reasonable

1. "Now Therefore, it is agreed by and between the parties hereto as follows:

"1st. That each of the parties will immediately pay to the owner of the lot herein referred to, the sum of \$300.00 in full payment of said lot and title shall be taken in the names of John F. Thoresen and Elide Thoresen, husband and wife, and Erik H. Larson and Clara Marie Larson, husband and wife;

"2nd. That the second party shall pay to the first party the sum of \$817.97 in cash, being one-half of the labor and materials paid for to the present time by the First Party in said property;

"3rd. That all unpaid bills for labor and materials heretofore put in said property, and not paid for, and all ma-

terials and outside labor necessary for the completion of said property, shall be paid for one-half by the First Party and one-half by the Second Party;

"4th. That for any labor performed by the parties to this agreement in the completion of the dwelling upon said property, or other buildings, the First Party shall be allowed the sum of \$2.25 per hour and the Second Party shall be allowed the sum of \$2.00 per hour.

"5th. That upon the completion of said buildings, said property shall be placed on the market for sale, at a price and upon terms to be mutually agreed upon between the parties hereto, and after deducting from the sale price, and paying, any unpaid bills for materials or out-

and just interpretation of the writing is that the duties of cooperating and paying expenses are independent. Under such construction, the mere fact of appellants' payment of \$504.63 more than the sum contributed by respondents does not disprove the latter's substantial performance of their obligation to pay. See *Collins v. Ramish*, 182 Cal. 360, 364, 365, 188 P. 550; *Connell v. Higgins*, 170 Cal. 541, 556, 557, 150 P. 769; *Murphy v. Sheftel*, 121 Cal.App. 533, 540, 9 P.2d 568. Especially is this true in view of *finding 16* that appellants had paid only \$504.63 in excess of the sum paid by respondents, and *finding 24* that prior to the first trial there had been no accounting between the parties and it was not known by either party what had been the contribution of the other to the joint enterprise.

The Findings

[3, 4] Appellants' contention that certain findings are contrary to the evidence is evidently asserted without first consulting the axiom that appellate courts will resolve every doubt and conflict in favor of the judgment in order to give it validity. Consequently, such attack will succeed only in the event that it can be said that, construing the evidence in its entirety in conformance with the above axiomatic test, the finding of the trial court is so arbitrary and unreasonable that it cannot be sustained. A scrutiny of the record discloses that the findings attacked as "contrary" to the proof have substantial support in the exhibits and in the testimony of respondents. For instance, finding 16 is established by the facts that (1) on completion the property was worth \$11,000; (2) appellants had advanced only \$504.63 more than respondents; (3) such difference was not known to the

parties prior to the trial. Payment by appellant of \$504 more than had been paid by respondents over a period of four and a half years in a joint venture, entailing so large an expenditure as is here involved is a fact of such slight weight that its influence was not noticeable in the final computation of the sums due each party on division of the proceeds of sale. The action was for partition. The court determined many facts with reference to the investments of each party in order to be enabled fairly to divide the proceeds. So long as the facts of each controverted issue were determined the court was placed in position to do justice between the litigants.

[5] That the court could have found appellants had paid more than \$4,932.91 for labor (findings 9 and 10); respondents had performed services worth \$927 (finding 12); appellants were entitled to credits of \$29.30 and \$55.78 (13 and 14); respondents were entitled to credits of \$92.09 for taxes paid (15),—these are findings on simple issues predicated on documentary evidence of the effect of which there could be no serious doubt. The finding that respondents had fully complied with the contract and appellants failed to comply by not cooperating with respondents resulted from the court's adoption of the testimony of respondents and their witness Jameson, and of appellant Erik Larson and its rejection of the evidence of appellants. Because respondents might have neglected some remote or nonessential duty does not vitiate the finding of their having performed their obligations in full. If their compliance was substantial, it was, in legal effect, full compliance.

The attack on finding 19 is meaningless.² The adoption of respondents' testimony

side labor, any amounts due either party for labor, and the cost of sale, including a broker's commission, if any, escrow fees, Title Insurance Policy, etc., the remainder of the sale price shall be divided equally between the parties hereto.

"6th. Each of the parties hereto, and their respective wives [sic], whose consent is hereto attached, shall sign any and all papers necessary to carry out the terms of this agreement."

real estate described from the time of the completion of the structures to December, 1950, but said defendants did not exclude the plaintiffs from occupying said property, and the defendants occupied said property for the sole purpose of protecting it, to keep it clean, and to facilitate a sale thereof; that the defendants' occupancy of the property did not constitute a violation or breach of the agreement between the parties."

2. "19. That the defendants occupied the

could cause no determination other than that after the Larsons had for two months occupied the house while the Thoresens lived in the garage, appellants moved to Palm Springs, October 22, 1947, and respondents thereafter occupied the house. With the exception of one visit to El Monte, appellants remained in the desert city until the first trial in November, 1948. Therefore, appellants excluded themselves from the new home while it was occupied by respondents to the obvious advantage of both parties, as found by the court.

The finding (22) that respondents caused no damage by their occupancy and did not hinder the sale (finding 25) were rational determinations from the testimony of respondents and the real estate broker, witness Jameson.

[6] The contention is made that the trial court was inconsistent in finding the property depreciated to the extent of \$2,800 instead of \$2,500 as alleged in the answer. While the latter sum may have been the extent of the depreciation at the time of filing the answer, respondents were entitled to recover for all detriment resulting after the commencement of the action. Civ.Code, § 3283. Whereas the evidence showed the value at completion to have been \$11,000, at the sale by the receiver it brought only \$8,200. Not only does the cross-complaint pray for general relief but appellants, in their supplement and amendment to the amended complaint allege the same values at completion and sale as those testified to by respondents. An amendment was therefore not required to allege the damages to have been \$2,800. *Collins v. Sargent*, 89 Cal.App. 107, 113, 264 P. 776. See *Bryson v. McCone*, 121 Cal. 153, 159, 53 P. 637; *Hicks v. Drew*, 117 Cal. 305, 312, 49 P. 189.

3. "24. That there was no accounting between the plaintiffs, and the defendants prior to the trial of this action, and it was not known by either of the parties what the contribution of the other was to said enterprise prior to the trial of this action."
4. "27. That by reason of the failure and refusal of the plaintiffs to pay their share of the unpaid bills for labor and materials in the construction of the buildings re-

Findings 24³ and 27⁴ are supported by the evidence. The first was proved by the fact that at the first trial neither party knew the amount of his own contributions to the enterprise. Under a directive of the court, counsel for the parties made investigations and prepared a stipulation (Ex. 6) showing the sums each adventurer had paid. As to finding 24 there was no denial of the fact found. Findings 13 and 14 crediting appellants with the total of \$85.08 were, contrary to appellants' assertions, incorporated in finding 16 and made a part of the award.

Findings Made on Material Issues

The assertion that no findings were made with reference to certain material issues is contrary to finding 19, to wit: "That the defendants occupied the real estate described from the time of the completion * * * to December, 1950 * * * to keep it clean, and to facilitate a sale thereof" and that "defendants did not exclude the plaintiffs from occupying said property." Also, finding 25 declares defendants' occupancy did not hinder the sale of the property or discourage its being purchased but increased its salability. Finding 14 covers a material issue in declaring appellants' right to one-half the net rentals collected. While finding 23 is a conclusion of law, it follows other findings to the effect that appellants had no right to a credit for rent while respondents occupied the house. Finally, it was a material issue as to whether the sale of the property rendered moot the count for declaratory relief. Finding 31 determined that the right of occupancy had become a dead issue. Thus the findings cover all material issues and they do so to a substantial degree, omitting nothing that

ferred to in the written agreement between the parties, said bills being listed in paragraph 8 hereof, interest in the amount of \$288.12 accrued on said bills prior to payment by the Receiver, and the defendants are entitled to judgment against the plaintiffs for said amount, and payment shall be made out of the plaintiffs share of the funds in the hands of the Receiver."

was necessary or material to a solution of the controversy.

No Inconsistency in Conclusions

[7] Appellants complain that the formal decision makes no mention of the attorneys' fees and rentals purportedly awarded by the "memorandum decision." Such complaint has no basis for the reason that the trial court's opinion is sterile of potency and, as against the findings and conclusions is without legal status. No utterance of the trial judge, either in a memorandum prepared for the aid of counsel or in an extemporaneous remark during the trial, affects in the slightest degree his formal findings and award. *Scholle v. Finnell*, 173 Cal. 372, 376, 159 P. 1179; *Putman v. Superior Court*, 209 Cal. 223, 227, 286 P. 425.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



117 Cal.App.2d 35

NEMER v. NEMER.

Civ. 19419.

District Court of Appeal, Second District,
Division 3, California.

March 26, 1953.

Hearing Denied May 21, 1953.

Action for divorce, wherein wife obtained interlocutory judgment. From an order of the Superior Court of Los Angeles County, Arnold Praeger, J., granting husband's motion to enter final judgment of divorce nunc pro tunc and from the final judgment of divorce, plaintiff appealed. The District Court of Appeal, Vallée, J., held that whether the parties became reconciled after granting of interlocutory judgment so as to preclude entry of final judgment of divorce was a question for trial court under the evidence.

Appeal from order dismissed and judgment affirmed.

1. Divorce ⇨177, 184(1)

Order granting motion to enter final judgment of divorce nunc pro tunc was reviewable on appeal from final judgment of divorce, but no appeal would lie from the order itself. Code Civ.Proc. § 963.

2. Divorce ⇨184(4)

Where final judgment of divorce entered nunc pro tunc on motion of husband as of one year subsequent to entry of interlocutory judgment of divorce granted wife was predicated on testimony of husband, his version of occurrences after entry of interlocutory judgment must be accepted on appeal from final judgment.

3. Divorce ⇨156

Reconciliation and actual resumption of marriage relation may justify court in refusing, or make it the duty of court to refuse, to grant a final judgment of divorce.

4. Divorce ⇨156

Where events occur to change the status or relation of the parties after entry of interlocutory judgment of divorce, such as condonation and resumption of marital relation, entry of final judgment of divorce becomes a judicial and not a ministerial act, in the performance of which trial court has a broad discretion.

5. Divorce ⇨156

In order to constitute "reconciliation" the circumstances thereof must show intention of parties to reunite as husband and wife.

See publication Words and Phrases, for other judicial constructions and definitions of "Reconciliation".

6. Divorce ⇨156

Reconciliation is a state of mind to be determined from all the evidence, including all reasonable inferences that may be drawn therefrom.

7. Divorce ⇨156

Mere fact that parties indulged in marital intercourse is not a controlling circumstance of reconciliation.

8. Divorce ⇨184(6)

Whether evidence showed a mutual intention to effect a reconciliation and unite

in mending matrimonial yoke is a question of fact for trial court.

9. Divorce ⇨184(6)

Whether husband and wife became reconciled after granting of interlocutory judgment of divorce so as to preclude entry of final judgment of divorce was a question for trial court under conflicting evidence as to circumstances under which they agreed to resume living together.

10. Divorce ⇨162

Evidence that husband relied on wife's attorney, who obtained interlocutory judgment of divorce, to obtain final judgment warranted conclusion more than two years after entry of interlocutory judgment that final judgment had not been entered because of negligence and inadvertence of husband, and under such circumstances, court had power to then enter final judgment *nunc pro tunc* as of expiration of one year after entry of interlocutory judgment. Civ.Code, § 133.

Bertram H. Ross, Los Angeles, for appellant.

Thomas Higgins, Jr., Los Angeles, for respondent.

VALLÉE, Justice.

[1] Appeal by plaintiff from an order granting a motion made by defendant to enter a final judgment of divorce *nunc pro tunc*, and from the final judgment of divorce granted after a hearing at which plaintiff contended the application of defendant for the final decree should be denied on the ground the interlocutory judgment had been followed by a reconciliation and the resumption of marital relations. Since an appeal does not lie from the order, that appeal will be dismissed. Code Civ.Proc. § 963. The ruling is reviewable on appeal from the judgment.

On May 19, 1950, plaintiff-wife was granted an interlocutory judgment of divorce from defendant. The judgment was entered May 22, 1950. On May 7, 1952, no final judgment having been entered, defendant obtained an order commanding plaintiff to appear and show cause why

the final judgment should not be rendered and entered *nunc pro tunc* as of May 23, 1951. Plaintiff appeared and opposed the motion. On the hearing evidence was adduced by both parties. On June 19, 1952, an order was made that final judgment be entered *nunc pro tunc* as of one year subsequent to the entry of the interlocutory judgment. A final judgment was so entered on June 24, 1952.

[2] Inasmuch as the final judgment is predicated on the testimony of defendant, his version of the occurrences after the entry of the interlocutory judgment must be accepted. On April 1, 1951, plaintiff "went to work" for defendant in his store. He paid her a salary until June 18, 1951. Sometime in June, 1951, defendant told plaintiff that if she would just promise him that her family would not interfere in their marriage, if she would just think of him and be for him, that they should try to work out their marriage—try living together again. Defendant testified he told plaintiff: "Esther, if I would ever go back to you, it would be on one condition, on the condition we will try it out, but one thing, that you musn't run around, you must promise me not to go around with any man, we won't have any interference of the family. I have had plenty, because I can't stand another thing as we had. If you are willing to do that,' I said, 'we will talk things over, and if it doesn't work out, you and I are going to split. You owe me nothing and I owe you nothing, no strings attached, and we are through.'" They moved into an apartment on July 1, 1951, and lived there together until April 27, 1952, when defendant moved out and did not return. From sometime in January, 1952, until defendant left on April 27, 1952, plaintiff refused to have intercourse with him. Defendant testified that during the period the parties were living together plaintiff called him vile names, that just before he moved out was one such occasion and that he said: "Okay, Esther, you called me those words time and time again.' I said, 'This is the climax. You and I are through. You haven't lived up to anything.'" Defendant also testified that when they moved into the apartment it was his feeling that he was

having a "trial situation" with plaintiff; that he did not feel he was married to her; that if it didn't work, there were no strings attached, and he and Mrs. Nemer could part and part friendly; that was their agreement; it was just a trial.

[3-8] Reconciliation of the parties and actual resumption of the marriage relation may justify the court in refusing, or make it the duty of the court to refuse, to grant a final judgment of divorce. *Gloyd v. Superior Court*, 44 Cal.App. 39, 42, 185 P. 995. Where, after the entry of an interlocutory decree, events occur to change the status or relation of the parties, such as condonation and a resumption of the marital relation, the entry of the final decree is not a ministerial act; it becomes a judicial act in the performance of which the trial court has a broad discretion. *Lane v. Superior Court*, 104 Cal.App. 340, 345, 285 P. 860; *Angell v. Angell*, 84 Cal.App.2d 339, 191 P. 2d 54. The circumstances of reconciliation must show that the parties intended to reunite as husband and wife. In re *Estate of Abila*, 32 Cal.2d 559, 561, 197 P.2d 10. Reconciliation is a state of mind to be determined from all the evidence, including all reasonable inferences that may be drawn therefrom. *Ruggles v. Bailey*, 15 Cal.App. 2d 555, 556, 59 P.2d 837. The mere fact that the parties indulged in marital intercourse which they admitted, is not a controlling circumstance. *Hawkins v. Hawkins*, 104 Cal.App. 608, 612-613, 286 P. 747. Whether the evidence showed a mutual intention to effect a reconciliation and unite in mending the matrimonial yoke is a question of fact for the determination of the trial court. *Keller v. Keller*, 122 Cal.App. 712, 715, 10 P.2d 541; *Kronman v. Kronman*, 129 Cal. App. 10, 15, 18 P.2d 712.

[9] The evidence was such that the trial court would have been justified in finding that the parties became reconciled after the granting of the interlocutory decree. It also appears that it was justified in finding, as it did, that there was no reconciliation. Under such circumstances a reviewing court may not substitute its views for those of the trial court. *Coward v. Coward*, 3 Cal.2d 340, 44 P.2d 358; *Angell*

v. Angell, 84 Cal.App.2d 339, 343, 191 P.2d 54.

[10] In any event, says plaintiff, the court was without power to enter the final judgment *nunc pro tunc*. Defendant testified that prior to commencement of the action he had a conference with plaintiff and her attorney at which a property settlement agreement was entered into; that he was not represented by an attorney; that at the conference plaintiff's attorney told him he was going to take care of everything to the end of the case, including obtaining the final judgment; and that he relied on plaintiff's attorney to obtain it. This evidence was sufficient to warrant the court in concluding that the final judgment had not been entered previously because of negligence and inadvertence on the part of defendant. Under such circumstances the court was empowered to enter the final judgment *nunc pro tunc* as of the expiration of one year after the entry of the interlocutory judgment. Civ.Code, § 133; *Hull v. Hull*, 102 Cal.App.2d 382, 384, 227 P.2d 546.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



116 Cal.App.2d 798

DAVIES v. ACWARE PLASTICS et al.

Civ. 19375.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1953.

Action for recovery of amount paid corporation president for his personal stock on ground that the sale was made for the benefit of the corporation which did not have a permit for the issuance or sale of stock. The Superior Court, Los Angeles County, Walter R. Evans, Judge of the Superior Court of Mono County, Designated, entered judgment for defendant, and plaintiff appealed. The Dis-

trict Court of Appeal, Moore, P. J., held that the evidence sustained the finding that the sale was a bona fide sale of the president's personal stock and that it was not made for the direct or indirect benefit of the corporation or the direct or indirect promotion of any scheme or enterprise with intent of violating or evading any provision of the Corporate Securities Law.

Affirmed.

1. Licenses ☞39.24

In action for recovery of amount paid corporation president and treasurer for stock on ground that corporation was without permit to sell or issue such stock, evidence supported finding that such corporate officer had sold his personal stock to plaintiff, not stock held by corporation. Corporations Code, §§ 25000 et seq., 25152.

2. Brokers ☞3

Where president and treasurer of corporation was not engaged in business of selling stock, and sale of his personal stock to another was a single, isolated transaction, he was not a "broker" required by Corporations Code to obtain license. Corporations Code, § 25006.

See publication Words and Phrases, for other judicial constructions and definitions of "Broker".

3. Licenses ☞39.24

In action for recovery of money paid corporation president and treasurer for stock, evidence that such corporate officer loaned proceeds of sale to corporation which lacked permit to issue or sell stock presented question for trier of fact as to whether sale was made for benefit of corporation in violation of Corporations Code. Corporations Code, §§ 25000 et seq., 25006, 25152.

4. Licenses ☞39.24

In action for recovery of amount paid to corporation president and treasurer for stock on ground that sale had been for benefit of corporation which lacked permit to issue or sell stock, evidence sustained finding that sale was bona fide sale of corporate officer's personal stock and that it was not made for direct or indirect benefit of corporation or for direct or indirect promotion of any scheme or enter-

prise with intent of violating or evading any provision of Corporate Securities Law. Corporations Code, §§ 25000 et seq., 25006, 25152.

Frank J. Kanne, Jr., Los Angeles, for appellant.

Collins & Woolway, Los Angeles, for respondents.

MOORE, Presiding Justice.

The court below found against plaintiff's allegation that he had been fraudulently induced to invest \$5000 in the stock of the corporate defendant. He demands a reversal of the ensuing judgment on the grounds of (1) insufficiency of the evidence, (2) erroneous construction of section 25152 of the Corporations Code.

Appellant purchased his stock from respondent Gummo who was president and treasurer of Acware Plastics, and owner of two thirds of its capital stock. Through a friend of his family, appellant made the acquaintance of Gummo in November 1947. Thereafter they corresponded with reference to appellant's employment, his investment and the finances of the corporation. On December 11, 1947, Gummo wrote him that "our only problem now is one of working capital. * * * We should sell around \$25,000 worth of stock to be used as working capital." Appellant came to Los Angeles on February 20, 1948. On the following day he handed to Gummo a check in the amount of \$5,000, made payable to appellant, which he endorsed "Ray Davies, Jr. Payable to Acware Plastics for stock." Two days later a certificate for fifty shares of the capital stock of the corporation was delivered to appellant.

The court found: On or about the 23d day of February, 1948, Gummo sold and delivered to plaintiff fifty shares of his personally owned stock of Acware Plastics for \$5,000; at the time of such sale plaintiff was fully informed that he was purchasing privately owned stock of Gummo; Gummo was not the issuer or underwriter thereof; the sale was made by Gummo for his own account and "was not made, directly or indirectly, for the benefit of Acware

Plastics or any underwriter of said stock and said sale was not made for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the California Corporate Securities Law.”

Appellant contends that the stock transferred to him was not the personally owned stock of Gummo; that in any event the sale was made for the benefit of the corporation and since no permit had been granted by the Commissioner of Corporations for the sale or issuance thereof to plaintiff, the sale was in violation of the Corporate Securities Act, Corporations Code, secs. 25000 et seq., and therefore void.

Gummo testified that when the certificate for the fifty shares was delivered to appellant he informed Davies that he had asked his attorney what to do about the stock and had been advised that in view of the fact that this was a family proposition and since it would require some time to have the corporation get a permit for issuing new stock, Gummo should transfer his own shares and if the company was in need of funds, Gummo should advance the \$5,000 to the company and take its note.

[1] The stock was originally issued to Gummo by the corporation pursuant to a permit of the Division of Corporations. That the stock was validly issued, there can be no doubt. Gummo testified that he transferred fifty shares of his personal stock to plaintiff. At the time of the delivery of the certificate, appellant signed a receipt bearing the notation that the fifty shares of stock had been transferred from Charles F. Gummo. The \$5,000 check which Davies had delivered to Gummo was deposited in the corporation bank account and the same amount was carried on the books of the corporation as a loan from Gummo to the corporation. There is no evidence that the corporation issued any new capital shares. The foregoing evidence

generously sustains the finding that Gummo sold to appellant fifty shares of his own personal stock.

In support of his contention that the sale was void because no permit had been granted to defendants for the issuance of the stock, plaintiff cites section 25152 of the Corporations Code which reads as follows: “Except as expressly provided in this division, the Corporate Securities Law does not apply to the sale of securities when (a) made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account, and (b) the sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of the security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Law.”

[2-4] Gummo was not engaged in the business of selling stock and the sale in question was a single, isolated transaction. He was not a broker as defined by the code section¹ which requires one to obtain a license. That he loaned the corporation the \$5,000 which he obtained from the sale of his private stock does not *ipso facto* make the sale one for the benefit of the issuer of the security. That is a question of fact which the trier of fact has decided adversely to appellant. There is ample evidence to sustain the finding that the sale was a bona fide sale of Gummo's personal stock and that it was not made for the direct or indirect benefit of the issuer or the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the California Corporate Securities Law.

Affirmed.

McCOMB and FOX, JJ., concur.

1. Corporations Code, sec. 25006 reads as follows:

“(a) ‘Broker’ includes every person or company, other than an agent, who, in this State, engages either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or

otherwise dealing in, any security issued by others, including all securities of the classes listed in Section 25100, or of underwriting any issue of such securities, or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public.”

116 Cal.App.2d 746

**PEOPLE v. ONE 1950 MERCURY SEDAN,
ENGINE NO. 50LA40896M, 1950 LI-
CENSE NO. 29B9130.**

Civ. 19081.

District Court of Appeal, Second District,
Division 1, California.

March 18, 1953.

Rehearing Denied April 6, 1953.

Hearing Denied May 14, 1953.

Proceedings were brought for forfeiture of automobile, which was allegedly used for transportation of marihuana. Legal owner of automobile did not file an answer within 20 days required by statute, but did file an answer before case was heard. The Superior Court of Los Angeles County entered a judgment against legal owner after striking out its answer and entered an order denying legal owner's motion for new trial, and legal owner appealed. The District Court of Appeal, Drapeau, J., held that due process of law required that legal owner be given his day in court and be permitted to be heard.

Judgment reversed, and appeal from order denying motion for new trial dismissed.

1. Forfeitures ⇨5

Where legal owner of automobile, which the state sought to have forfeited because it was allegedly used for transportation of marihuana, did not file answer in forfeiture proceedings within 20 days as required by statute, but answer was filed by legal owner before case was heard, legal owner was entitled to its day in court, and was entitled to be relieved of its default. Code Civ.Proc. § 473; Health and Safety Code, §§ 11614-11616.

2. Forfeitures ⇨2

Statute providing for forfeiture of automobiles used in transporting narcotics should be construed in a manner as favorable to owner as is consistent with fair principles of interpretation. Health and Safety Code, § 11610 et seq.

3. Constitutional Law ⇨48

Where statutes are susceptible of two interpretations, one of which will satisfy constitutional guarantees, courts will, if possible, uphold statutes.

4. Constitutional Law ⇨319

Refusal of court to permit legal owner of automobile to appear and defend

against forfeiture of automobile, which had allegedly been used in transportation of narcotics, where legal owner filed answer before case was heard, but not within 20 days required by statute, was a denial of "due process of law". Code Civ. Proc. § 473; Health and Safety Code, §§ 11614-11616.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Process of Law".

5. Constitutional Law ⇨251

"Due process of law" means, broadly speaking, that before property of a person may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given opportunity to be heard.

6. Constitutional Law ⇨315

Relief from defaults in law cases in proper circumstances is an integral part of "due process of law". Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Process of Law".

7. Forfeitures ⇨5

Though the state has right to forfeit automobiles used to transport narcotics, and though automobiles may be taken away from owners because persons permitted to drive them have transported narcotics in them, even without knowledge of owners, and even though automobiles may be forfeited when infinitesimal quantity of narcotics is transported, the state must prove that in fact narcotics were transported. Health and Safety Code, § 11610 et seq.

8. Forfeitures ⇨5

Where forensic chemist testified in proceedings for forfeiture of automobile, on ground that it had allegedly been used for transportation of marihuana, that three small envelopes, enclosed in a larger envelop handed to him, each contained one marihuana cigarette, but chemist would not state that they were same cigarettes that he had examined in his laboratory and that specific cigarettes before him were narcotic, his testimony was insufficient to establish that cigarettes were marihuana cig-

arettes. Health and Safety Code, § 11610 et seq.

9. Evidence ⇨222(1, 10), 265(1)

Declaration by litigant contrary to his position in a law suit is admissible and is evidence tending to prove matter admitted, but rule is subject to qualification that declaration is not binding on co-defendants. Code Civ.Proc. § 1870, subd. 2.

10. Evidence ⇨222(10)

In proceeding for forfeiture of automobile, on ground that it had been used for transportation of marihuana, alleged admission of driver of automobile to arresting officer that he knew cigarettes were marihuana did not bind legal owner of automobile. Health and Safety Code, § 11610 et seq.; Code Civ.Proc. § 1870, subd. 2.

David C. Marcus, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Donald D. Stoker and Stanley Zipser, Deputy Attys. Gen., for respondent.

DRAPEAU, Justice.

A clothes cleaner telephoned the police department in Los Angeles that he had found two brown paper cigarettes in a coat left with him to be cleaned, and that he thought they were marihuana cigarettes. Police officers went to the cleaner's place of business, and waited for the owner of the coat to appear.

Jimmie Torres, a sixteen-year-old boy, drove up in a Mercury sedan. He, and several companions riding with him, were taken into custody.

The coat had been left to be cleaned by one of Jimmie's companions. This companion called for it, but said it was Jimmie's.

The officers searched the Mercury in Jimmy's presence, and found one brown paper cigarette in a rug doubled up on the floor of the car. Then they let everybody go but Jimmie and his companion who called for the coat.

At the police station Jimmie told the officers that he found the cigarettes in the

Mercury after he had parked it on a street in Oakland. One of the officers testified on direct examination: "I asked him if he had any more marihuana, and he said he did not." On cross examination the officer further testified: "I asked him if he knew these were marihuana cigarettes, and he said he did."

In this proceeding to forfeit the automobile to the state, the trial judge found that J. J. Torres (Jimmie's father), Jimmie, and Mary Torres (Jimmie's sister), were registered owners of the automobile, and that while the vehicle was being driven by Jimmie it was used to transport marihuana, a narcotic. It was adjudged that the Mercury was forfeited to the state, pursuant to the provisions of Chap. 7, Art. 1, Div. X of the Health and Safety Code.

Jimmie and his family lived in Oakland. At the time the car was seized Jimmie had driven it to Los Angeles to visit relatives.

Jimmie's father made the down payment on the car, and monthly payments on the balance of the purchase price. This balance was advanced under a conditional sales contract assigned to Mercantile Acceptance Corporation.

Jimmie's father testified that the certificate of ownership was issued by the Motor Vehicle Department to the assignor of Mercantile Acceptance Corporation, as legal owner, and in his name and in the names of Jimmie, his son and Mary his daughter, as registered owners. He said this was done because he could not drive and the boy could.

Notice of seizure of the automobile was filed in the Superior Court December 27, 1950. A copy of the notice was mailed to the acceptance company on the same day. Answer of the acceptance company was filed January 19, 1951.

The Superior Court struck out the answer of the acceptance company because it had not been filed within 20 days after mailing of the notice of seizure. The Superior Court denied a motion under Section 473 of the Code of Civil Procedure by the acceptance company to be relieved of its default.

Grounds of appeal are as follows:

1. That it was error to strike the answer of Mercantile Acceptance Corporation, and

to deny relief under Section 473 of the Code of Civil Procedure.

2. That the evidence is insufficient to sustain the finding of forfeiture.

3. That defendant father's motion to dismiss at the close of plaintiff's case should have been granted.

These matters will be discussed in order.

First, the contention that it was error to strike the acceptance company's answer and to deny its motion under Section 473 of the Code of Civil Procedure:

The sections of the Health and Safety Code upon which the court's action was predicated are as follows:

"§ 11614. *Time for filing answer to notice.* Within twenty days after the the mailing or publication of the notice, the owner of the vehicle may file a verified answer to the fact of the use of the vehicle alleged in the notice of seizure and of the intended forfeiture proceeding.

"§ 11615. *Extension of time for filing answer* forbidden. No extensions of time shall be granted for the purpose of filing the answer.

"§ 11616. *Failure to file answer: Order of forfeiture.* If at the end of twenty days after the notice has been mailed or published there is no verified answer on file, the court shall hear evidence upon the fact of the unlawful use and shall, upon motion, order the vehicle forfeited to the State."

This presents the question: Does the failure of the legal owner of an automobile to file an answer in narcotics forfeiture proceedings within twenty days after mailing notice of forfeiture end the case so far as the legal owner is concerned?

This appears to be the plain legislative intent, if such proceedings are completed and judgment rendered before the legal owner appears.

[1] But here answer was filed before the case was heard. In such circumstances the legal owner is entitled to his day in court. Section 473 of the Code of Civil Procedure is applicable to just such cases as this.

[2] The statute imposing forfeiture of automobiles used in transporting narcotics should be construed in a manner as favorable to the owner as is consistent with fair principles of interpretation. *People v. One 1939 Buick Coupe*, 56 Cal.App.2d 163, 132 P.2d 308; Cf. *People v. One 1940 Ford V-8 Coupe*, 36 Cal.2d 471, 224 P.2d 677.

[3] Where statutes are susceptible of two interpretations, one of which would satisfy constitutional guarantees, if possible courts will uphold the legislation. *People v. One 1941 Buick Sport Coupe*, 28 Cal.2d 692, 171 P.2d 719.

[4] In this case to deny the legal owner the right to appear and defend against the asserted forfeiture was to deny him due process of law. Any other construction would be to destroy the element of fairness implicit in our American system of justice. For justice is always the controlling consideration under our law. And in no field of that law is due process more essential than in this present-day legislative resurrection of the ancient medieval concept of the deodand.

[5] As said in a dissenting opinion by Mr. Justice Carter in *Simpson v. City of Los Angeles*, 40 Cal.2d 271, at page 285, 253 P.2d 464:

"While it is impossible to define with precision 'due process of law' it means, broadly speaking, that before a man's property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard. It means further that the notice shall be a real and reasonable one, and the hearing, such as is ordinarily, or at least reasonably, given in similar cases."

[6] Relief from defaults in law cases in proper circumstances is an integral part of due process of law in California. Therefore it was an abuse of discretion for the court to strike the answer from the file, and to deny relief under Section 473 of the Code of Civil Procedure.

Grounds of appeal 2 and 3 will be discussed together.

[7] While the state has the undoubted right to forfeit vehicles used to transport

narcotics; while vehicles may be taken away from owners because persons permitted to drive them have transported narcotics in them, even without their knowledge, *People v. One 1937 Plymouth 6 # 4-Door Sedan*, 37 Cal.App.2d 65, 98 P.2d 750; *People v. One 1941 Buick Sport Coupe*, 28 Cal.2d 692, 171 P.2d 719, and even when an infinitesimal quantity of narcotic is transported, such as one marihuana cigarette concealed in a sock, *People v. One 1941 Chrysler Tudor*, 71 Cal.App.2d 312, 162 P.2d 653, still simple justice requires that the state must prove that in fact narcotics were transported.

The proof in this case does not measure up to this indispensable requirement.

After proving the facts above narrated, the state put a forensic chemist on the witness stand to prove that the brown paper cigarettes contained narcotic, marihuana.

This witness testified that three small envelopes, enclosed in a larger one handed to him, each contained one marihuana narcotic cigarette.

But this witness would not say that these were the same cigarettes that he examined in his laboratory and that the specific cigarettes before him were narcotic.

[8] And no foundation was established that the cigarettes in court were the same cigarettes examined in his laboratory by the forensic chemist. Therefore so far as the record in this case is concerned the cigarettes found in the coat and in the car are brown paper cigarettes, no more.

The trial court sustained objection to the introduction in evidence of the cigarettes. Then the court went forward with the case, and found that the automobile had been used to transport the narcotic marihuana.

One more thing remains for consideration. Was the testimony of the arresting officer that Jimmie said he knew the cigarettes were marihuana sufficient to support the finding?

[9] It is a fundamental rule that a declaration by a litigant contrary to his position in a law suit is admissible and is evidence which tends to prove the matter admitted. Code of Civ.Proc. § 1870, subd. 2;

Bonebrake v. McCormick, 35 Cal.2d 16, 215 P.2d 728. But the rule is subject to the qualification that the declaration is not binding upon co-defendants. *Nishi v. Inoguchi*, 116 Cal.App. 398, 2 P.2d 864.

[10] Therefore, Jimmie's admission did not bind the other defendants.

The judgment and the order striking the answer of defendant Mercantile Acceptance Corporation and denying relief under Section 473 of the Code of Civil Procedure are, and each of them is, reversed. The appeal from the order denying motion for new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



117 Cal.App.2d 7

CLAYTON v. CLAYTON.

Civ. 4607.

District Court of Appeal, Fourth District,
California.

March 25, 1953.

Post-decretal proceedings instituted by wife for modification of child custody provisions of divorce decree. The Superior Court, Kern County, R. B. Lambert, J., granted the relief sought, and the husband appealed. The District Court of Appeal, Griffin, J., held that there had been sufficient showing of change in circumstances to justify modification of the decree.

Affirmed.

I. Divorce $\S$ 303(3)

Order modifying divorce decree as to custody of children can be made without finding as to unfitness of parent to have custody of children.

2. Divorce $\S$ 303(3)

In proceedings to modify child custody provisions of divorce decree, there was sufficient showing of change of circumstances to justify granting relief sought.

3. Parent and Child Ⓒ2(3.1)

Where child custody contest is between parents, both of whom are fit to care for child, statutory provision that, other things being equal, child of tender years shall be given to mother, must be read in connection with provision that best interest of child must be considered; and trial court, when faced with two fit parents, must give consideration to best interests of children, and in determining that fact has broad discretion in deciding whether other things are equal. Civ.Code, §§ 138 (1,2), 197.

4. Infants Ⓒ19

Record, in child custody case, would not sustain contention that trial judge had misconceived facts or prejudged issues to extent that he failed to exercise reasonable discretion.

5. Divorce Ⓒ222

Where, by terms of divorce decree, action in respect to any change in custody and support of minor children was still pending, and judgment was subject to modification upon proper application and showing, trial court could award counsel fees to divorced wife in proceedings brought by her to modify child custody provisions of decree. Civ.Code, § 137.3; Code Civ.Proc. § 1049.

6. Husband and Wife Ⓒ205(6)

In absence of showing by husband that wife was possessed of sufficient funds of her own to pay her attorney's fees and costs in child custody case, attorney's fees were allowed her. Civ.Code, §§ 137.3, 167.

Siemon & Siemon, Bakersfield, for appellant.

Dorsey, Campbell & Bultman, Henry E. Bianchi, Bakersfield, for respondent.

GRIFFIN, Justice.

On May 31, 1949, plaintiff secured an interlocutory decree of divorce from defendant by default. The final decree was entered on December 17, 1950. Both decrees granted the care, custody and control of two minor children, then aged three and four years respectively, to plaintiff.

Plaintiff's original complaint alleged that plaintiff was a fit and proper person to have the custody of the children (no mention is made of the unfitness of defendant); that plaintiff and defendant agreed (subject to the approval of the court) that plaintiff would retain custody of the children for six months "for the reason that defendant does not now have adequate housing for said children and plaintiff does have means for caring for them"; and that at the expiration of six months the parties would consult for the purpose of determining, with the consent of the court, the ultimate disposition of their custody.

In accordance with this allegation, the court awarded the custody to plaintiff, without prejudice to defendant's right to petition the court for a change of custody. It appears that the paternal grandparents took the children into their home and rendered care for them. A limited right of visitation was given to the defendant. After the final decree was entered, which carried the same provisions as the interlocutory decree re custody, defendant remarried and moved into an adequate home. Her present husband, at that time, made about \$360 a month. He testified he was willing to support the wife and children and give them the best of care. Plaintiff was remarried to a young lady with one child. A child was later born to them.

On November 12, 1951, defendant moved to modify the respective decrees to change the custody of the two minor children from plaintiff to defendant, to require payment of defendant's attorneys' fees and costs, and for support for the children. Supporting as well as opposing affidavits were filed. At the hearing evidence was produced by both parties in support of their claims. On December 20, 1951, the court made an order amending the decrees by changing the custody from the plaintiff to the defendant, subject to the right of plaintiff to reasonable visitation and temporary custody during a portion of the school vacation period. It ordered plaintiff to pay \$20 per month each for the support of the children and to pay \$100 for defendant's attorneys' fees and costs.

On appeal from this order it is argued first that the evidence is insufficient to sustain the finding that the children's welfare would be promoted by the change; that there was no evidence to the effect that plaintiff was not a fit and proper person to have the custody and that the evidence showed defendant did not properly care for the children during their married life.

[1] There was some evidence that the mother mistreated the children, particularly the boy, at times during the period the parties were married. On the other hand, there was evidence of plaintiff's conduct which, if true, might have been subject to censure. There is no finding by the court as to the unfitness of either party, and such a finding as between the mother and father is not essential. *Frazier v. Frazier*, 115 Cal. App.2d 551, 252 P.2d 693; *Beal v. Beal*, 218 Cal. 755, 758, 24 P.2d 768.

In the ordinary proceeding between a husband and wife, it has been held that before a modifying order is justified there must be evidence of a change in circumstances or conditions. *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96.

[2] In *Ott v. Ott*, 127 Cal.App. 322, which is factually quite similar to the instant case, the court held that in a proceeding by a wife to modify a final decree of divorce which contained, as did the interlocutory decree, a provision awarding the custody of the two minor children of the parties to the husband, so that the custody of said children would be awarded to her, her remarriage constituted at least some showing of changed conditions affecting the welfare of the children, so as to warrant an order of modification of the decree. See, also, *Harbour v. Harbour*, 48 Cal.App.2d 97, 119 P.2d 394; *Bogardus v. Bogardus*, 102 Cal. App. 503, 283 P. 127; and 5 Cal.Jur.Ten Year Supp. pp. 336-337, sec. 140.3, as to what other facts may constitute change of conditions or circumstances justifying a modification of the decree. A change of conditions and circumstances here clearly appears. By agreement of the parties, by the pleadings and by the judgment of the court, it appears that due to the circumstances existing at the time the divorce proceedings were filed, conditions where differ-

ent, and the understanding was that the defendant would have the right to apply to the court for custody, after a period of six months, if conditions changed and if the parties could not agree as to the custody. The decree, in reference to custody, was apparently predicated upon the alleged agreement of the parties.

[3] It is the rule that where a contest is between the opposing parents, both fit, the "tender years" provision of subdivision (2) of section 138 of the Civil Code must be read with the provisions of subdivision (1) of the section making the welfare of the children a factor that must be considered. The trial court, when faced with two fit parents, must give consideration to the best interests of the children, and in determining that fact has a broad discretion in deciding whether other things are equal. Cases emphasizing the broad discretion existing in the trial court are legion. *Hamilton v. Hamilton*, 104 Cal.App.2d 111, 231 P.2d 69; *Bush v. Bush*, 81 Cal.App.2d 695, 185 P.2d 38; *Munson v. Munson*, 27 Cal.2d 659, 166 P.2d 268; and cases cited in *Frazier v. Frazier*, 115 Cal.App.2d 551, 252 P.2d 693.

It is true that the right of a mother to the custody of a minor child is not superior to that of the father, as pointed out by counsel for plaintiff. Civil Code Sec. 197. But in actions for divorce the court, in awarding custody, is to be guided by what appears to be for the best interests of the child, and other things being equal, a child of tender years should be given to the mother. Civil Code Sec. 138. Whether other things were equal, under the circumstances here related, was a factual question for the determination of the trial court. No abuse of discretion appears. *Simmons v. Simmons*, 22 Cal.App. 448, 134 P. 791; *Cowen v. Cowen*, 100 Cal. App.2d 366, 223 P.2d 666.

[4] It is next claimed that the trial judge, from his comments made during the hearing, misconceived the facts, and accordingly plaintiff did not have a fair trial of the issues, citing *Webber v. Webber*, 33 Cal. 2d 153, 161, 199 P.2d 934. The judge, during the hearing, did make some uninvited comments to the effect that as between the grandparents and the natural mother, who has a decent home, it is best for the children

to be with the mother, and that under these circumstances grandparents have no right to the children. He then added: "This woman is the mother, and if she is a fit person she is entitled to her children. I don't see why anybody would deprive her of them. Because she doesn't get along with her husband doesn't mean she is not a good mother". He concluded, however, with the statement: "This is a question between these parents", and ordered the custody changed from the father to the mother, with right of visitation and temporary custody in the father, as indicated. While the trial judge fairly well indicated, throughout the hearing, what his ultimate conclusion was going to be, it cannot be said that he erroneously prejudged the issues to the extent that he failed to exercise reasonable discretion. No miscarriage of justice occurred.

[5] It is next argued that the court had no authority to allow the defendant her attorneys' fees and costs in presenting the motion, since the decree of divorce had become final before the application to modify it was made. He cites section 137.3 of the Civil Code, which provides that:

"During the pendency of any action for divorce or for * * * support * * * of children, the court may order the husband * * * to pay such amount as may be reasonably necessary for the cost of maintaining * * the action and for attorney's fees." (Italics ours.)

It is contended that the action, at the time the application was made, was not *pending*, citing Section 1049, C.C.P., which provides that an action is pending from the time of its commencement until its final determination on appeal or until the time for appeal has passed. The point might appear to be unique and novel. However, in *Storrs v. Storrs*, 47 Cal.App.2d 108, 112, 117 P.2d 381, the same contention was made and the court rejected it, based on the ruling in *Prouty v. Prouty*, 16 Cal.2d 190, 105 P.2d 295, where the court upheld an order for attorneys' fees, under somewhat similar

conditions, and cited many authorities of this state wherein such costs and attorneys' fees were allowed. Since, by the terms of the decree, the action in respect to any change in the custody and support of the minor children was still pending, and the judgment was subject to modification upon proper application and showing, section 137.3 of the Civil Code was applicable. *McClure v. McClure*, 4 Cal.2d 356, 362, 49 P.2d 584, 100 A.L.R. 1257.

[6] Lastly, it is argued that the court could not exercise discretion in the matter since there was no proof of lack of funds of defendant or necessity for the allowance of attorneys' fees for her; that there was no evidence that she had not already paid her attorneys' fees and costs; that since she testified she had a home and could adequately provide for the children, and since her present husband testified he was earning \$360 per month, which would be community property, all the evidence indicated no need for the order, and accordingly the court had no authority to grant it, citing *Loeb v. Loeb*, 84 Cal.App.2d 141, 148, 190 P.2d 246.

The affidavit of defendant, made in support of the order, shows that she was unemployed and remained at her home caring for it. There was substantial evidence, at the hearing, that defendant had been in destitute financial condition prior to her marriage to her present husband. His community earnings would not be liable for defendant's attorneys' fees and costs contracted for and incurred in the instant proceedings. Sec. 167, Civ.Code. It is true that the showing here made is not entirely satisfactory but plaintiff has made no showing indicating that defendant was possessed of sufficient funds of her own to pay her attorneys' fees and costs. We conclude that there was sufficient evidence to support the order.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

116 Cal.App.2d 759

**HARRIS et al. v. NATIONAL UNION OF
MARINE COOKS & STEWARDS,
etc. et al.
Civ. 15221.**

District Court of Appeal, First District,
Division 2, California.

March 20, 1953.

Hearing Denied May 14, 1953.

Action by former union members against union for writ of mandate to compel their reinstatement in union and for loss of earnings over two year period which resulted from their alleged wrongful expulsion. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgments for former union members, and the union and others appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to sustain award of \$5,000 to each of them.

Judgments affirmed.

1. Labor Relations ⇨768

Rule that employee who has been wrongfully discharged before his term of service has expired must seek other employment and diminish damages sustained by him applies where employee sues a trade union for wrongfully bringing about his discharge.

2. Master and Servant ⇨42(1)

Generally, employee who is wrongfully discharged is not obligated to seek or accept other employment of different or inferior kind in order to mitigate damages.

3. Damages ⇨6

One whose wrongful conduct has rendered difficult ascertainment of damages cannot escape liability because such damages cannot be measured with exactness.

4. Labor Relations ⇨768

In action against union by former union members for loss of earnings over two year period which allegedly resulted from their wrongful expulsion, evidence was sufficient to sustain award of \$5,000 to each of them.

5. Witnesses ⇨275(2)

In action against union by former union members for loss of earnings over a two year period which allegedly resulted from their wrongful expulsion, where one

former member had described his occupation as "labor relations" on gun permit application and had devoted much of his unemployed time negotiating with defendant union, refusal to allow further cross examination of such former member on subject of such occupation after he had testified that he did not earn any money as a labor relations man was proper.

6. Labor Relations ⇨768

In action against union by former union members for loss of earnings over two year period which allegedly resulted from their wrongful expulsion, fact that award to each former union member was of like amount would not compel finding that awards were arbitrary.

7. Labor Relations ⇨765

In action against union by former union members for loss of earnings over two year period which allegedly resulted from their wrongful expulsion, refusal to allow union to show, for purposes of comparison with statistics for period in question, that, from 1941 to 1944 union had 15,000 members and controlled 2,000 vessels on ground that such evidence was too remote did not constitute an abuse of trial court's discretion.

8. Labor Relations ⇨765

In action against union by former union members for loss of earnings over two year period which allegedly resulted from their wrongful expulsion, refusal to allow union to show, upon issue of mitigation of damages, that another union was shipping two cooks on each vessel was not error in view of fact that former union members were chief stewards and not required to ship as cooks.

9. Appeal and Error ⇨878(1)

Upon appeal from judgment for former union members in their action to compel their reinstatement in union and for loss of earnings over two year period which allegedly resulted from their wrongful expulsion, former union members, who had not taken an appeal, were not in position to ask to have judgment reversed on ground that awards to them were inadequate.

Gladstein, Andersen & Leonard, San Francisco, for appellants.

Ropers & Majeski, Redwood City, Robert J. Barbieri, San Francisco, Aaron Sapiro, Los Angeles, and G. C. Ringole, San Francisco, for respondents.

DOOLING, Justice.

The judgments here appealed from affect the same five plaintiffs who received the judgments affirmed by this court in *Harris v. National Union, etc., Cooks & Stewards*, 98 Cal.App.2d 733, 221 P.2d 136. On that appeal we affirmed a judgment granting a writ of mandate which ordered the restoration of these plaintiffs to membership in defendant union and awarded them damages for loss of wages caused by their illegal expulsion therefrom. In entering the former judgment the trial court retained jurisdiction pending the appeal for the purpose of awarding such additional damages as might be suffered by plaintiffs until they were actually restored to the union. The present awards cover the period from September 30, 1948 to October 1, 1950 when plaintiffs were finally restored to their membership. For this period each plaintiff was given judgment for \$5000. The only questions presented on this appeal relate to the damages, since the right to such damages as plaintiffs properly proved are settled by the former appeal.

[1,2] Much of the briefs is taken up with the duty of respondents to mitigate their damages. The extent of this duty in a case of this character is delimited in *Smetherham v. Laundry Workers' Union*, 44 Cal.App.2d 131, 139, 111 P.2d 948, 952: "It is a general rule that it is the duty of an employee who has been wrongfully discharged before his term of service has expired, to seek other employment, and thus diminish the damages sustained by him. 8 Cal.Jur. 787. Apparently this rule applies where the employee sues a third party for wrongfully bringing about his discharge. *Adams v. Cameron*, 27 Cal.App. 625, 150 P. 1005, 151 P. 286. It is also a general rule that an employee who is wrongfully discharged is not obliged to seek or to accept other employment of a

different or inferior kind, in order to mitigate damages. Note to 28 A.L.R. 737; *Elbert v. Los Angeles Gas Co.*, 97 Cal. 244, 32 P. 9."

The problem presented to the trial court in the case of each of the five respondents was to determine: 1. If each respondent had not been prevented from obtaining employment with the shipping companies which employed its stewards through the appellant union during how many months of the two year period covered by the judgments might each respondent have actually been employed by such companies and what would his earnings have been from such anticipated employment? 2. Was comparable employment open to each respondent with other companies not under contract with appellant union? 3. If comparable employment was available did each respondent make a reasonable effort to secure such employment or was there some reasonable ground for his not doing so? 4. If any respondent failed to make a reasonable effort to mitigate his damages by how much would the damages have been reduced if he had made such effort?

[3] It is obvious that these questions are fraught with uncertainty, an uncertainty which fathers the rule quoted by us on the previous appeal in this case from *Zinn v. Ex-Cell-O Corp.*, 24 Cal.2d 290, 297-298, 149 P.2d 177: "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." *Harris v. National Union, etc., Cooks & Stewards*, supra, 98 Cal.App.2d at page 738, 221 P.2d at page 139.

The appellants proved that through the Sailors Union of the Pacific there were opportunities for some employment as stewards principally on tankers and that there were a few such opportunities on a limited number of other vessels. They also proved that due to a shortage of positions men in the classification of respondents normally worked about three-quarters of the year. A witness Turner, called by respondents, who was familiar with the working conditions in the field testified at length to what the respondents Harris,

Kaplan and Handelsman would have earned during the two year period in question if they had not been deprived of their opportunity to work for the companies supplied by appellant union. Without breaking down his figures they ran close to \$20,000 for the two year period. With these general facts in mind we approach each individual case.

The Harris Evidence.

[4, 5] Harris testified that while he was a member of the Sailors Union of the Pacific and could have had work as a steward on tankers he did not accept it because he suffered from catarrh and the fumes on tankers aggravated this condition. On cross-examination he gave some answers which tended to weaken this testimony but its weight in view of these later answers was for the trial court to determine. Evidence tending to support Harris' testimony of the bad effect of the fumes on tankers upon his respiratory condition is the fact that he went to New Orleans during this period and shipped out from there on three voyages in another type of vessel for a period aggregating 171 days. A man who does not want to work at his profession would clearly not go to so much trouble to obtain such work. Harris also engaged in some employment on shore. It is argued that he testified that he was working day and night during this period on his controversy with the union, but he also testified that he was seeking employment day and night. We cannot say that taking all the factors into consideration an award of \$5000, \$2500 per year, is not supported by the evidence. The evidence most favorable to Harris would have supported a much larger amount.

The Kaplan Evidence.

Kaplan testified that he could not get employment on tankers because of the ill feeling toward him of one of the officers of the Sailors Union of the Pacific. He sought work unsuccessfully through all of the sea-faring unions. He worked on shore during this period as a pile butt, laborer, timekeeper, carpenter, porter and ditch-digger. The court could find that Kaplan made every reasonable effort, and

in taking the menial positions that he did went far beyond the efforts required by the law, to mitigate his damages. The award to him might under the evidence most favorable to his case have been much larger.

It developed that in securing a gun permit Kaplan's occupation had been stated as "labor relations". Cross-examination developed that the person taking the application suggested the term because of Kaplan's activities in union matters. He testified "I never drew no money as a labor relations man * * * I never earned no money from it." There was no error in the court limiting further cross-examination on this subject. It had already been developed that he devoted a great deal of his unemployed time to his dispute with the respondent union and that was the sum of his "labor relations".

The Handelsman Evidence.

Handelsman did seek employment on tankers and did in fact receive some employment thereon. He also sought work in many hotels and restaurants without success. He was incapacitated part of the time. The court was entitled to weigh all the factors and we cannot say that the award made was not amply supported.

The McCourt Evidence.

McCourt was 72 years old. Because of his age he could only expect work with a company which had previously employed him. He could not get work on tankers because of his age, nor elsewhere although he tried everywhere. He had been steadily employed while he was a member of the respondent union. Again we can only hold the award supported by substantial evidence.

The Antons Evidence.

Antons worked as a port steward with the Grace Line from December 1948 to October 1949 when he was laid off on account of a reorganization of the staff. He later worked six months on the S.S. Cache. He made unsuccessful efforts to secure other employment. His age prohibited his employment on tankers and on Military Service Transportation. His good faith efforts to secure employment

and the amount of his damages were for the trial court and the modest award is supported by the evidence.

[6] The fact that the awards were the same in each case does not compel us to find that they were arbitrary. We are only concerned on appeal to find sufficient in the evidence to support each award.

[7] Appellants complain of the refusal of the trial court to permit the introduction of evidence covered by several offers of proof. The first offer was in connection with the cross-examination of Kaplan and has already been disposed of. The second offer was to show that from 1941 to 1944 the union had 15,000 members and controlled 1200 vessels. This was to be compared with 5400 members and 200 vessels in the period 1948-1950. The latter was proved as was also the percentage of time actually worked by each member during 1948-1950. The trial court committed no abuse of discretion in ruling that evidence for the period 1941-1944 was too remote. In re Guardianship of Jones, 86 Cal.App. 2d 35, 38, 194 P.2d 141, 142, and cases there cited.

The court properly sustained an objection to the offer to prove a custom of chief stewards to ship in lower ranks when work

as chief steward was not available. The duty of mitigation of damages as stated in the Smetherham case, supra, 44 Cal.App. 2d page 139, 111 P.2d at page 952, does not require the plaintiff "to seek or to accept other employment of a different or inferior kind".

[8] The final offer of proof was that the Sailors Union of the Pacific was shipping two cooks on each vessel. The respondents were chief stewards and not required to ship as cooks.

Appellants also complain of certain conduct of the trial judge. We find no prejudice in his conduct of the case.

[9] Respondents Harris, Kaplan and Handelsman ask us to reverse the judgments as to them as inadequate but without taking an appeal they are in no position to ask for such relief. *Salter v. Ulrich*, 22 Cal.2d 263, 268, 138 P.2d 7, 146 A.L.R. 1344.

Judgments affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

40 Cal.2d 552

BEVERLY OIL CO. v. CITY OF LOS ANGELES et al.
L. A. 21977.

Supreme Court of California, in Bank.
 March 27, 1953.

Oil company brought suit against city for declaratory relief and to enjoin enforcement of city zoning ordinance restricting nonconforming use of company's land for oil production. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment adverse to company, and company appealed. The Supreme Court, Shenk, J., held that zoning ordinance was not invalid as to company though it prohibited redrilling or deepening of wells.

Judgment affirmed.

Schauer, J., dissented.

Prior opinion 242 P.2d 682.

1. Municipal Corporations ⇨601(1)

Comprehensive zoning by municipal corporations is a legitimate exercise of police power.

2. Municipal Corporations ⇨601(1)

Fact that exercise of police power by municipal corporation in enacting zoning ordinance results in deprivation of individual rights and property cannot prevent operation of police power, once it is shown that exercise of police power is proper and method of its exercise is reasonably within meaning of due process of law.

3. Municipal Corporations ⇨625

The enactment of a city zoning ordinance which limits landowner's property interest in oil-bearing lands located within city is not of itself an unreasonable means of accomplishing a legitimate objective within police power of city.

4. Municipal Corporations ⇨601(7, 11)

City zoning ordinance must be shown to be unreasonable, oppressive, or unwarranted interference with property rights in exercise of the police power before it will be held invalid.

5. Municipal Corporations ⇨122(2)

Oil company contending that city zoning ordinance limiting drilling of oil wells was invalid had burden of establishing invalidity.

6. Municipal Corporations ⇨601(9)

City ordinance which expressly permitted operation of existing oil wells as nonconforming use, and which permitted redrilling of existing wells to present level to improve their production, but which forbade drilling of new wells or redrilling of old wells to depths beyond present level, was not void as to oil company having nonconforming use.

7. Municipal Corporations ⇨605

Existence of a nuisance is not necessarily the basis on which zoning ordinance may operate against a particular industry.

8. Municipal Corporations ⇨601(17), 621.53

Classification of zones in city zoning ordinance and granting of variances present questions generally within discretion of zoning authorities.

9. Municipal Corporations ⇨63(2)

Determination of zoning authorities as to classification of zones and granting of variances under zoning ordinance may not be set at naught by the courts, unless determination is arbitrary and unreasonable.

10. Municipal Corporations ⇨625

Fact that operations of oil company were restricted by city zoning ordinance in zone where others were permitted to operate planing mills, shooting galleries, skeet shooting, pig pens, wholesale poultry and rabbit slaughtering and stone cutting was not sufficient basis for holding that zoning authorities acted in arbitrary or unreasonable manner in respect to company's property.

11. Judgment ⇨735

Judgment in action by oil company against city that ordinance was void only in so far as it prohibited oil company from drilling exploratory well deeper than the old existing wells in the center of the property was not res judicata in subsequent action by company against city on question of invalidity of ordinance.

12. Estoppel ⇨62(4)

City which had annually levied and collected taxes against property on which producing oil wells were located was not thereby estopped from enacting a compre-

hensive zoning ordinance prohibiting re-drilling or deepening of wells which were a nonconforming use.

George E. Cryer and R. Alston Jones, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Alan G. Campbell, Deputy City Atty., Los Angeles, for respondents.

SHENK, Justice.

This is an appeal from a judgment for the defendants in an action seeking declaratory relief and to enjoin the defendants from enforcing a zoning ordinance alleged to restrict and eventually terminate the plaintiff's nonconforming use of land for oil production.

The plaintiff owns $11\frac{1}{6}$ acres of land bounded by San Vicente, Beverly and La Cienega Boulevards and West Third Street in Los Angeles. The first producing oil well on this property was drilled in 1908 and thereafter a total of ten or eleven oil wells were placed in production. In 1924 the property was annexed to the City as a part of the Fairfax Addition. In 1925 the City Council passed its first zoning ordinance; it zoned a part of the area in question for limited industrial use (M-2) and the remainder for commercial use (C-2). The use for drilling and production of oil was set apart for area "M-3" and was prohibited in "M-2" and "C-2" areas. However, the operation of existing wells in these areas was expressly permitted as a nonconforming use by the ordinance. In addition to the plaintiff's wells there were other wells in production in the area but as production declined these other wells were abandoned. By 1947 the only wells remaining in production were seven operated by the plaintiff on the property in question, and there are now no other wells for many miles. The wells yield approximately 6,000 barrels per month.

The area immediately surrounding the property is largely commercial with some light industrial development. All the surrounding streets are heavily traveled. On the westerly side the Pacific Electric Rail-

way operates freight lines over its right of way. Beyond the immediately surrounding streets there is a dense residential development in every direction, although some of the area is zoned for light industrial and commercial development.

The present Comprehensive Zoning Ordinance, effective June 1, 1946, is largely a reenactment of previous ordinances. It permits the continued nonconforming use of the land and the maintenance thereon of all nonconforming structures. However, it expressly provides that no new well for the production of hydrocarbon substances, which is a nonconforming use, shall be drilled nor shall existing wells be deepened. In 1945, prior to the reenactment of the present ordinance, the plaintiff instituted a suit against the city and obtained an adjudication that it could drill one new well in the center of its property, which it did. In addition the city in July, 1949, granted a variance which permits the plaintiff to drill on a triangular two-acre plot within the $11\frac{1}{6}$ acre tract, as many as four new wells, provided that for each one of the wells so drilled it abandon an existing well in the overall tract.

By a 1949 amendment to the present ordinance it is provided that "The nonconforming use of land shall be discontinued within (5) years from June 1, 1946 [the date of the enactment of the present ordinance], or within five (5) years from the date the use became nonconforming, in each of the following cases: (1) Where no buildings are employed in connection with such use; (2) Where the only buildings employed are accessory or incidental to such use * * *." The plaintiff asserts that this amendment was intended to terminate the nonconforming use of land for oil production, and that the situation precipitated by the amendment made it necessary to bring this action to protect its mineral rights. The case was argued in the trial court only on the question of the propriety of the enforcement of those provisions of the ordinance which prohibit drilling or re-drilling wells on the plaintiff's property. Although no specific reference was made to the 1949 amendment in the pleadings, still the validity of the ordinance as affected by the

amendment seems to have been properly put in issue when it was alleged and denied that the defendants "seek to prevent any additional drilling and to stifle and terminate the operation of the wells now on plaintiff's property * * *." Nevertheless it was incumbent upon the plaintiff to show that as between the parties a controversy existed with respect to the 1949 amendment before it could rely upon a threatened termination of its operations under the amendment as an invasion of its constitutional rights. The plaintiff failed to make such a showing. Furthermore, the provisions of the ordinance continue to permit the nonconforming use of buildings or structures (including derricks, pumping units, well casings, pipes, storage tanks) in Section 12.23-B of the Los Angeles Municipal Code and the maintenance of such buildings or structures in Section 12.23-A1.

The defendants assert that the administrative interpretation of the 1949 amendment in its application to the nonconforming use of land for the production of oil in a commercial or limited industrial zone, is that such use may be continued indefinitely since it necessarily involves the nonconforming use of nonconforming structures and therefore not within the purview of the amendment. At the trial no claim was made nor was any evidence presented to the effect that the defendants have taken any action or made any threat inconsistent with the asserted administrative interpretation. The trial judge specifically found that "no evidence was introduced in this case that the defendants construe the provisions [of the 1949 amendment] as applicable to the subject property and that there is no evidence that defendants threatened to or will apply said provisions to the subject property; therefore, no findings of fact are made with respect to said matter." Any issue in regard to the 1949 amendment therefore becomes academic in this proceeding and the decision must rest upon the validity of actions taken or threatened by the defendants whereby a controversy is created.

Since this action was begun an amendment to Section 12.23 of the Municipal Code provides that nonconforming oil wells must be abandoned after a 20-year period of

liquidation. The effect of this latter provision was not in issue before the trial court and is not in issue here.

[1,2] Comprehensive zoning has long been established as being a legitimate exercise of the police power. *Miller v. Board of Public Works*, 1925, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; *Euclid v. Ambler Realty Co.*, 1926, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303. The plaintiff has argued in the present case that the ordinance is invalid because it operates to take away or impairs his vested right to reach any and all oil underlying his property. However, the very essence of the police power as differentiated from the power of eminent domain is that the deprivation of individual rights and property cannot prevent its operation, once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law. This was illustrated by the case of *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348, affirming *Ex parte Hadacheck*, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248, upholding a zoning ordinance of this same defendant, the City of Los Angeles, in a case similar in many respects to the present one. *Hadacheck* had erected his brick yard and kiln in an almost uninhabited locality several miles outside the city upon an eight-acre tract of land with soil peculiarly valuable for brick-making. Subsequently the city boundaries were extended to include the locality and later a zoning ordinance was enacted which operated retroactively to require the removal of the industry. In its opinion the Supreme Court of the United States stated: "It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & Alton R. R. v. Tranbarger*, 238 U.S. 67, 78, 35 S.Ct. 678, 59 L.Ed. 1204, 1211. To so hold would preclude development and fix a city forever in its primitive conditions. There

must be progress, and if in its march private interests are in the way, they must yield to the good of the community." [239 U.S. 394, 36 S.Ct. 145.]

The policy in this state favors the conservation of oil deposits through statutory regulation, Oil and Gas Conservation, ch. 1, Div. 3, Public Resources Code. The people have a "primary and supreme interest" in oil deposits. Public Resources Code, § 3400. And it is recognized that oil production is a business which must operate, if at all, where the resources are found. Nevertheless city zoning ordinances prohibiting the production of oil in designated areas have been held valid.

In *Pacific Palisades Association v. City of Huntington Beach*, 196 Cal. 211, 237 P. 538, 539, 40 A.L.R. 782, the court stated that the city had "the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing."

In *Marblehead Land Company v. City of Los Angeles*, 9 Cir., 47 F.2d 528, certiorari denied, 284 U.S. 634, 52 S.Ct. 18, 76 L.Ed. 540, the Circuit Court of Appeals affirmed a judgment of the District Court denying an injunction against the enforcement of the Los Angeles zoning ordinance in its prohibition of oil well drilling operations in an area zoned for other uses. The argument raised the question of the right of the property owner to extract natural resources. The court stated, 47 F.2d at page 532: "* * * there can be no question of the inherent right of the city to control or prohibit such production, provided it is done reasonably and not arbitrarily. In that event the loss must fall upon the owner whether it prevents him from erecting structures or establishing industries which he desires to erect or establish, or whether it prevents him from developing the inherent potentialities of his land." The court decided that the particular ordinance was not arbitrary or unreasonable, even though the City Council had once amended the ordinance to permit oil drilling operations and had then repealed the amendment, while in the meanwhile the land had

been leased for oil drilling purposes and a considerable sum of money had been spent in preliminary work.

[3] It must be deemed to be well settled that the enactment of an ordinance which limits the owner's property interest in oil bearing lands located within the city is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city.

There remains the question of whether the application of the ordinance in the circumstances of this case seeks to accomplish its legitimate objective in a manner which is reasonable and not arbitrary. It should be noted that the ordinance does not prohibit the production of oil by the plaintiff, and the plaintiff's only objections to its enactment are that it cannot drill new wells, or redrill old wells to depths beyond the present level. It may redrill existing wells to their present level to improve their production. Furthermore, it requested and was granted a variance under which it may concentrate all of its oil production operations in a triangular two-acre parcel, and may drill from within that area wells at such angles as to reach any presently producing deposit underlying the tract provided it abandons one of four existing wells for each new well drilled. In addition the plaintiff may drill an additional fifth well within the triangular area. When the effect of the variance is considered with the ordinance, it appears that the plaintiff is complaining of an impairment far less serious in effect than those previously considered and upheld. It has not been denied the right to extract the mineral wealth underlying its property, which denial has been upheld in other cases. In addition it appears that in some respects the plaintiff has been benefited by the operation of this ordinance. It is a known fact that oil is a migratory substance and that a well may drain the oil from underneath the adjoining properties, *Bernstein v. Bush*, 29 Cal.2d 773, 177 P.2d 913. The plaintiff's wells may recover oil which could be recovered by surrounding owners if it were not for the prohibitions of the ordinance. The variance therefore places the plaintiff in a position

which is highly favorable as against surrounding property so far as oil production rights are concerned.

[4-6] Since it must be shown that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power before a zoning ordinance can be held invalid, *Zahn v. Board of Public Works*, 195 Cal. 497, 514, 234 P. 388; affirmed 274 U.S. 325, 328, 47 S.Ct. 594, 71 L.Ed. 1074; *Miller v. Board of Public Works*, 195 Cal. 477, 484, 488, 234 P. 381, 38 A.L.R. 1479, we conclude that the plaintiff has failed to establish the invalidity of the present zoning ordinance, or as applied to the circumstances in this case that there has been an unconstitutional impairment of its property rights. The burden rests upon the plaintiff to establish the invalidity of the ordinance in its application to the property involved. The plaintiff's failure to sustain this burden raises a presumption of the existence of such facts as are sufficient to sustain the ordinance. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138.

[7-10] Other arguments advanced by the plaintiff are without merit. It attaches significance to the asserted fact that its operations did not constitute a nuisance. However, the existence of a nuisance is not necessarily the basis upon which a zoning ordinance may operate against a particular industry. The classification of zones and the granting of variances present questions generally within the discretion of the zoning authorities. Their determination may not be set at naught by the courts unless it is arbitrary and unreasonable. *County of San Diego v. McClurken*, 1951, 37 Cal.2d 683, 234 P.2d 972. It is to be noted that section 12.23 of the Los Angeles Municipal Code contains an express declaration that oil drilling and production in urbanized areas (which includes the zones within which this property lies) are detrimental to the public health, safety and welfare. Notwithstanding this the plaintiff has been allowed to produce oil in this urban area. The fact that its operations are restricted

in a zone where others are permitted to operate planing mills, shooting galleries, skeet shooting, pig pens, wholesale poultry and rabbit slaughtering and stone cutting is not in itself a sufficient basis for holding that the zoning authorities have acted in an arbitrary or unreasonable manner in respect to the plaintiff's property, or that the declaration embodied in section 12.23 is improper.

The plaintiff relies upon *Jones v. City of Los Angeles*, 1930, 211 Cal. 304, 295 P. 14, wherein the court refused to apply retroactively, so as to destroy the plaintiff's valuable sanatorium business, a zoning ordinance which forbade such institutions in residential areas. It was there held that it was unreasonable and arbitrary to destroy the plaintiff's sanatorium business under the circumstances of that case. Each case must be determined on its own facts. In the present case the record does not show that the plaintiff's business is threatened with destruction, but merely that it is regulated and restricted in a manner determined to be reasonable.

[11] The plaintiff asserts that the action previously brought against the defendant (*Beverly Oil Co. v. City of Los Angeles*, L. A. Superior Court No. 500993) in 1945 is res judicata on the question of invalidity of the ordinance. The judgment there was that the ordinance was void only insofar as it prohibited the plaintiff in the action from drilling one exploratory well, deeper than the old existing wells, in the center of the property. The only relief sought in that action was an adjudication that the plaintiff had the right to drill this exploratory well, whereas in this action the plaintiff seeks an adjudication that the entire ordinance as applied to it is void.

[12] The plaintiff argues that the defendant city is estopped to interfere with the recovery of oil under the plaintiff's land because the city has taxed the plaintiff's mineral rights. But the recognition of the existence of a property right and the requirement that it be subject to taxation does not mean that the right may not be legally regulated. An authorized restriction on

the use of such a right cannot invalidate the ordinance.

No other points require discussion.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent.

It is a matter of history that the device of zoning by ordinance was conceived as providing a method whereby discriminatory measures otherwise unlawful could be sustained. As related by W. L. Pollard of the Los Angeles Bar (Annals of the American Academy of Political and Social Science (May, 1931), vol. 155, part II, Zoning in the United States, pp. 17-18), "The so-called 'laundry cases' in San Francisco and elsewhere in northern California were the first California cases wherein the right of the City Council or the Board of Supervisors to restrict and prohibit certain uses within given districts in a city was recognized. * * * From 1870 to 1890, much of the laundry work in San Francisco was done by Chinese. This period marks the time of the violent anti-Chinese disturbances in California. Many state laws and city ordinances were enacted which sought to discriminate against the Chinese. All of these laws and ordinances were invalidated by the courts.

"At one time there were over three hundred Chinese laundries scattered through the residence and business districts of San Francisco. Practically all the structures of San Francisco were frame, and the presence of these laundries presented a definite fire hazard, as they had much combustible material—cloth and wood, and so forth—piled on the floors in buildings where fire was extensively used for boiling water, heating irons, and other purposes. Likewise, these laundries used large quantities of water which, having been used for washing purposes, became impregnated with soap and the substances washed from the clothes, and when turned into the gutters or other drainage facilities then present in the city, was objectionable from

the standpoint of odor. The laundries were also unsightly, in that the buildings were usually frame structures with drying lines on the roofs or inside the yards.

"The City Council of San Francisco seized upon these facts as a basis for their regulatory ordinances. The fact that the laundry buildings were becoming the clubs of the Chinese added to their objectionable features in the popular mind, and stirred the legislative body to drastic action. * * * The ordinances carried penal clauses and were enacted under police power * * *." They declared that "the indiscriminate establishment of public laundries * * * is injurious and dangerous to public health * * * and prejudicial to the well-being and comfort of the community, and depreciates the value of property * * *." Such ordinances "did not entirely prohibit laundries in certain districts but required them to procure permits from the Fire Wardens, the Board of Public Health, or the Board of Supervisors * * *."

The Annals of the American Academy continues: "While the ordinances did not specifically mention Chinese laundries, they were so drafted that in effect they were directly aimed at the existence and the operation of such establishments conducted by the Chinese. On December 28, 1885, a Chinese named Yick Wo was arrested * * * and charged with violating one of these ordinances."

Yick Wo, it seems, was well possessed of some of those admirable attributes of the Chinese people which have given so many of them (as has been apparent to the world in later generations, before, during, and since World War II) the will, the courage, and the perseverance to fight on against powerful aggressors who would enslave them. Mr. Yick was convicted. He carried his fight through several courts, including this court, which in denying him relief (In the Matter of Yick Wo (1885), 68 Cal. 294, 299, 305, 9 P. 139) admitted that "Clothes-washing is certainly not opposed to good morals, or subversive of public order or decency," but held that "it may be highly dangerous to the *public* safety," that "The process of washing is

not prohibited by * * * regulating the places at which, and the surroundings by which, it must be exercised," and that "We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the constitution of the United States * * *." Yick Wo, however, was not licked. He carried his fight to the Supreme Court of the United States and in the now historic decision (*Yick Wo v. Hopkins* (1886), 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220) he was freed.

I think it regrettable that this court, from its *Yick Wo* decision down to date, has shown so little inclination to protect private citizens against discriminatory, unfair, and, as concerns all legitimate objectives of valid zoning regulations, unnecessarily harsh, measures. The whole concept and the course of application of zoning laws, from their genesis in *Yick Wo* for the very purpose of accomplishing unlawful discrimination by "legal" means, have been characterized by a lack of reciprocating fairness. As stated in the *Annals of the American Academy* (p. 21) above referred to, "the courts have not as yet fully [and I would interpolate, fairly] recognized the zoning idea by holding that, once a city has zoned its area and set aside some portions thereof for industrial use, thereafter any industry permitted therein shall have full right to operate unhampered by nuisance charges, so long as it uses up-to-date machinery and conducts its business under rules of standard practice." In other words, the zoning concept and its application, to be more nearly fair, should include protection for property rights rather than being used exclusively, or predominantly and controllingly, for taking such rights without compensation.

The framers of our form of government did not contemplate that private property should be taken for public use without compensation. (U.S.Const., Fifth Amendment; Cal.Const., art. I, § 14; *Chicago, Burlington & C R'd v. Chicago* (1897), 166 U.S. 226, 236, 241, 17 S.Ct. 581, 41 L.Ed. 979.) Zoning does take it for a public use—often a purely esthetic and very nebulous one—

and the way our court has interpreted and applied the law, no compensation has been allowed. Upon my view of the record here the plaintiff is being quite unnecessarily, arbitrarily, and to no substantially good end, deprived without compensation of valuable property rights.

Under the ordinance here involved, although plaintiff may continue to produce oil and may redrill, it is precluded from drilling to depths beyond the present level. It is a matter of common knowledge among those who have had any substantial contact with the oil producing industry that in California some of its richest production has been achieved by tapping the deeper sands after shallower production had been largely exhausted. It seems difficult to conceive of a more useless, unnecessary and wholly arbitrary "regulation" than that involved herein, which while permitting the drilling for, and the production of, oil on plaintiff's property limits the drilling and production to pre-existing depths.

I would reverse the judgment.



116 Cal.App.2d 875

JACKSON et al. v. OSBORN et al.

JACKSON et al. v. CORNELL et al.

Civ. 8156 and 8157.

District Court of Appeal,
Third District, California.

March 24, 1953.

Actions against peace officers and their sureties for false arrest and imprisonment were consolidated for trial. The Superior Court, Merced County, Maushart, J., entered judgments on verdicts for defendants, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that justice of the peace had jurisdiction to issue warrants for arrest of plaintiffs for allegedly contributing to delinquency of a minor and that such warrants were regular on their face.

Judgments affirmed.

1. False Imprisonment ⇨40

Where arrests on which actions for false arrest and imprisonment were predicated were made pursuant to warrants, requested instruction that arrest without warrant must be made as soon as possible was properly refused as tending to mislead and confuse jury. Civ.Code, § 43.5(a).

2. Criminal Law ⇨206

1951 Amendment of statute relating to issuance of warrants of arrest merely sought to clarify the statute and did not make any change in the law. Pen.Code, § 813.

3. False Imprisonment ⇨12

Process is "regular on its face" when it proceeds from a court, officer, or body having authority of law to issue process of such nature, and is legal in form, and contains nothing to fairly apprise anyone that it was issued without authority.

See publication Words and Phrases, for other judicial constructions and definitions of "Regular On Its Face".

4. Criminal Law ⇨207(3)

Justice of the peace had jurisdiction to issue warrants of arrest for allegedly contributing to delinquency of a minor in violation of Welfare and Institutions Code, notwithstanding statutory provision giving juvenile court original jurisdiction over such misdemeanor. Welfare and Institutions Code, § 702; Pen.Code, §§ 813, 860.

5. False Imprisonment ⇨7(3)

Warrants of arrest issued by justice of the peace for allegedly contributing to delinquency of a minor were "regular on their face" within statute exonerating officers from civil liability for arrest made pursuant to warrant regular upon its face. Welfare and Institutions Code, § 702; Pen.Code, § 813; Civ.Code, § 43.5(a).

6. False Imprisonment ⇨31

Sheriffs and Constables ⇨169

In action against peace officers and their sureties for false arrest and imprisonment, evidence that officers in good faith and without malice sought and obtained warrants for arrest of plaintiffs and that such warrants were regularly issued and

valid on their face sustained verdicts for defendants. Pen.Code, § 813; Civ.Code, § 43.5(a).

Frank Loria and Sutter & Elledge, Modesto, for appellant.

C. Ray Robinson, R. A. McCormick and William B. Boone, Merced, for respondent.

SCHOTTKY, Justice.

Evelyn Jackson and her husband, John Jackson, brought two actions to recover damages for alleged false arrest and imprisonment, naming various peace officers and their sureties as defendants in each suit. Defendant Cornell was Sheriff of Merced County; defendant Adcock was his deputy; and deputy Borth was at that time serving as a special deputy sheriff for the county. Defendant Osborn was constable of the township in Merced County where plaintiffs resided. The actions were consolidated for trial and the jury rendered a verdict in favor of defendants in each case. Plaintiffs have appealed from the judgments entered on said verdicts.

Plaintiffs urge two grounds for reversal of the judgments: (1) The trial court erred in its refusal to instruct the jury as to the law of arrest without warrant concerning misdemeanors; and (2) the trial court erred in submitting to the jury the issue of the regularity of the warrant upon its face because as a matter of law the warrant issued from a court without jurisdiction. Before discussing these contentions we shall summarize briefly the evidence as disclosed by the record.

On the afternoon of March 26, 1950, defendant Borth observed one Harvey Jackson, son of plaintiffs, shooting a BB gun at a light bulb in the town of Winton. Three other boys were also involved, but when Borth stopped, Harvey Jackson ran; Borth spoke to the other three. He did not at that time know what Harvey Jackson's name was. The following day, Borth pointed him out on the street and was informed as to his name. Borth thereafter contacted defendant Adcock and advised him of the previous day's episode. At about 5:30 p. m.,

Borth and Adcock drove to the Jackson house in the sheriff's car, which was readily identifiable as such; Borth's testimony was that he wore his badge, and Adcock said he was in complete uniform. The purpose of the trip was to apprehend Harvey Jackson and take him to the detention home. The officers did not at that time have a warrant of arrest, and there is conflict in the testimony as to whether they have gone to the Jackson house pursuant to specific advice that no warrant was needed. Borth and Adcock were in agreement that Adcock made a telephone call to Mr. Silman, the Probation Officer of Merced County. Borth's statement was that the call was placed after the abortive attempt to make the arrest without warrant. Adcock's testimony was that the call was made prior to going to the Jackson home, and that he was specifically advised by Silman that a warrant was not necessary to arrest in a juvenile matter of that kind. The officers were unable to complete their mission; although Adcock informed the Jacksons why they wanted Harvey and where they proposed to take him, both parents insisted that the officers could not take the boy; the Jacksons instead told Harvey to go into the house. The officers then returned to Atwater and appeared before Judge Walter, magistrate of the Justice's Court there, explaining the whole situation to him. Borth signed a complaint upon which Judge Walter issued two warrants, one for the arrest of Harvey Jackson for malicious mischief, and one for the arrest of the parents, under the Welfare and Institutions Code, for contributing to the delinquency of a minor. It was the officers' thought that the parents' refusal to surrender the boy without warrant amounted to contributing to the delinquency of a minor. The complaint upon which the warrants were issued was marked for identification, but was not offered or admitted into evidence; appellants say that it set forth no particulars as to the acts or omission constituting the delinquency. Armed with the warrants, the officers enlisted the aid of defendant Osborn, the constable, and returned to the Jackson residence about 7:30 or 8:00 p. m., to complete the arrests. Osborn's testimony was that

he was not certain what the warrant for Mr. and Mrs. Jackson was based on, though he knew that the warrant for Harvey was based upon "something about the boy shooting out lights, windows or something of the sort." Borth did not follow Adcock and Osborn into the house when the arrests were made, nor did he accompany them when the Jacksons were taken to jail. The Jacksons made no resistance, although they stated they would get the officers for this and that the officers would be sorry. They were incarcerated in the Merced County jail, where Mrs. Jackson remained from the evening of March 27th until April 7th; Mr. Jackson remained in jail seven days longer than his wife. Both plaintiffs testified that they were greatly distressed by the unsanitary and filthy condition of the jail and the unsavory character of the inmates.

Plaintiffs first contend that the court committed reversible error in refusing to give the following instruction offered by them:

"You are instructed that in order to justify an arrest without warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest he must then obtain a warrant therefor."

Plaintiffs state that the court instructed the jury as to what constitutes false imprisonment and also gave the following instruction:

"You are instructed that section 43.5(a) of the Civil Code, which was in full force and effect at the time of the arrests out of which this suit arose, provides as follows:

"'No cause of action for arrest pursuant to warrant regular on its face. There shall be no liability on the part of and no cause of action shall arise against any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if such peace officer in making the arrest acts without malice and in the reasonable belief that

the person arrested is the one referred to in the warrant.'

"If, therefore, you find that the warrants in this case were regular upon their face and the officers acted without malice and in the reasonable belief that Mr. and Mrs. Jackson were the persons referred to in the warrants, then I instruct you that your verdict must be in favor of all defendants and against the plaintiffs. Under such circumstances, the officers incur no liability whatsoever, regardless of how disastrous may have been the effect upon John Jackson and Evelyn Jackson."

Plaintiffs argue that in no way did the court tell the jury how to ascertain whether or not the warrant in question was "regular on its face" and that the requested instruction should have been given because, to quote plaintiffs: "Were the jury so informed, it would be much more capable of ascertaining the intent and state of mind with which defendants acted in obtaining the warrant for the arrest of plaintiffs as having contributed to their son's delinquency in refusing the officers the taking of his custody without a warrant. We believe, therefore, that had the requested instruction been given, such statement of the law, when considered with the experience of officers Adcock and Osborn and the indoctrination of officer Borth, would have a direct bearing on the jury's determination with respect to the question of malice." The requested instruction was based on the decision of this court in *Jackson v. Superior Court*, 98 Cal.App.2d 183, 219 P.2d 879, in which prohibition was granted to prevent the District Attorney of Merced County from proceeding with a prosecution under an information charging the Jacksons (plaintiffs here) with obstructing an officer in his attempt to arrest their son. Our reasons for granting the writ were that the attempted arrest was not valid because it was made without a warrant, was based upon an offense committed more than a day before, there was no reason why the arrest was not made at the time the officer saw the misdemeanor committed, and the parents' resistance was not unreasonable. The officers subsequently obtained warrants un-

der which the Jacksons were arrested, which arrests constitute the basis of their suits for false arrest and imprisonment.

[1] However, as pointed out by respondents, it is expressly conceded in plaintiffs' brief that plaintiffs "were placed under arrest pursuant to warrants." Consequently, an instruction in the form requested by plaintiffs could only serve to mislead and confuse the jury and it was properly refused by the court. So far as plaintiffs' contention that it would have a direct bearing on the jury's determination with respect to the question of malice it is sufficient to state that the requested instruction did not purport to deal with the subject of malice. Furthermore, the jury were instructed fully on the subject of malice and were also instructed at the request of plaintiffs:

"You are hereby instructed that an arrest pursuant to a warrant regular on its face, does not relieve the arresting officers from liability in the event that the issuance of said warrant was procured through their mistake or malicious motive."

Plaintiffs' second contention is that the court erred in submitting to the jury the issue of the regularity of the warrant upon its face because as a matter of law the warrant issued from a court without jurisdiction. They contend in effect that the trial court should have instructed the jury that the warrant was irregular on its face. However, as defendants point out, no such instruction was offered by plaintiffs, but, on the contrary, the defendants offered and the court gave the instruction last hereinbefore quoted, which assumes that the warrant was in fact regular and presented to the jury the issue of whether or not the warrant was procured by defendants through mistake or malicious motive. So it is evident that the contention now made by plaintiffs' present counsel was not relied upon by the counsel who represented plaintiffs at the trial of the action.

Plaintiffs point out that the warrant for their arrest was issued by a justice of the peace on the basis of a complaint charging a violation of section 702 of the Welfare and Institutions Code, which section pro-

vides, in part, that "The juvenile court shall have original jurisdiction over all misdemeanors defined in this section * *."

From this, plaintiffs suggest that perhaps only the juvenile court has jurisdiction in matters under this statute, because there appears to be no direct authority authorizing either that the misdemeanor complaint be brought in a justice's court, or that such a court could hold a preliminary examination pursuant to such a complaint. Penal Code section 860, providing that "Nothing contained in this section shall affect the jurisdiction or procedure of the superior court sitting as a juvenile court", is cited to show lack of jurisdiction in the justice's court. Two opinions of the Attorney General, 8 Ops. AG Cal 167 and 289, are cited, one suggesting that complaint *should* be filed in the Juvenile Court in the first instance, and the other that preliminary examinations are necessary in the face of a not guilty plea. The second opinion states in part:

"I am of the further view that the Juvenile Court does not have exclusive jurisdiction to conduct preliminary examinations but that jurisdiction in such cases is shared with other magistrates and that charges brought under Section 702 can be brought before any magistrate and, in such cases, preliminary examination is required except, as previously stated, where the accused pleads guilty before the Juvenile Court on charges brought before it in the first instance.

"While the courts of this State have not directly passed upon the right of a magistrate, other than the Juvenile Court, to hold preliminary examinations on charges brought under Section 702, nevertheless it has been the practice to bring these charges before the Justice's Court, sitting as a magistrate, and to hold a preliminary examination, certifying the accused to the Juvenile Court. *Butler v. Hastings*, 1934, 139 Cal.App. 641, 34 P.2d 751; *People v. Superior Court*, 1930, 104 Cal.App. 276, 285 P. 871; *People v. Giminiani*, 1924, 70 Cal.App. 195, 232 P. 993; and

Edington v. Superior Court, 1912, 18 Cal.App. 739, 124 P. 450, 128 P. 338."

The opinion quoted from was rendered in 1946, prior to the 1951 amendment of section 813 of the Penal Code. The section then read:

"When warrant may issue: (Duty of magistrate). If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest."

In 1951 the section was amended to read:

"(Warrant: When to be issued.) When a complaint is filed with a magistrate charging a public offense originally triable in the superior court of the county in which he sits, if such magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant for the arrest of the defendant."

[2] Plaintiffs argue that the change to Penal Code section 813 made by the Legislature in 1951 by adding reference to "public offense originally triable in the superior court" must be held to increase the authority of a magistrate so as to permit him to issue warrants in a new class of cases, such as violation of Welfare and Institutions Code section 702, because, say plaintiffs, if this view is not taken, the change in statutory language has no significance, and, therefore, at the time this warrant was issued, the magistrate issuing it had no authority to do so. We do not agree with this contention of plaintiffs. As we view the matter, the Legislature, in adding the 1951 amendment to section 813, was not making any change in the law but was seeking to clarify the section and to make it express in clearer terms what must have been the intention of the Legislature when it was originally enacted.

Defendants in answering plaintiffs' second contention make the further argument that the jurisdiction of Judge Walter to

issue the warrant and the sufficiency of the prior proceedings are not material, because the question is not whether actual authority existed, but only whether apparent authority existed—was there anything in the warrant constituting fair warning that it had been issued without authority, that is, was it irregular on its face, citing Civil Code section 43.5(a), *Pankewicz v. Jess*, 27 Cal.App. 340, 149 P. 997; *Malone v. Carey*, 17 Cal.App.2d 505, 62 P.2d 116; *Barrier v. Alexander*, 100 Cal.App.2d 497, 224 P.2d 436; *Downey v. Allen*, 36 Cal.App.2d 269, 97 P.2d 515.

Section 43.5(a) of the Civil Code provides:

"There shall be no liability on the part of and no cause of action shall arise against any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if such peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant."

[3] In *Pankewicz v. Jess*, *supra*, the court said, 27 Cal.App. at page 342, 149 P. at page 998:

"An officer whose duty it is to serve process is bound to serve the same when such process is regular on its face. Process is said to be regular on its face when it proceeds from a court, officer, or body having authority of law to issue process of that nature, and which is legal in form, and contains nothing to notify or fairly apprise any one that it is issued without authority.
* * *"

And in *Downey v. Allen*, *supra*, 36 Cal. App.2d at page 273, 97 P.2d at page 517, it is stated:

"* * * A peace officer is not liable for the service of a warrant which is valid upon its face, irrespective of any defects in the proceedings leading up to the issuance thereof."

[4, 5] We are convinced that the Justice of the Peace had jurisdiction to issue the

warrant of arrest and we are convinced also that the warrant was regular on its face. Furthermore, Judge Walter, the Justice of the Peace, and defendant Adcock were permitted to testify without objection that all proceedings for the proper issuance of the warrant had taken place prior to its issuance. Indeed, at the trial there was no contention that the warrant was not regular on its face.

Respondents go beyond the scope of appellants' brief and argue that plaintiffs' position on appeal is opposite to the theory upon which the cases were tried, so the judgments should be affirmed because both issues presented on appeal are being raised for the first time. As an additional reason for affirmance defendants urge that the complaints did not state a cause of action and the defects therein were not cured by trial. Defendants support the first of these contentions by references to counsel's statements during the trial and the instructions offered by appellants. As for the alleged insufficiency of the complaints to state a cause of action, defendants state that they pointed this defect out at every stage, and, further, instead of trying to obtain a reversal for pleading defect, they are urging affirmance because of pleading defect.

[6] While these contentions of defendants have substantial merit, we deem it unnecessary to discuss them, as we are convinced that the judgment should be affirmed on the merits. There is ample evidence to support the implied finding of the jury that defendants, as officers of law, in good faith and without malice sought and obtained a warrant for the arrest of plaintiffs, and that said warrant was regularly issued and was valid on its face. The case was fully and fairly tried, the jury was correctly instructed as to the law applicable to the case, and no prejudicial error was committed.

The judgments are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

117 Cal.App.2d 19

**GOODWILL INDUSTRIES OF SOUTHERN
CALIFORNIA v. LOS ANGELES
COUNTY et al.**

Civ. 19267.

District Court of Appeal, Second District,
Division 2, California.

March 26, 1953.

Rehearing Denied April 20, 1953.

Hearing Denied May 21, 1953.

Action by a nonprofit charitable welfare corporation against a county and city to recover the amount of taxes paid by plaintiff on stores maintained and operated by it for disposition of cast off merchandise reconditioned by handicapped, aged and needy persons employed by plaintiff, and for a declaration that plaintiff's property is exempt from taxation. From a judgment of the Superior Court of Los Angeles County, Roy L. Herndon, J., dismissing the action, plaintiff appealed. The District Court of Appeal, Fox, J., held that plaintiff was not entitled to exemption from taxation, since its property was not irrevocably dedicated to exempt purposes by its articles of incorporation, which expressly included taxable purposes of providing industrial education, building, equipping and operating trade schools and workshops, and establishing and conducting industries and stores.

Judgment affirmed.

1. Taxation ☞251

To be entitled to tax exemption under statute exempting charitable corporations' property irrevocably dedicated to charitable purposes, corporation claiming exemption must show that its property is irrevocably dedicated to exempt purposes. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

2. Taxation ☞241(1)

In determining whether nonprofit charitable welfare corporations' purposes, stated in its articles of incorporation, constitute irrevocable dedication of its property to tax exempt purposes, language thereof must be given strict, but reasonable, construction to end that tax exemption may be neither enlarged nor extended beyond plain meaning of such language. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

3. Taxation ☞251

The fact that nonprofit charitable welfare corporation is a worthy institution, engaged in activities of great value to people related to its operations and contributing to public welfare, is immaterial in determining whether its property is exempt from taxation as irrevocably dedicated to exempt purposes, as such corporation, like other private owners of property, has burden of showing that it clearly comes within terms of exemption. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

4. Taxation ☞241(1)

The statutory requirement that charitable corporation's property be irrevocably dedicated to tax exempt purposes to be relieved of taxation is concerned with purposes rather than uses, so that crucial factor in such exemption is not past or present use of property, but ultimate purpose to which it is dedicated. Revenue and Taxation Code, § 214(6), Const. art. 13, § 1c.

5. Taxation ☞241(1)

The sole consideration in determining whether charitable corporation's property is irrevocably dedicated to tax exempt purposes, as required by statute to relieve it of taxation, is corporation's powers respecting such property. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

6. Taxation ☞241(1)

Exemption of charitable corporation's property from taxation may not be allowed, if corporation's articles of incorporation permit, not only present use, but ultimate and permanent diversion of its assets, for nonexempt purposes. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

7. Taxation ☞241(1)

A nonprofit charitable welfare corporation was not entitled to exemption of its property from taxation as irrevocably dedicated to exempt purposes, where its articles of incorporation did not limit corporation's powers to such purposes, but also expressly included taxable purposes of providing industrial education, building, equipping and operating trade schools and workshops, and establishing and conducting in-

dustries and stores, though present and intended future use of all such property was purely and exclusively charitable. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

8. Estoppel ⇨62(3, 5)

A city and county were not estopped from urging failure of charitable corporation's articles of incorporation to dedicate its property irrevocably to tax exempt purposes as defense in such corporation's action to recover amount of taxes paid by it because of county assessor's erroneous approval of corporation's showing of such dedication by amended articles filed with him in each of four years before Supreme Court's decision so construing statute involved as to preclude exemption of corporation's property from taxation. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

9. Statutes ⇨219

A city and county are not bound by county tax assessor's administrative interpretation of statute as entitling charitable corporation to exemption of its property from taxation, where courts subsequently determine such interpretation to be erroneous and declare law to be to contrary, tax exemption not being a personal grant of assessor, but a legal right conferred by constitution and statute. Revenue and Taxation Code, § 214; Const. art. 13, § 1c.

10. Taxation ⇨320

Erroneous allowance of tax exemption by taxing officials does not perpetuate right to such exemption or effectuate amendment of constitution or taxing statutes.

11. Estoppel ⇨62(1)

Generally, government does not lose its revenues because of administrative official's erroneous ruling as to meaning of tax law.

12. Administrative Law and Procedure
⇨390

An administrative regulation in conflict with statute is invalid, and government is not bound thereby.

13. Taxation ⇨587

Nonpayment of taxes when due in reliance on tax collecting official's ruling of

nonliability therefor is generally no defense against collection of such taxes, unless recovery is barred by statute of limitations; taxpayer being deemed to act with knowledge that administrative officials cannot bind government by their erroneous interpretation of tax statute.

14. Estoppel ⇨62(1)

Estoppel may be invoked against a government entity in exceptional cases, where justice and right so require, but may not be invoked, where its application would tend to thwart public policy.

15. Estoppel ⇨62(3, 4)

A charitable corporation, failing to show irrevocable dedication of its property to tax exempt purposes, as required by statute to entitle it to exemption from taxation, cannot recover amount of taxes paid on such property on theory of estoppel of city and county to deny exemption because of county tax assessor's approval of corporation's showing of such dedication for four years before Supreme Court decision construing statute as precluding exemption, since recovery of such amount would violate fundamental legislative policy. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

16. Estoppel ⇨62(3, 4)

A county and city were not equitably estopped by county tax assessor's errors in allowing tax exemptions of substantial portions of charitable corporation's property from retaining taxes properly collected on corporation's other properties, exemption of which was lawfully denied for lack of irrevocable dedication thereof to exempt purposes, where no part of taxes sought to be recovered exceeded amount fairly and justly payable on such properties. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

17. Taxation ⇨543(1, 8)

A suit for refund of taxes being governed by equitable principles, plaintiff may recover only on showing that more taxes were exacted than should have been paid in equity and good conscience, and recovery is limited to difference between tax actually

paid and that which properly should have been exacted.

18. Taxation ◊251

A county and city were not precluded by laches from urging lack of irrevocable dedication of charitable corporation's property to tax exempt purposes as defense to its action for refund of taxes paid thereon, though defendants failed to raise such issue before plaintiff filed claim for exemption and other cases, wherein defendants raised question, were pending in courts as burden was on plaintiff to establish its eligibility for exemption and defendants raised issue promptly after Supreme Court decision in one of such cases that corporation's property was not exempt from taxation. Revenue and Taxation Code, § 214(6); Const. art. 13, § 1c.

19. Appeal and Error ◊102

An appeal from order sustaining demurrer to complaint without leave to amend is unauthorized. Code Civ.Proc. § 963.

Snyder & Fletcher and Owen E. O'Neil, So. Pasadena, for appellant.

Ray L. Chesebro, City Atty., Louis A. Babior, Deputy City Atty., Los Angeles, for respondent City of Los Angeles.

Harold W. Kennedy, County Counsel, Arvo Van Alstyne, Deputy County Counsel, Los Angeles, for respondent Los Angeles County.

FOX, Justice.

The trial court sustained a demurrer without leave to amend to plaintiff's second amended complaint. A judgment of

dismissal was accordingly entered. Plaintiff appeals from this judgment.

Plaintiff is a nonprofit, charitable welfare corporation. It is exempted from federal revenue tax and state income and sales tax. Plaintiff is engaged in collecting cast-off personal property, reconditioning it and selling it through the stores which the corporation maintains and operates. The Goodwill Industries exist for the purpose of employing handicapped, aged, and needy persons in this process and thereby assisting in training its employees for independent living and self-support. All income from the sale of plaintiff's merchandise goes to its workers in wages after deducting the cost of operations. Capital investment in buildings and equipment comes from contributions of outside supporters.

[1] This action is (1) to recover the 1949-1950 taxes, paid under protest, on plaintiff's stores which it alleges are necessary for the disposition of its reconditioned merchandise, and (2) for a declaration that its property is exempt from taxation. Plaintiff's theory is that it comes within the welfare exemption law. California Constitution, art. XIII, § 1c; Revenue & Taxation Code, § 214. In order to be entitled to the benefit of such tax exemption, plaintiff must show that its property is "irrevocably dedicated" to exempt purposes.

Section 214 of the Revenue and Taxation Code¹ provides that property used exclusively for religious, hospital, scientific or charitable purposes, and owned and operated by a corporation organized and operated for such purposes, is exempt from taxation if the property is "irrevocably dedicated" to these purposes and upon liquidation, etc.,

1. The pertinent provisions of section 214 on the tax lien date read:

"Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chest, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

* * *

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of

the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes; * * *

"The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade."

will not inure to the benefit of any private person but only to an organization which is organized and operated for such purposes. It thus becomes necessary to determine whether plaintiff's property is irrevocably dedicated to the aforesaid purposes. We must, therefore, examine plaintiff's articles of incorporation to ascertain the purposes to which plaintiff may devote its property. *Pasadena Hospital Ass'n v. County of Los Angeles*, 35 Cal.2d 779, 786, 221 P.2d 62; *Moody Institute of Science v. County of Los Angeles*, 105 Cal.App.2d 107, 109, 233 P.2d 51. These articles provide as follows:

"That the purposes for which said association is formed and incorporated are *educational, industrial, spiritual and benevolent*; to secure the Americanization of the foreign born; to provide for the educational and industrial welfare of the poor and neglected by the inspiration of *industrial education* and mental and spiritual uplift, and by the encouragement of thrift and helpful conditions of living and labor, to endeavor to prevent pauperism, and by means of Christian cooperation to relieve the temporary distresses of the unfortunate; *to build, equip, and operate trade schools and workshops and allied and coordinate institutions, to establish and conduct industries, stores and medical clinics, to carry on any and all kinds of welfare and benevolent work among the poor and needy; to receive by gift, devise, or purchase and otherwise acquire, to own, hold and enjoy, to sell, lease, give and otherwise encumber any and all and every kind or kinds of real and personal property, and to carry on any and all operations necessary or convenient in connection with any of its objects or the transaction[s] of any of its business.*" (Italics added.)

[2-6] In determining whether the purposes stated in plaintiff's articles constitute an irrevocable dedication of its property to exempt purposes "a strict but reasonable construction" must be given to the language used to the end that a tax exemption may be neither enlarged nor extended beyond "the

plain meaning" of such language. *Cedars of Lebanon Hospital v. County of Los Angeles*, 35 Cal.2d 729, 736, 221 P.2d 31, 15 A.L.R.2d 1045. In this connection it should also be pointed out that the fact that plaintiff is a worthy institution whose activities are of great value of the people who are related to its operations and that it contributes to the public welfare, is immaterial here because it, like other private owners of property, has the burden of showing that it "clearly" comes within the terms of the exemption. *Cedars of Lebanon Hospital v. County of Los Angeles*, supra. It is thus to be noted that the requirement, that property be irrevocably dedicated to exempt purposes in order to be relieved of taxation, is concerned with *purposes* rather than *uses*. Hence the crucial factor in such an exemption is not the past or present use of the property but the ultimate purpose to which it is dedicated. *Pasadena Hospital Ass'n v. County of Los Angeles*, supra, 35 Cal.2d at page 785, 221 P.2d 62. Consequently, "[t]he sole consideration in determining the question of irrevocable dedication of its properties is that of plaintiff's powers with respect thereto." *Pasadena Hospital Ass'n v. County of Los Angeles*, supra, 35 Cal.2d at page 787, 221 P.2d at page 67. So, "[i]f the articles of incorporation permit not only a present use but also the ultimate and permanent diversion of its assets to non-exempt purposes no exemption may be allowed." *Moody Institute, etc. v. County of Los Angeles*, supra, 105 Cal.App.2d at page 109, 233 P.2d at page 52.

[7] Applying these principles, it is clear that plaintiff was not entitled to exemption from taxation.

An examination of the quoted section of plaintiff's articles of incorporation discloses that its purposes are, among others, "educational" and "industrial"; to provide "industrial education"; "to build, equip, and operate trade schools and workshops and allied and coordinate institutions, to establish and conduct industries, [and] stores * *," and "to carry on any and all operations necessary or convenient in connection with any of its objects or the transaction of any of its business." The plain meaning of this

language makes it clear that plaintiff could, in the tax year here involved, or at any later period, without violating its charter, *build, equip, and operate* schools of less than collegiate grade, such as, for example, trade schools, and could devote all of the property upon which it presently seeks exemption to any or all of such purposes. This would be contrary to the express provisions of section 214, Revenue and Taxation Code, and the principles enunciated in the Pasadena Hospital case and the holding in Moody Institute of Science v. County of Los Angeles, *supra*.

In an effort to escape the effect of these decisions plaintiff emphasizes that the present and intended future use of all of the subject properties is purely and exclusively charitable. This, however, does not provide any legal basis for a conclusion that the property is irrevocably dedicated to exempt purposes during plaintiff's corporate life. The identical contention was made by the Pasadena Hospital. It was fortified by a background of more than 50 years' exclusive use as a charitable hospital. It was, however, squarely rejected by the Supreme Court. Pasadena Hospital Ass'n v. County of Los Angeles, *supra*, 35 Cal.2d at pages 786-787, 221 P.2d 62.

Plaintiff also contends that the Pasadena Hospital and Moody Institute cases are inapplicable on the theory that these cases dealt only with corporations which had "extra curricular nonexempt powers," that is, nonexempt powers which were "apart from or in addition to the general purposes for which they were formed." From this premise plaintiff argues that it has no such extra curricular powers, and that its property should therefore be treated as irrevocably dedicated exclusively to exempt purposes.

A careful reading of these cases fails to disclose anything indicating that the court drew such a distinction as that contended for by plaintiff. If any such distinction were possible, however, plaintiff's argument would result in a *non sequitur* for plaintiff's nonexempt powers are clearly included among, and constitute in part, its *general and primary* powers and purposes. As in the Moody Institute case, there is

nothing in plaintiff's articles of incorporation which in any way limits or restricts its nonexempt purposes (e. g., educational powers) or subordinates them to the status of powers which are merely incidental to a program of charitable rehabilitation of the handicapped or aged. Plaintiff's alleged intent to employ its nonexempt powers in such a restricted manner does not cure this deficiency in its articles of incorporation. Plaintiff attempts to use the Cedars of Lebanon case in support of his argument. There the property under consideration for tax exemption was used for a nurses' school which was held to be a necessary and incidental function of a modern hospital, and thus an exempt *use* of property for hospital purposes. That case is not applicable here because the present issue relates not to *use* but to *purposes* as expressed in plaintiff's articles of incorporation. Therefore, since plaintiff's powers are not limited to exempt purposes, but expressly include also taxable purposes, its property is not entitled to tax exemption. Pasadena Hospital Ass'n v. County of Los Angeles, *supra*; Moody Institute, etc. v. County of Los Angeles, *supra*.

[8-13] Plaintiff's third cause of action is based upon the theory that even if its articles of incorporation fail to meet the irrevocable dedication requirement, nevertheless the city and county are precluded by estoppel and laches from urging such non-compliance as a defense against the action for recovery of the 1949 taxes here involved. As a factual foundation for the attempted application of these principles, plaintiff alleged that after the adoption by the Legislature in 1945 of the welfare exemption sections of the Revenue and Taxation Code plaintiff amended its articles of incorporation for the purpose of establishing its eligibility for such exception. In 1947 plaintiff filed with the Los Angeles County Assessor its amended articles together with other documents for the purpose of obtaining exemption from taxes for that year. The assessor approved plaintiff's showing and allowed the welfare exemption to substantial portions of its property, other than the properties here involved on which exemption was denied be-

cause of its use for nonexempt purposes. The same procedure with the same results followed for the years 1948, 1949 and 1950. This action was filed in May, 1950.

It is apparent that plaintiff's claim of estoppel is predicated upon the erroneous approval by the assessor of plaintiff's showing of irrevocable dedication for the four years prior to the decisions in the Pasadena Hospital and Moody Institute cases. In order to avail itself of this error, plaintiff argues such approval "constitutes a valid and irrefutable finding of fact" that its property "'is' irrevocably dedicated as required by the statute." This proposition is not sound for implicit in it is the idea that the County Assessor acts at his peril at the outset under new legislation granting new property tax exemptions; and to the perpetual prejudice of the taxing entities for whom he acts, in interpreting and applying the exemption prior to judicial interpretation thereof; that after once allowing the exemption, he, together with the taxing entities, are thereafter powerless to change position, irrespective of light cast thereon by subsequent judicial decisions interpreting the pertinent statutes, without first giving notice to any taxpayers who may be affected thereby sufficiently in advance of the tax lien date to permit such taxpayers to take whatever steps may be necessary to secure the exemption; and that after once denying the exemption upon a specified ground, he, together with the taxing entities concerned, are thereafter powerless to urge that such denial may be sustained upon a different and alternative but equally conclusive ground. This proposition is based on the concept that the city and county are bound by an administrative interpretation of legislation, even though that interpretation is ultimately determined by the courts to have been in error and the law is in fact declared to be to the contrary. Tax exemption is not a personal grant of the assessor but a legal right conferred by constitution and statute. Erroneous allowance of tax exemption by taxing officials does not perpetuate a right of tax exemption or effectuate amendment of the constitution or the taxing statutes. In this connection the court said, in *La Societe*

Francaise De Bienfaisance Mutuelle v. California Employment Commission, 56 Cal. App.2d 534, 553, 133 P.2d 47, 57: "It is the general rule that the government does not lose its revenues because of an erroneous ruling of an administrative official as to the meaning of a tax law. [Citations.] An administrative regulation which is in conflict with the statute is invalid and the government is not bound thereby. [Citations.] The duty of the tax officials is to collect taxes imposed by law. Accordingly, unless recovery is barred by the statute of limitations it is generally no defense that taxes were not paid when due in reliance on an official ruling of non-liability. The taxpayer is deemed to act with knowledge that administrative officials cannot bind the government by their erroneous interpretation of tax statutes." See, also, *Stanford University Bookstore v. Helvering*, 65 App.D. C. 364, 83 F.2d 710, 712; *Outer Harbor Dock & Wharf Co. v. City of Los Angeles*, 49 Cal.App. 120, 132, 193 P. 137; 31 C.J.S., Estoppel, § 147, pp. 434-435.

[14, 15] Estoppel, may, of course, be invoked against a government entity in "exceptional cases" where "justice and right require it." *Farrell v. County of Placer*, 23 Cal.2d 624, 627, 628, 145 P.2d 570, 571, 153 A.L.R. 323. But it may not be invoked where its application would tend to thwart public policy. *County of San Diego v. California Water, etc., Co.*, 30 Cal.2d 817, 826, 186 P.2d 124, 175 A.L.R. 747. Here the Legislature has expressly required an irrevocable dedication of property to certain exempt purposes as a condition precedent to the grant of the welfare exemption. Rev. & Tax. Code, § 214, subd. 6. This requirement represents basic substantive policy enacted by the Legislature to insure compliance with the constitutional authorization for the exemption. Calif. Const., art. XIII, § 1c. To permit plaintiff to recover the taxes here in question on the theory of estoppel would be violative of this fundamental policy.

[16, 17] Plaintiff's estoppel argument is lacking in equitable support. What plaintiff is urging is that although the assessor is now advised, in consequence of the Pas-

adena Hospital and Moody Institute decisions, that his action in previously allowing tax exemption to other substantial portions of its property was inadvertently contrary to law, and that the city and county were thus mistakenly deprived of revenue to which they would have been entitled, nevertheless the city and county are now precluded by the assessor's errors from retaining the taxes properly collected upon the properties here in issue, on which exemption was lawfully denied. This contention is contrary to the established principle that, since a suit for a refund of taxes is governed by equitable principles, a plaintiff who challenges the validity of a tax may recover only if it be shown that more has been exacted than in equity and good conscience should have been paid. *Northrop Aircraft, Inc. v. California Emp. Stab. Comm.*, 32 Cal.2d 872, 879, 198 P.2d 898. This principle was invoked and applied in *Simms v. County of Los Angeles*, 35 Cal. 2d 303, 316, 217 P.2d 936, 945. The court observed that "the rule operates to limit recovery to the difference between the tax actually paid and that which properly should have been exacted, and to prevent recovery if the taxpayer paid only his fair and just proportion of taxes." Since plaintiff's theory of estoppel is necessarily based on the assumption that the defense of lack of "irrevocable dedication" is well taken, it is clear that no part of the taxes which plaintiff seeks to recover was in excess of the amount which was fairly and justly payable upon the property with which we are here concerned.

[18] Plaintiff's contention that defendants are precluded by laches from urging "irrevocable dedication" is without merit. Plaintiff emphasizes this issue was not raised until defendants filed their demurrer to its second amended complaint in Febru-

ary, 1952; that if this question had been brought up prior to plaintiff's filing its claim herein for exemption plaintiff could have amended its articles of incorporation to meet the requirement of the welfare exemption statute and that it is now too late. Plaintiff also points out that during this period the Pasadena Hospital and Moody Institute cases were in the courts and that defendants had raised the question of irrevocable dedication for exempt purposes in those cases. The answer to this is twofold; In the first place, the burden was on the plaintiff to establish its eligibility for the welfare exemption. The statute had not been judicially interpreted. Plaintiff had as much opportunity as defendants to forecast the outcome of those cases, and it was for plaintiff to decide how far it was willing to go in irrevocably dedicating its property to exempt purposes and what risk it was willing to take in relation thereto. Defendants were not under a duty to warn plaintiff that the outcome of these cases might be such that plaintiff's dedication of its property to exempt purposes would be insufficient to entitle it to the benefit of the welfare exemption. The second answer is that defendants raised this issue promptly after the decision in the Moody Institute case became final. There was no specific holding until then that property devoted to educational purposes, as in this case, was not entitled to the welfare exemption. Under these circumstances it cannot be said that defendants were guilty of laches.

[19] Plaintiff's purported appeal from the order sustaining the demurrer without leave to amend is dismissed since such an appeal is unauthorized. *Code Civ.Proc.*, § 963. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

116 Cal.App.2d 896

**MANTECA VEAL CO. et al. v.
CORBARI.
Civ. 15424.**

District Court of Appeal, First District,
Division 1, California.
March 25, 1953.

Action on multiple counts wherein the Superior Court, City and County of San Francisco, I. L. Harris, J., rendered judgment in favor of plaintiffs predicated upon findings in their favor on common counts, one for goods sold and delivered and one upon account stated. On appeal by defendant, the District Court of Appeal, Bray, J., held that the evidence sustained the judgment.

Affirmed.

1. Account Stated ☞19(3)

Sales ☞359(1)

Evidence sustained findings in favor of plaintiffs on common counts, one for goods sold and delivered, and one upon an account stated.

2. Account Stated ☞5

Approval of balance as shown on book and agreement to pay, after defendant and his bookkeeper had gone over and approved account, established account stated.

3. Appeal and Error ☞757(1)

"Summary of material facts" required to be made in opening brief means something more than just facts favorable to appellant. Rules on Appeal, rule 13.

See publication Words and Phrases, for other judicial constructions and definitions of "Summary of Material Facts".

4. Appeal and Error ☞1047(5)

Error, if any, in ordering production of books was error without prejudice where books were not introduced in evidence and court's findings were not based on them.

5. Trial ☞404(5)

Determination adverse to plaintiffs, as to cause of action predicated upon defendant's claimed purchase of firm to which plaintiff had delivered meat, did not cause plaintiff's cause of action on common counts, one for goods sold and delivered, predicated upon defendant's promise, as manager, to pay personally if plaintiffs

would deliver meat to firm, and one upon account stated, to fail likewise.

6. Sales ☞17

Defendant did not have to own firm to which plaintiff delivered meat in order to directly obligate himself to pay therefor.

Cosgrove, Molinari & Tinney, Alan H. Critcher, San Francisco, for appellant.

Felix Lauricella, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment in favor of plaintiffs in the sum of \$8,020.82 and interest.

Questions Presented.

[1-3] The main question is factual—the sufficiency of the evidence to support the court's finding in favor of plaintiffs on common counts, one for goods sold and delivered, one upon an account stated. Secondary questions concern the court's order requiring defendant to produce his books and the effect of an amendment to the complaint.

Evidence.

Under the rule that our duty on the appeal is to determine if there is substantial evidence to support the court's finding, there can be no doubt that it is supported. One Nicolai, doing business as a wholesale meat dealer under the name of Nicolai Meat Company, was indebted to many creditors. (Nicolai was declared bankrupt after the commencement of this action.) Among them was defendant, to whom about \$70,000 was owed, and plaintiffs, who had attached for about \$11,000. In December, 1947, the balance due plaintiff was paid by defendant. Defendant testified this was a loan to Nicolai pursuant to an agreement between plaintiffs and Nicolai Meat Company to keep the business alive and to get plaintiffs to continue to deliver meat to Nicolai. Attorney Walsh testified that Nicolai had advised with him relative to filing a petition under chapter XI of the Bankruptcy Act. A meeting then was called by defendant's attorney at which the latter stated that if defendant came in and

operated the business there would be no necessity for filing such petition. It was then arranged that the business was to be entirely controlled by defendant but operated by one Arlin. Then a written assignment of the management of the Nicolai Meat Company for the benefit of himself and the other creditors was made to defendant, in which defendant agreed to furnish meats for the business. Defendant continued to manage the business during all the time here involved.

Plaintiff Antifae testified that he told Nicolai plaintiffs would sell him no more meat. Probably the same day, defendant asked Antifae if he would continue to deliver meat to Nicolai Meat Company. Antifae informed him he would not give Nicolai a penny's worth more. Thereupon defendant said, "I will pay for it; it will help me to get my money out." Peter Antifae, plaintiffs' manager, testified that defendant told him that defendant would be responsible for the meat delivered, that he would pay the bill. Plaintiff Antifae testified that defendant stated that he was not changing the name of the Nicolai Meat Company and to bill in that name. Plaintiffs had no further dealings with Nicolai. Numerous orders were placed with plaintiffs for meat by defendant and also by one Arlin, defendant's authorized agent. In June, 1948, defendant asked Peter Antifae no longer to bill the Nicolai Meat Company for meat delivered by plaintiffs to that company, but to bill defendant instead.

Both Antifaes testified that in August, 1948, defendant claimed an error in the accounting, so defendant with his bookkeeper came to plaintiffs' place of business and together they checked plaintiffs' books. One invoice was missing and when plaintiffs produced the signed invoice, defendant agreed that the balance shown on the book, \$8,020.82, was correct and agreed to pay it as soon as he could get a loan. This alone established an account stated.

Defendant denied agreeing to pay for the meat, contending that he was merely managing Nicolai's business for the benefit of creditors and that he had no personal lia-

bility. It is unnecessary to detail the other evidence in the case. The testimony of plaintiff Nick Antifae and his brother Peter Antifae alone is enough to support the court's findings under the conflict of evidence rule. The court's findings do not depend solely upon the testimony of the Antifae brothers. Among other matters, the testimony of defendant is very unsatisfactory, consisting in large degree of statements, "I don't remember," "I don't know." We might point out for defendant's benefit that in an opening brief the "summary of the material facts" required by rule 13, Rules on Appeal, means something more than just the facts favorable to the appellant. While possibly it is too much to hope that an appellant's summary will be completely objective, the court is not impressed by a statement of facts which completely ignores the evidence produced by the other side. Not only does defendant's brief completely ignore the testimony of the Antifae brothers, but it cavalierly dismissed the testimony of an attorney who testified in plaintiffs' favor by stating merely, "Francis P. Walsh, Esq., was representing Mr. Nicolai in the matter."

Production of Books.

[4] While defendant was testifying plaintiffs moved for an order requiring defendant to produce his books revealing payments to plaintiffs, his check stubs, cancelled checks, "anything pertaining to loans he made to the Nicolai Meat Company, if there were such loans, or whether he was operating that business as his own business." The court stated, "I will order that." Defendant contends that this order violated the rule set forth in *Ex parte Clarke*, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, *Demaree v. Superior Court*, 10 Cal.2d 99, 73 P.2d 605, *Funkenstein v. Superior Court*, 23 Cal.App. 663, 139 P. 101, and *Shell Oil Co. v. Superior Court*, 109 Cal. App. 75, 292 P. 531. Assuming, but not deciding, that the court's order was erroneous, it was error without prejudice as the books and other material were not introduced in evidence, nor were the court's findings based on them. In *Grant v. Main*

Oil Co. of Cal., 90 Cal.App. 622, 266 P. 554, the appellant complained of the court's alleged error in admitting in evidence certain books of account. The court said, 90 Cal. App. at page 623, 266 P. at page 555: "It is not necessary to pass upon this point for the reason that the evidence clearly established, without the introduction of the books, that plaintiff was entitled to the judgment rendered."

Amendment to Complaint.

[5,6] On August 11 a bill of sale to defendant of the business was executed by Nicolai. At the bottom of this document defendant accepted it and stated that he assumed the obligations set forth in an attached list, amounting to \$132,000, among which was \$7,794.71 due plaintiffs. A notice of intention to sell the business to defendant was published. As a result additional claims of over \$20,000 came in, and defendant refused to accept ownership of the business. It was this transaction which the court found to have been rescinded by defendant because of fraud. Near the end of the case plaintiffs moved for leave to amend the complaint to conform to the proof to set up an additional cause of action based on this bill of sale transaction. Defendant did not object, except to say that the statement made by plaintiffs' counsel concerning the proof was not complete. The court allowed the amendment. Defendant now contends that having added this additional cause of action and the court having found against it, the causes of action on the two common counts fall with it. There is nothing to such contention. Nor is there any substance to defendant's contention that because at the beginning of the trial plaintiffs' counsel stated that defendant was the partner of Nicolai, there was an issue of partnership in the case. Likewise there is no issue of guaranty. Plaintiffs are not suing on any claimed guaranty. As to the first count they are suing on defendant's direct promise to pay if they would deliver meat to the company he was managing. He did not have to own that company, as they apparently contend, in order, as he did, to directly obligate himself to pay. As to the second count they

are suing on an account stated, fully proved by the evidence that defendant and his bookkeeper went over and approved the account.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



117 Cal.App.2d 59

Guardianship of BRAZEAL.

BOWMAN et al. v. BRAZEAL.

Civ. 15276.

District Court of Appeal, First District,
Division 2, California.

March 27, 1953.

Mother, who had given control, custody and possession of her child to residents of San Francisco, filed a petition to have herself appointed guardian of the child. The Superior Court of Contra Costa County entered order appointing guardian, and residents of San Francisco appealed. The District Court of Appeal, Dooling, J., held that San Francisco was place of residence of child, and that therefore Superior Court of Contra Costa County had no jurisdiction of guardianship proceeding.

Order reversed.

1. Guardian and Ward ⇐13(8)

Order denying motion to dismiss petition for appointment of guardian was not appealable.

2. Guardian and Ward ⇐13(8)

Order appointing guardian was appealable. Probate Code, § 1630.

3. Appeal and Error ⇐770(1)

Where respondent filed no brief, and her counsel, though given notice as required by court rule, did not appear for oral argument and informed clerk of District Court of Appeal that he would neither file a respondent's brief nor be present to argue case

orally, District Court of Appeal would accept as true statement of facts in appellants' opening brief. Rules on Appeal, rule 17(b).

4. Parent and Child ⚡(3.7)

Where parents voluntarily, with intention of absolutely relinquishing all rights in and duties and obligations toward child, give him to custody of others, there is an "abandonment" of child.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

5. Domicile ⚡

Ordinarily, residence of child follows that of his father.

6. Domicile ⚡

Where child is abandoned by his parents, the residence of the child does not follow that of his father.

7. Guardian and Ward ⚡

Where mother of child surrendered control, custody and possession of child to residents of San Francisco and urged them to adopt child legally, and they took child into their home, and for a number of years raised child as their own, and child's father ratified agreement, there was an "abandonment" of child by mother and father, and residence of child was in San Francisco, and therefore Superior Court of Contra Costa County had no jurisdiction of guardianship proceeding brought by mother to be appointed guardian of child. Probate Code, § 1440.

Nicholas Alaga, San Francisco, for appellant.

Charles L. Hemmings, Martinez, for respondent.

DOOLING, Justice.

[1, 2] Notice of appeal was filed by appellants Melba J. Bowman and Oscar Bowman who have the physical custody of the minor, Melba Linn Brazeal, from an order denying appellants' motion to dismiss for lack of jurisdiction a petition of the minor's mother to be appointed guardian of her person, from the order appointing said mother guardian of the person, and from an order

denying appellants' motion to vacate the order appointing guardian. The order denying the motion to dismiss the petition is not appealable, *Greene v. Superior Court*, 37 Cal.2d 307, 310, 231 P.2d 821, and since the merits of the case can be determined on the appeal from the order appointing guardian the attempted appeal from the order denying the motion to vacate becomes unimportant, although apparently it is also not an appealable order. Prob.Code, sec. 1630.

[3] Respondent has filed no brief nor did her counsel appear for oral argument. Her counsel was given the notice required by Rule 17(b), Rules on Appeal and in reply thereto he informed the clerk of this court by letter that he would neither file a respondent's brief nor be present to argue the case orally before the court. Accordingly, pursuant to Rule 17(b), this court will accept as true the statement of facts in the appellants' opening brief.

According to this statement shortly after the birth of the child on April 1, 1945, "the control, custody and possession of said minor was surrendered" to appellants, residents, of San Francisco. "From April 12, 1945 until January 1951, said infant remained in the control, custody and possession of the Bowmans in San Francisco and Frances Dorleen Brazeal (respondent mother) urged the Bowmans to legally adopt the child. The Bowmans took the child into their home on the express understanding with Frances Dorleen Brazeal that they should raise the child as their own child and that the child should not be informed as to her true parents. Further, Wayne Brazeal, the child's father, was informed of this agreement and the status of the child * * and embraced and ratified said agreement. From April 12, 1945" until the date of the hearing "the child resided in the City and County of San Francisco. During that period the Bowmans assumed the sole support of the child."

It is appellants' position that these facts show an abandonment of the minor by her parents and the minor's residence in San Francisco and that the Superior Court of Contra Costa County had, therefore, no jurisdiction to appoint a guardian.

[4-6] Where the parents voluntarily with the intention of absolutely relinquishing all rights in and duties and obligations toward the child give him to the custody of others an abandonment is accomplished. In re Vance, 92 Cal. 195, 28 P. 229; In re Hawkins, 183 Cal. 568, 192 P. 30. The same cases are authority for the rule that while ordinarily the residence of the child follows that of his father where the child has been abandoned this is not true.

[7] Under these circumstances San Francisco was the place of the minor's residence and since she neither resided nor was temporarily domiciled in Contra Costa County the court of that County had no jurisdiction of the guardianship proceeding. Prob. Code, sec. 1440.

The order appointing guardian is reversed. The appeals from the other orders are dismissed.

NOURSE, P. J., and GOODELL, J., concur.



117 Cal.App.2d 89

MOORE et al. v. DEALY et al.
Civ. 4613.

District Court of Appeal, Fourth District,
California.

March 30, 1953.

Hearing Denied May 28, 1953.

Action by persons, who had furnished \$25,000 required by contractor to obtain performance bond, for contractor's breach of contract whereby plaintiffs, in addition to the \$25,000, were to receive \$10,000 upon completion of the construction contract and were to oversee construction job, and where- by the \$25,000 and all monies received were to be deposited into a commercial account subject to joint control of the parties. The Superior Court, Kings County, Clark Clement, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Mussell, J., held, inter alia, that the parties had engaged in a business enterprise for profit which was in the nature of

a joint venture, a provision in the agreement to share losses being implied, and, therefore, the agreement was not usurious.

Affirmed.

1. Appeal and Error ⇐991

In action by persons, who together had furnished \$25,000 required by building contractor to enable contractor to obtain performance bond, for contractor's breach of agreement whereby such persons, in addition to the \$25,000, were to receive \$10,000 upon completion of building contract, question of whether contract involved was usurious was one of fact for trial court.

2. Appeal and Error ⇐1010(1)

Where finding of trial court that contract was not usurious was justified by evidence, such finding was binding upon District Court of Appeal.

3. Usury ⇐1

The test in determining whether contract is usurious is whether there was an attempt to evade usury law.

4. Usury ⇐12, 13

In a "usurious transaction", there must be a loan of money, which is to be repaid to lender, with compensation for its use in an amount constituting a charge in excess of the highest permissible rate, and there must exist the corrupt intent to exact illegal charge for use of the money lent.

See publication Words and Phrases, for other judicial constructions and definitions of "Usurious Transaction".

5. Usury ⇐113

The presumptions of law are in favor of legality of a transaction, and, therefore, where transaction in question is open to two constructions, one making for legality, the other for illegality, in absence of evidence pointing clearly to usury, it is court's duty to adopt construction in favor of legality.

6. Usury ⇐37

Where persons together furnished \$25,000 required by contractor to obtain performance bond, and such persons and contractor agreed that the \$25,000 and progress money should be deposited in commercial account, subject to joint control of the parties, and funds were to be used for pay-

ment of labor and material, not as loan to contractor, and such persons were to oversee construction job and assist contractor, and were to receive, in addition to the \$25,000, \$10,000 upon completion of construction contract, the parties were engaged in a business enterprise for profit which was in the nature of a joint venture, a provision in the agreement to share losses being implied, and the agreement was not usurious.

7. Contracts ⇨322(3)

In action by persons, who had furnished \$25,000 required by a contractor to obtain performance bond, for contractor's breach of contract in failing to deposit progress payment in the account subject to joint control, evidence supported trial court's findings that such failure of contractor gave plaintiffs legal cause for refusing further performance of contract, and that plaintiffs were prevented from further performance by contractor's failure to comply with contract terms.

8. Compromise and Settlement ⇨23(3)

In action by persons, who together had contributed \$25,000 required by contractor to obtain performance bond, for breach of agreement whereby progress payments were to be deposited into commercial account subject to joint control and whereby such persons were to receive, in addition to the \$25,000, \$10,000 upon completion of construction contract, evidence was insufficient to support contractor's contention that parties had entered into oral agreement for purpose of settling their differences.

9. Damages ⇨140

Where contractor breached contract whereby persons who had furnished \$25,000 required by contractor to obtain performance bond were to receive, in addition to the \$25,000, \$10,000 upon completion of construction contract, award of \$10,000 for contractor's breach of contract was proper. Civ.Code, § 3302.

MUSSELL, Justice.

Defendant R. T. Dealy appeals from a judgment awarding plaintiffs damages for breach of contract and denying defendants relief on their cross-complaint. The contract in question was in writing and was executed by the parties on July 15, 1950. It is stated therein that R. T. Dealy is a general contractor and that he was awarded the general contract for an addition to the Coalinga Hospital; that in order to make possible the awarding of the contract to Dealy, it was necessary that there be on deposit, for his use in connection with the performance of the contract, the sum of \$25,000.00, which said sum Dealy could not, himself, advance; that the Peerless Casualty Company had issued a performance bond to Dealy conditioned upon the deposit of \$25,000.00 to be used in the performance of the contract; that Reeves and Moore were able and willing to arrange for the deposit of said sum, to be used in the performance of the contract, each advancing the sum of \$12,500.00. It was then agreed that Reeves and Moore would deposit the money in a commercial bank account, subject to withdrawal upon the joint signatures of Dealy and either Reeves or Moore; that the \$25,000.00 was to be withdrawn and paid for labor, materials for and on account of the hospital addition and in furtherance of the performance of the contract between Dealy and the hospital district; that "it shall be the duty and the obligation of G. W. Reeves and John B. Moore to review, analyze and study the items and accounts calling for payment in the performance of said contract, and after said review and analyzation, the said G. W. Reeves and John B. Moore are to authorize, in cooperation with R. T. Dealy, the payments of the said bills incurred in the performance of the said contract."

Dealy agreed to deposit all funds received from the district in the commercial account and that all funds in said account should be first withdrawn for the payment of materials, labor and other direct costs and expenses under the contract.

Reeves and Moore agreed, when requested, to advise and consult with Dealy as

Clyde E. Cate and Ralph Robinson, Fresno, for appellants.

Walch & Griswold, Hanford, for respondents.

to the performance of the contract and if requested by Dealy, to inspect the work and progress thereof from time to time. It being understood and agreed that Reeves and Moore were both skilled in construction work. It was further agreed that the relationship of Reeves and Moore with Dealy "is not one of partnership, nor one of joint venture, but is an arrangement whereby the said G. W. Reeves and John B. Moore are assisting the said R. T. Dealy in the performance of his contract, and assisting in the disbursement of the funds in payment for materials and labor and other items in the construction work, and in assistance in obtaining a performance bond from the Peerless Casualty Company, and in the advance of the said sum of \$25,000.00 which is to be used in the construction of said addition."

Provision was made for return to Reeves and Moore of the money advanced by them, after the payment of labor and material costs and after the expiration of 35 days from the notice of completion of the contract. The contract then provides as follows:

"Prior heretofore and on the 15th day of June, 1950, the said R. T. Dealy and his wife made and executed and delivered two (2) promissory notes, each in the sum of \$5,000.00. One payable to G. W. Reeves and wife, and one payable to John B. Moore and wife. Said notes being due and payable on the 15th day of June, 1951. It is agreed that said notes represent the compensation and payment for services rendered and to be rendered by said G. W. Reeves and John B. Moore to the said R. T. Dealy, in and about the securing of said contract and performance of said contract with the Coalinga Hospital District. It is understood and agreed that all sums accruing or arising in and under said contract shall be paid into the commercial account hereinabove specified, and upon the filing of the Notice of Completion and the acceptance of the addition as called for by the contract and the elapsing of forty-five days, that there shall be paid the sum of \$5,000.00 to said G. W.

Reeves and the sum of \$5,000.00 to said John B. Moore, and that said payments shall be payment in full of said promissory notes as herein described and referred to."

It was further agreed that any money remaining in the commercial account, after the return of the \$25,000.00 to plaintiffs and the payment of the two notes, should be paid to Dealy and that he would pay plaintiffs the \$25,000.00 furnished by them, plus \$10,000.00 due on the notes if the commercial account was insufficient for that purpose.

On June 12, 1950, Dealy's bid for the construction of the Coalinga Hospital addition was accepted. Prior to that time plaintiffs and Dealy had discussed the matter of providing the performance bond of \$25,000.00 and Dealy suggested to Reeves and Moore that if they would put up the money, he would give them one-half of the profits, estimated at \$30,000.00. Reeves told Dealy that he and Moore could raise the \$25,000 on the basis of sharing the profit. Moore and Dealy and Mr. Pressey, a representative of the bonding company, then went to San Francisco and arrangements were made with the bonding company for a bond, with the understanding that if the contract were awarded to Dealy, Moore and Reeves would put up the \$25,000.00. It was recommended at this meeting that the parties seek legal counsel to have a contract, a proper contract, drawn between the parties. On their return from San Francisco, the parties met in Pressey's office and three alternative propositions were offered by Dealy: 1. That they would deduct all the costs of the job, including overhead, and then split the profits; 2. That he would take two-thirds of the profit and give Moore and Reeves one-third; or 3. He would guarantee a profit of \$5,000.00, each, to Moore and Reeves and would give them notes for this amount. On June 15, 1950, Reeves and Moore decided to take \$5,000.00 each for their share of the profits. Dealy and his wife then executed and delivered to Reeves and Moore two promissory notes, each for \$5,000.00.

An agreement was prepared by an attorney at the request of Dealy. However, this agreement was not satisfactory to Reeves and Moore and attorneys Walch and Griswold then prepared the contract, dated July 15, 1950, upon which this action was brought. Pursuant to this agreement, Reeves and Moore reviewed, analyzed and studied the items and accounts calling for payment in the performance of the construction, authorized payment of the bills and inspected the job on numerous occasions.

On December 26, 1950, Reeves, Moore and Dealy each withdrew \$1,000.00 from the commercial account with the understanding that the money would be returned to the account if needed. On January 23, 1951, Dealy needed \$4,000.00 and prepared three checks for this amount, one for each of the parties. He presented them to Moore for his signature, together with a demand for the return of the two \$5,000.00 promissory notes. Moore signed Dealy's check and refused to return the notes. The checks to Moore and Reeves were not signed or cashed at that time because they felt that all of the money would be needed to complete the construction job.

On March 12, 1951, a progress payment in the sum of \$17,390.53 was made by the hospital district. Defendants' evidence was that this payment was received on March 19th, 20th or 21st. On or about March 13, 1951, Mrs. Dealy made out a series of checks in payment of accounts payable. These checks were signed by Dealy and Moore and when the progress payment was received, Reeves had not signed the checks. Reeves ascertained that the progress payment had not been deposited in the commercial account and he refused to sign the checks. The record shows that Mrs. Dealy kept the progress payment until March 28th and then deposited it to the account of R. T. Dealy Company. Dealy refused to place the progress payment in the commercial account and Reeves refused to sign the checks for the accounts payable. This disagreement resulted in an offer by Dealy to return plaintiffs' money and pro-rate the

profits. However, the parties could not agree on the pro-rate method.

Dealy issued checks to Reeves and Moore for \$7,500.00 each and these checks were cashed by them, together with the checks for \$4,000.00 which they had previously received. Reeves and Moore then quit their jobs and filed this action, claiming damages in the sum of \$10,000.00 for breach of contract. The trial court rendered judgment awarding plaintiffs the damages prayed for and this appeal followed.

The principal contention of appellant Dealy is that the agreement of July 15, 1950, was an agreement in violation of the usury statutes. In this connection the trial court found "that the arrangements evidenced by the agreement dated July 15, 1950, and the promissory notes dated June 15, 1950, constituted the entering into by plaintiffs John B. Moore and G. W. Reeves and defendant R. T. Dealy of a business enterprise for profit; that the advance of \$25,000.00 by said plaintiffs John B. Moore and G. W. Reeves for the use of defendant R. T. Dealy was in no sense a loan but was deposited to make the enterprise a success and that the promissory notes dated June 15, 1950, were merely an evidence of guaranteed profit to plaintiffs John B. Moore and G. W. Reeves, binding defendant R. T. Dealy and were in no way a scheme to evade the Usury Law of the State of California; that said notes were not in violation of the Usury Law of the State of California." This finding is sufficiently supported by the evidence. Moore and Reeves were skilled in construction work. They agreed to oversee the job, see that it ran according to their estimates, take a survey and analyze the bills, assist Dealy and help him run the job. There is testimony that Moore and Reeves checked the job on several occasions on week ends and after working hours and that Moore usually signed the bills after finishing work.

[1-5] The question of whether the contract involved was usurious was one of fact for the trial court's determination and since the finding in this respect is justified by the

evidence, it is binding upon us. *Miley Petroleum Corp., Ltd. v. Amerada Petroleum Corp.*, 18 Cal.App.2d 182, 191, 63 P.2d 1210. The test is whether there was an attempt to evade the law. As was said in *Rose v. Wheeler*, 140 Cal.App. 217, 219, 220, 35 P.2d 220, 221:

"In a usurious transaction, there must be a loan of money, which is to be repaid to the lender, with compensation for its use in an amount constituting a charge in excess of the highest permissible rate. And as a necessary concomitant there must exist the corrupt intent to exact the illegal charge for the use of the money lent. *Lamb v. Herndon*, 97 Cal.App. 193, 197, 275 P. 503.

"The presumptions of law are in favor of legality; and therefore if the transaction in question is open to two constructions, one making for legality, the other for illegality, then in the absence of evidence pointing clearly to usury, it is the duty of the court to adopt the construction in favor of lawfulness. *Coley v. Wolcott*, 103 Cal. App. 140, 284 P. 241; *Shelley v. Byers*, 73 Cal.App. 44, 57, 238 P. 177."

[6] The evidence supports the trial court's finding that the parties in the instant action entered into a business enterprise for profit. The \$25,000.00 furnished by plaintiffs was deposited in a commercial account, subject to joint control of the parties. It was to be used for the payment of labor and material used in the construction work and not as a loan to Dealy. The parties were primarily interested in carrying out the construction contract at a profit for all concerned. Where, as here, the facts show a joining of funds, property and labor in a common purpose to attain a result for the benefit of the parties and where each had a right in some measure to direct the conduct of the other through a fiduciary relationship which existed, the court was justified in finding that the parties engaged in a business enterprise for profit which was in the nature of a joint venture. (A provision in the agreement to share the losses being implied.) *Martter*

v. Byers, 75 Cal.App.2d 375, 384, 171 P. 2d 101. Under such circumstances, the agreement in question is not usurious. *Fitzgerald v. Provines*, 102 Cal.App.2d 529, 538, 227 P.2d 860.

[7] Appellant Dealy's next contention that he did not breach the contract by failing to deposit the progress payment of \$17,390.53 in the commercial account since Reeves had refused to sign the checks for the payment of the bills. There is no merit in this contention. The evidence shows that Dealy converted the payment to his own use by placing it in his own bank account contrary to the terms of the contract between the parties. There was testimony to the effect that it was customary for Reeves to sign the checks after the progress payment was received and deposited. The evidence is sufficient to support the trial court's finding that the failure of Dealy to deposit the progress payment in the commercial account gave plaintiffs legal cause for refusing further performance of the contract and that plaintiffs were prevented from further performance by the failure and refusal of Dealy to comply with the terms of the contract.

[8] Appellant argues that after the parties began to disagree in March, 1950, they entered into an oral agreement for the purpose of settling their differences and that this oral agreement was executed. The evidence does not support this contention. While several offers were made by Dealy to settle the differences, none of them were unconditionally accepted by Moore and Reeves.

[9] Finally, it is argued that the court erred in fixing the amount of damages to be allowed for breach of contract. There was no error in the award made. Civil Code, § 3302; *Newmire v. Ford*, 20 Cal. App. 337, 128 P. 952; *Bartlett v. Odd-Fellows Savings Bank*, 79 Cal. 218, 21 P. 743.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

117 Cal.App.2d 114

**HORRELL v. SANTA FE TANK
& TOWER CO. et al.**

Civ. 19096.

**District Court of Appeal, Second District,
Division 1, California.**

March 31, 1953.

Rehearing Denied April 27, 1953.

Hearing Denied May 28, 1953.

Buyer brought action against seller to recover damages, on ground that seller falsely represented that water cooling tower would work under atmospheric conditions at certain location, but tower did not work under such atmospheric conditions. The Superior Court of Los Angeles County, Robert H. Scott and Julius V. Patrosso, J., entered judgment adverse to seller, order denying motion for judgment notwithstanding verdict, and order striking cost bill, and seller appealed, and buyer cross-appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to justify finding of scienter or knowledge on part of seller as to falsity of representations.

Judgment and order denying motion for judgment notwithstanding verdict affirmed, and appeal from order striking cost bill dismissed.

1. Fraud ☞50

Generally, to establish cause of action for fraud or deceit, plaintiff must prove that material representation was made, that it was false, that defendant knew it to be untrue or did not have sufficient knowledge to warrant belief that it was true, that it was made with intent to induce plaintiff to act in reliance thereon, that plaintiff reasonably believed it to be true, that it was relied on by plaintiff, and that plaintiff suffered damage thereby.

2. Fraud ☞45

In action by buyer of water cooling tower against seller to recover damages on ground that seller had falsely represented that tower would work under atmospheric conditions at certain location, but atmospheric conditions were such that tower would not work, complaint alleging that seller did not have exact accurate information and data concerning atmospheric or weather conditions at place in question, and that seller was well aware that without

such information and data seller could not accurately predict performance of tower, and that seller concealed and suppressed from buyer its lack of information and data, sufficiently alleged scienter or knowledge on part of seller of falsity of representations. Civ.Code, §§ 1572, subd. 2, 1574.

3. Fraud ☞58(2)

In action by buyer of water cooling tower against seller to recover damages, on ground that seller had falsely represented that tower would work under atmospheric conditions at certain location, but atmospheric conditions were such that tower would not work, evidence was sufficient to sustain finding of scienter or knowledge on part of seller as to falsity of representations. Civ.Code, §§ 1572, subd. 2, 1574.

4. Appeal and Error ☞1002

Jury's verdict, based on conflicting evidence, is conclusive on appeal.

5. Trial ☞260(1)

Trial court does not err in refusing to give requested instruction if full charge correctly states substance of law applicable to facts involved.

6. Appeal and Error ☞1067

Unless it appears probable that different result would have been reached had refused instruction been given, reversal is not warranted on appeal.

George R. Maury, Los Angeles, for plaintiff-respondent.

Wadsworth & Fraser, Los Angeles, for defendants-appellants.

DRAPEAU, Justice.

Plaintiff is a mechanical engineer engaged in the sale of processing equipment. In late May of 1947, his customer Citrus Foods Company was in the market for a refrigerator unit for cooling canned orange juice. Plaintiff telephoned defendant company and inquired of Mr. Dresser, manager of the cooling equipment division, "if he could supply a water cooling tower * * to cool 311 gallons per minute of water from 95 degrees back down to 80 degrees Fahren-

heit; the tower was to be used in or near La Habra, California. * * * He asked me if I knew what the weather conditions were at La Habra, and I told him I didn't. * * * He asked me if I knew what the wet bulb temperature was at La Habra. I told him I did not. He asked me if I knew what the wind velocity was at La Habra, and I again told him that I did not; those were things that were up to him, I was not designing a tower, I wanted a tower to cool that much water in or near La Habra. * * * I told Mr. Dresser on the telephone that one of the stipulations was that this cooling tower would have to be delivered and erected in not to exceed 30 days. I asked him if he could comply with that requirement, and he said yes."

Either that day or the next morning, Mr. Dresser quoted plaintiff a price on an atmospheric-type cooling tower. On May 29, 1947, defendant company confirmed such quotation by a written proposal containing the following warranty of performance:

"Quantity Clean Water—U.S. Gallons per Min. 311

Initial Temp. 95° F. Dry Bulb 85° F.

Final Temp. 80° F. Wet Bulb 68° F.

Wind Velocity 3 m.p.h. Rel. Humidity 41%

Drift Loss .2%

Tower Site—ground

Tower Location—near La Habra, California.

Exposure—Must be broadside to prevailing wind."

Specifically, defendants warranted performance of the tower with a three mile wind blowing broadside of the cooling tower.

The tower was duly installed. The citrus company selected the site, put in the forms and poured the concrete for the base. Defendants' workmen built the tower on the concrete base. When the cooling system was completed, it failed to work.

By process of elimination it was found that the "water wasn't being cooled properly. * * * The tower was not adequate." This for the reason that the prevailing wind in La Habra was at times less than three miles.

Defendants at first suggested additional sprays which were ineffective when installed. On September 19, 1947, defendants recommended the installation of an entirely different type of tower, i. e., a mechanical draft tower.

By the instant action plaintiff sought damages from defendants. Defendants' demurrer was sustained to the first cause of action of the third amended complaint without leave to amend.

The case went to trial on the second cause of action of said third amended complaint, to-wit: fraud and deceit based upon misrepresentations of defendants concerning the weather conditions under which the tower would operate in or near La Habra.

The jury returned its verdict in favor of plaintiff. From the judgment which followed, and from the order denying their motion for judgment notwithstanding the verdict, defendants appeal.

Plaintiff has also appealed from a portion of the judgment and from an order striking cost bill which appeal is the subject of a motion now pending in this court.

It is first urged that respondent has not stated a cause of action in fraud and deceit, because of failure to allege scienter or knowledge on the part of appellants.

[1] In general, to establish a cause of action for fraud or deceit, "plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby." *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 422, 159 P.2d 958, 964.

The complaint here does allege that when they made their oral statement and submitted their written offer, "defendants did not have exact accurate information and data concerning the atmospheric or weather conditions at or near La Habra, California, and were well aware that without such information and data they could not accur-

ately predict the performance of the cooling tower described in their written confirmation of offer or any cooling tower; and at said times and at all times thereafter to on or about September 15, 1947, defendants concealed and suppressed from plaintiff their lack of information and data and their consequent inability to predict accurately the performance of said cooling tower at or near La Habra, California."

That weather conditions at La Habra played an important part in the performance of the tower is evidenced by the questions put to respondent by appellants' agent Dresser, as hereinbefore noted. Moreover, Mr. Dresser testified that he understood from his conversation with him that respondent knew nothing about the weather conditions at La Habra.

When asked the following question: "When you made him the quotation * * * you put in that quotation dry bulb 85 degrees, wet bulb 68 degrees Fahrenheit, relative humidity 41 per cent, wind velocity 3 miles per hour. First with regard to the wind velocity, Mr. Dresser, what information did you have at that time to arrive at a wind velocity of 3 miles an hour?"—Mr. Dresser replied: "Past experience on quoting cooling towers for installation in this area; also charts showing wind direction and the average wind velocity, which is higher than what was picked."

One of the charts used was a government weather bureau report showing average wind velocity for the city of Los Angeles.

The witness admitted that he did not conduct any wind tests at La Habra prior to making his quotation.

He further testified:

"Q. By Mr. Maury: You were aware, then, I take it, Mr. Dresser, at the time that you sold the tower to Mr. Horrell, that it did require a 3 mile per hour wind in order to function properly? Did it not? A. Yes, sir.

"Q. And you were also aware, were you not, that there was no 3 mile an hour constant wind to be expected anywhere in the Los Angeles basin area; is that not true?

* * * The Witness: The answer is that's true. * * * When I talked with Mr. Horrell I knew that the cooling tower would perform when the wind was 3 miles per hour and given the conditions as they existed on the proposal. * * *

"Q. Did you ever tell Mr. Horrell that the practice in the industry was to quote these averages instead of facts? A. Nothing was said of that. * * *

"Q. Did you ever tell Mr. Horrell he could not reasonably expect a constant 3 mile per hour wind at La Habra? A. Not that I recall.

"Q. Did you ever tell him that you meant by these performance specifications that those conditions might occur sometime at La Habra, and that then the tower would work? A. Not that I recall."

He also admitted that when he went out to La Habra in the fall of 1947, he estimated the wind velocity at one mile.

[2, 3] In view of the foregoing, it is clear that respondent not only alleged but established by substantial evidence that appellants did not have sufficient knowledge of the weather conditions at or near La Habra to warrant a belief that their representations regarding them were true. *Hobart v. Hobart Estate Co.*, supra, 26 Cal.2d 412, 422, 159 P.2d 958.

See, also, *Wishnick v. Frye*, 111 Cal.App. 2d 926, 930, 245 P.2d 532, 534, where it is said: "In order to satisfy the requirement of scienter, it may be established either that defendant had actual knowledge of the untruth of his statements, or that he lacked an honest belief in their truth, or that the statements were carelessly and recklessly made, in a manner not warranted by the information available to defendant. *Gonsalves v. Hodgson*, supra [38 Cal.2d 91, 100, 237 P.2d 656]; 12 Cal.Jur. 724-725; *Restatement of Torts*, sec. 526."

Section 1572, subd. 2, Civil Code, defines as actual fraud, "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true".

And actual fraud is always a question of fact. Section 1574, Civil Code.

On the issue of reliance, respondent testified as follows:

"Q. Then I will ask you, Mr. Horrell, upon what did you rely when you purchased the cooling tower? A. I relied upon the fact that a cooling tower manufacturer who had to design and furnish a cooling tower to do a certain job would make it a point to provide that tower at the place where we requested, to function that way where we requested that it was to function, and that was in La Habra, and he couldn't do that without checking into the weather conditions, couldn't honestly fulfill that contract without checking into those weather conditions at La Habra and his was the design function of the tower—not mine.

"Q. Now, in reselling the tower to the American Fruit people did you re-guarantee the tower to them? A. I did.

"Q. And upon what did you rely when you re-guaranteed the tower to them? A. I relied on the fact that I had purchased a tower for them from an experienced tower manufacturer and that they, in turn, would furnish a tower, through us, to the job that would function under these conditions."

[4] Here the jury's verdict is conclusive, based as it was upon conflicting evidence presented on the various issues involved.

Appellants cite as prejudicial error certain comments made by the trial judge in sustaining respondent's objection to introduction in evidence of weather charts, to-wit:

"The Court: Did these charts or any of them or all of them together, tell you that there would be a constant breeze in La Habra of at least 3 miles an hour?

"The Witness: No, sir.

"The Court: Did you know this tower that you sold Mr. Horrell required a breeze of at least 3 miles an hour to function properly?

"The Witness: I would like to explain the performance of the tower.

"The Court: Can you answer the question? * * *

"The Witness: No."

It is claimed that the trial court arrived at a conclusion which was contrary to the evidence and that the remarks had such an influence on the jury as to deprive appellants of a fair trial.

However, there was evidence to the effect that the cooling system was operated on a twenty-four hour basis and required a three mile wind broadside of the tower at all times to keep it in operation.

It is also claimed that the trial court committed prejudicial error in refusing to give three of appellants' instructions to the jury.

[5, 6] There was no error in refusing to give the particular instructions complained of, for the reason that the jury was fully and fairly instructed on all of the aspects of fraud and deceit. It is not error for a court to refuse to give a requested instruction if the full charge correctly states the substance of the law applicable to the facts involved in the case, 24 Cal.Jur. 806-810; and a reversal is not warranted unless it appears probable that a different result would have obtained had the refused instructions been given, 24 Cal.Jur. 861-865.

For the reasons stated, the judgment and the order denying motion for judgment notwithstanding the verdict are, and each of them is, affirmed.

The motion of plaintiff-respondent for leave to dismiss his appeal from the judgment and the order striking cost bill is granted. Said appeal from the judgment and from said order striking the cost bill is dismissed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

116 Cal.App.2d 845

KEHLOR v. MUNICIPAL COURT.**Civ. 8272.**District Court of Appeal, Third District,
California.

March 23, 1953.

Hearing Denied May 21, 1953.

Petition for writ of mandate requiring dismissal of criminal complaint pending against petitioner in a municipal court. From a judgment of the Superior Court, Stanislaus County, denying the petition, petitioner appealed. The District Court of Appeal, Peek, J., held that absence of accused at time set for trial on misdemeanor charges and condition of calendars of court and defense counsel did not constitute good cause for subsequent delay in trial over accused's request for early trial.

Judgment reversed with directions.

1. Criminal Law $\S$ 636(1)

Defendant, having knowingly absented himself at time set for trial on misdemeanor charges in municipal court, was entitled to have trial proceed in his absence upon insistence thereon by his counsel. Pen.Code, $\S$ 1043; Const. art. 1, $\S$ 13.

2. Criminal Law $\S$ 576(5)

Accused's waiver of constitutional right to speedy trial by twice obtaining continuance thereof did not constitute similar waiver covering further postponement of trial over accused's objection. Pen. Code, $\S$ 1043; Const. art. 1 $\S$ 13.

3. Criminal Law $\S$ 576(2)

Where trial in municipal court on misdemeanor charges in operation of motor vehicle, having been twice continued at accused's request and further delayed because of absence of accused, was set on March 28 for trial on May 16, notwithstanding request by accused, who was then before the court, for an early trial, previous unexplained absence of accused and condition of calendars of court and defense counsel did not constitute good cause for such delay and accused was entitled to dismissal of complaint. Pen.Code, $\S\S$ 1043, 1382; Const. art. 1, $\S$ 13.

4. Criminal Law $\S$ 1163(1)

Prejudice will be presumed from violation of constitutional right to speedy

trial in criminal prosecution and it is enough for accused to show that prosecution has been unreasonably delayed. Pen. Code $\S$ 1382; Const. art. 1, $\S$ 13.

5. Criminal Law $\S$ 576(11)

Good cause for delay of trial on criminal charge will not be presumed but must be shown by prosecution. Pen.Code $\S$ 1382; Const. art. 1, $\S$ 13.

Sutter & Elledge and Robert D. Carter,
Modesto, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., T. W. Martz, Dist. Atty., Stanislaus County, Modesto, for respondent.

PEEK, Justice.

On April 8, 1952, Kehlror filed his petition for a writ of mandate in the Superior Court of Stanislaus County praying for an order of that court directing the respondent Municipal Court of the City of Modesto to dismiss a criminal complaint which was then pending against him in said court. On April 28, following a hearing on the petition, the same was denied and petitioner thereupon appealed to this court.

From the record before us, which consists of the judgment roll alone, it appears that on August 3, 1951, a complaint was filed in the Justice Court of Modesto Township, County of Stanislaus [which court on January 1, 1952, became the Municipal Court of Modesto Judicial District] consisting of seven counts each charging petitioner with a misdemeanor in the operation of a motor vehicle.

On August 9, 1951 defendant, with counsel, appeared in said Justice Court, pleaded not guilty to the violations charged, and was released on bail. The case was set for hearing in October [the record does not disclose the exact date]; however, the trial was continued at the request of defendant until December 5, 1951. On that date the case was again continued to March 20, 1952 at the request of defendant. On the date so set the defendant did not appear in person but he did appear by his

counsel, who again moved the court for a further continuance. The motion was denied, whereupon defendant's counsel announced in open court that he was ready to proceed to trial. The court refused to so proceed in the absence of the defendant, ordered that his bail be forfeited and that a bench warrant issue.

It appears from the allegations in the petition, to which no denial or other answer was filed, and from the affidavit of counsel in support thereof, which was made a part of the petition, that the court in making its order announced that its actions were predicated upon the fact that the court was satisfied that the defendant had sufficient knowledge of the time and place of trial, that no just cause had been shown why he was not present, and that the defendant would have to be present in order for the trial to proceed. It also appears from the affidavit that at no time did the district attorney suggest that the presence of the defendant was necessary for any purpose and that at no time did the district attorney offer any reason for his refusal to proceed with the trial other than the absence of the defendant.

Counsel for petitioner thereupon moved for a dismissal and following a submission of the motion the same was denied on March 27, 1952. On the following day, over the objection of counsel who requested an early date, the court reset the case for May 16, 1952 for the reason as stated in the petition "that in view of the calendars of both counsel for your petitioner and the Court, the 16th day of May, 1952, was the earliest possible date that said trial could be held."

The order of the Superior Court denying petitioner's motion for a writ of mandate states in part that "no satisfactory explanation was offered to the Judge by defense counsel as to why the defendant was not present." That while the Municipal Court could have proceeded to try the defendant in his absence, that court "cannot be compelled to do so for the reason that the Section [1382] is not mandatory. * * * the court at all times has a right to control the proceeding of a trial in its Court, and in exercising sound discretion

has a lawful right to refuse to proceed without the presence of the defendant. [This] Court is further of the opinion that the unexplained absence of the defendant on the day of the trial was a reasonable showing of good cause for delay within the meaning of Subdivision 3 of Section 1382 of the Penal Code, because such delay was traceable to the defendant himself. The defendant's trial was set for May 16, 1952 when he was before the Court on March 28, 1952, which is not an unreasonable delay under the circumstances of this case, especially in view of the fact that the defendant tried to get a continuance of the trial himself on March 20, 1952, and failed."

At the outset, Section 13, Article I of the Constitution of this state provides that: See *People v. Molinari*, 23 Cal.App.2d Supp. 761, 764, 67 P.2d 767, 768.

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy * * * trial."

The portion of section 1043 pertinent to the questions now reads as follows:

"The defendant must be personally present at the trial; provided, that in case of a misdemeanor charge, if he absents himself with full knowledge that a trial is to be or is being had, the trial may proceed in his absence."

The remaining portions of that section make mandatory the presence of a defendant in all felony cases.

The pertinent portions of section 1382 read as follows:

"The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: * * *

"3. Where the trial has not been postponed upon the defendant's application, if the defendant in a misdemeanor case in an inferior court, is not brought to trial within 30 days after he is arrested and brought within the jurisdiction of the court, unless by his own neglect or failure to appear in court when his presence is lawfully required, his trial must be postponed * * *."

It is defendant's contention (1) that he comes within the applicable provisions of section 1043 and (2) because of the failure of the court to proceed on March 20 and the resetting of his trial for May 16, he was thereby deprived of a "speedy trial" as that phrase is used in Section 13, Article I of the Constitution of this state.

We are confronted first with the constitutional mandate that the party accused in any criminal proceeding "*in any court whatever*" is entitled to a "*speedy trial*". (Italics added.) Additionally the legislature has admonished the courts that as a matter of public policy all criminal proceedings shall be determined at the earliest possible time, and that it shall be the duty of all courts and judicial officers to expedite such proceedings. Then so as to insure the carrying out of both the constitutional and legislative mandates section 1382 was enacted providing that upon application of the defendant the court "must order the prosecution to be dismissed * * unless good cause to the contrary is shown" if a defendant is not brought to trial within the specific periods therein set forth.

[1] As appears from the record the only basis for the refusal of the trial court to proceed to trial on March 20 was its desire to have the defendant present. However, the defendant knowingly had absented himself but desired to proceed by his counsel, a right granted by section 1043.

[2] It cannot be denied that while it was through his own requests that the case was not tried before, however, as the court noted in the similar case of *People v. Molinari*, supra, 23 Cal.App.2d Supp. at page 766, 67 P.2d 767, the waivers by the defendant of a right to a speedy trial for a period of several months could not amount to a similar waiver covering an additional period of approximately seven weeks. From the record before us it appears that the only reason for the final continuance was the condition of the court's calendar and that of defendant's counsel. Counsel's agreement to such setting was without prejudice to the position he had previously taken.

[3-5] Such facts and circumstances do not support the findings of the Superior Court that good cause was shown and such delay was not unreasonable. As stated in *Harris v. Municipal Court*, 209 Cal. 55, 64, 285 P. 699, 702:

"Prejudice will be presumed from the violation of this constitutional right. It is enough for the defendant to show that the prosecution has been unreasonably delayed. It will not be presumed that good cause for the delay in fact existed. If there was any good cause, it was for the prosecution to show it."

The judgment is reversed with directions to the trial court to enter its order directing the respondent Municipal Court of the City of Modesto to dismiss the criminal complaint now pending therein against the petitioner.

VAN DYKE, P. J., and SCHIOTTKY, J., concur.

Hearing denied; CARTER, J., not participating.



116 Cal.App.2d 891

PEOPLE v. SWEEDEN.

Cr. 937.

District Court of Appeal, Fourth District,
California.

March 24, 1953.

Motion by defendant to vacate and set aside judgment revoking probation. The Superior Court, Riverside County, John G. Gabbert and O. K. Morton, JJ., rendered order denying the motion, and defendant appealed. The District Court of Appeal, Griffin, J., held that neither revocation of probation nor denial of motion to vacate and set aside judgment revoking probation were an abuse of discretion.

Affirmed.

See also, 254 P.2d 902.

I. Criminal Law — 982

Trial court's denial of motion to vacate and set aside judgment revoking proba-

tion for failure to order return of defendant from custody for hearing on motion may be set aside only upon showing of abuse of discretion.

2. Criminal Law ☞982

Trial court's failure to order return of defendant from custody for hearing on motion to vacate and set aside judgment revoking probation was not an abuse of discretion, particularly where defendant neither asked court to allow him to be present nor showed any necessity for his presence at hearing.

3. Criminal Law ☞982

There is no constitutional nor statutory right to notice and hearing preceding revocation of probation.

4. Criminal Law ☞982

Probation is not a right but a privilege.

5. Criminal Law ☞982

Hearing on revocation of probation is not governed by rules concerning formal criminal trials.

6. Criminal Law ☞982

Probation is an act of clemency and proceedings connected therewith are not a phase of the criminal prosecution in which accused has a right to appear and defend. Penal Code, § 1203.2; Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

7. Criminal Law ☞982

Where hearing on revocation of probation was held in presence of defendant and probation officer's report was fully considered, trial court's revocation of probation was not an abuse of discretion.

8. Criminal Law ☞982

On a hearing on revocation of probation, defendant need not be proven guilty of a new crime beyond all reasonable doubt, and when evidence shows clearly and satisfactorily that defendant has violated terms of probation, there is no abuse of discretion in revoking order of probation.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was previously charged with two counts of forgery and with a prior conviction of a felony and having served a term of imprisonment therefor. He was then represented by court-appointed counsel. He pleaded guilty to the charges and admitted the prior conviction. On March 21, 1952, he was sentenced to state's prison. The commitment was suspended for a period of three years and defendant was granted probation for that period conditioned, among other things, that he serve one year in an adult detention facility, and not violate any law or ordinance. No appeal was taken from the judgment thus entered.

On June 26, 1952, he was brought before the court (Judge Morton) and charged with having violated his probation in that he was gambling at the County Road Camp, and conspiring to commit escape therefrom. At the hearing, as noted from the minutes, defendant was present in court without counsel. Apparently no request was made for such assistance. The record does not disclose whether defendant was or was not informed of any right he might have to the aid of counsel at that time. After a rather full hearing the probation order was revoked and the defendant was, on June 26, 1952, committed to the custody of the Superintendent of Correction at Chino.

On October 2, 1952, defendant filed his motion denominated Motion to Vacate and set aside judgment rendered on June 26, 1952, revoking probation and committing him to the state institution, upon the ground that he was not represented by counsel at the hearing on the matter of revocation of his probation. He claimed that the court did not inform him of his right to counsel and that the court did not offer to appoint counsel for him; that the proceedings were therefore in violation of his right to due process of law guaranteed by Article I of section 13 of the California Constitution, and that there was not sufficient evidence

Jimmie Sweeden, Jr., in pro. per. for appellant.

that he violated any law justifying the revocation of his probation.

Although defendant was not present, counsel was appointed by the court to represent him at the hearing of his motion. Judge Gabbert denied this motion. Defendant appealed.

[1,2] He argues first that the court erred in not ordering that he be allowed to appear at the hearing on the motion to vacate the judgment. The only indication that the defendant wished to be present at the hearing is found in the notice of motion, which states that the motion would be based on written and oral evidence to be presented by himself at the hearing. He neither asked the court to allow him to be present, nor showed any necessity for his presence at the hearing. He does not now suggest any prejudice that he suffered by being absent therefrom. The court appointed counsel to represent him. No abuse of discretion is shown in the failure of the court to order the return of the defendant for the hearing. The court's determination in this respect can be set aside only upon a showing of an abuse of such discretion. *People v. Kirk*, 76 Cal.App.2d 496, 498, 173 P.2d 367.

The next point worthy of consideration is the contention that the trial court lost jurisdiction to make the order revoking probation because it denied him his constitutional right to the due process of law secured to him by section 13 of Article I of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States, by failing to inform him that he had a right to counsel at said hearing on revocation of his probation, and failing to appoint counsel to represent him. He cites such cases as *Williams v. Kaiser*, 323 U.S. 471, 475, 65 S.Ct. 363, 89 L.Ed. 398; *Tomkins v. State of Missouri*, 323 U.S. 485, 487, 65 S.Ct. 370, 89 L.Ed. 407; *Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461; and *Gibbs v. Burke*, 337 U.S. 773, 69 S.Ct. 1247, 93 L.Ed. 1686.

[3-6] This contention was set at rest in *In re Davis*, 37 Cal.2d 872, 236 P.2d 579, in which *In re Dearo*, 96 Cal.App.2d

141, 214 P.2d 585, is cited with approval. In *re Cook*, 67 Cal.App.2d 20, 153 P.2d 578, relied upon by defendant, was disapproved insofar as it was inconsistent with the conclusions reached in the *Davis* case. In the *Davis* case [37 Cal.2d 872, 236 P.2d 581], it was stated that "neither the Constitution of the United States nor that of California precludes ex parte revocation of probation"; that under the federal law, as well as under our law, probation is not a right but a privilege; that notice and a hearing need not precede revocation of probation. If a hearing is held, it is not governed by the rules concerning formal criminal trials. It has been said that probation is an act of clemency, and such proceedings are not a phase of the criminal prosecution in which the accused has a right to appear and defend. In *re Dearo*, supra (citing 1203.2 Penal Code).

In *People v. Fields*, 88 Cal.App.2d 30, 198 P.2d 104, where judgment was not pronounced before an order granting probation was entered, it was held error, on revoking the order for probation, to pronounce judgment without arraignment for judgment and in the absence of counsel. Such is not the case here. Defendant was duly arraigned for judgment when he was represented by counsel. Judgment was pronounced and only the commitment was suspended. In that same case it was held that probation proceedings are no part of "prosecutions" within the meaning of Section 13 of Article I of our Constitution. *People v. Blankenship*, 16 Cal.App.2d 606, 61 P.2d 352, is factually in point. There, defendant contended that he was not represented at the hearing in which his probation order was revoked. This court held that such a hearing was not a trial and that the established rule governing the conduct of trials was not applicable. To the same effect is *In re Levi*, 39 Cal.2d 41, 244 P.2d 403. No appeal was taken from the order revoking the order granting probation and suspending execution of sentence as was done in *People v. London*, 28 Cal.App.2d 395, 82 P.2d 619.

[7] In considering the facts here related, no abuse of discretion on the part of the

trial court appears in revoking the probation at the hearing which was held in the presence of the defendant. The probation officer's report was fully considered. It showed that defendant had been doing some gambling while in the road camp and that one of the prisoners signed a statement to the effect that defendant approached him on two occasions about making an escape from the camp; that defendant asked him if he "liked money" and if he was afraid of a gun; that defendant suggested that the bookkeeper and guard at the camp returned to the camp on a certain day and at a certain time with a bag of money and that there was money in the camp safe; that defendant planned to proceed into the office on that day, ask the keeper for change, and while he was opening the safe, "slug" him and take the contents, break open a gun locker, take the keeper's car, and escape; that the prisoner told defendant he was not interested and later informed the superintendent of defendant's plan. Defendant denied these accusations.

The report also shows that another prisoner saw defendant on one occasion gambling and shooting dice; that there was money on the table; that he saw him gamble on other occasions. Defendant claims he was playing "draw poker", a perfectly legal pastime, and that as to the dice he had in his possession, he found them in the clothing of the prisoners when he was in charge of the camp laundry.

The superintendent of the camp testified he told defendant there was to be no gambling on the camp grounds, and that signs were posted "all through the camp" setting forth the rules and regulations, and that "No Gambling" was one of them. He related that a prisoner had informed him on two occasions of defendant's plans to escape. One prisoner testified at the hearing that defendant approached him and asked him to escape from the camp with defendant; that he related the plans as above indicated by the other prisoner; that he told him that was a crazy idea and he was not interested; that defendant said he was going to do it anyway; that defendant later told him he had given up the idea. Defendant was accorded an opportunity to cross-

examine the witnesses. He merely denied the accusations.

[8] In such a proceeding it is not necessary that the defendant be proven guilty of a new crime beyond all reasonable doubt, and there is no abuse of discretion in revoking the prior order when the evidence shows clearly and satisfactorily that the defendant has violated the terms of his probation. *People v. London*, 28 Cal.App.2d 395, 82 P.2d 619. No abuse of discretion or arbitrary action on the part of the trial judge appears.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



116 Cal.App.2d 913

Ex parte SWEEDEN.

Cr. 868.

District Court of Appeal, Fourth District,
California.

March 24, 1953.

Habeas corpus proceeding to secure release from custody. The District Court of Appeal held that writ of habeas corpus to review judgment revoking probation should first be sought from revoking court.

Order in accordance with opinion.

Habeas Corpus  41

Writ of habeas corpus to review judgment revoking probation should first be sought from revoking court.

Jimmie Sweeden, Jr., in pro. per., for petitioner.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

PER CURIAM.

Petitioner seeks a writ of habeas corpus, alleging generally the same facts related in

People v. Sweeden, 116 Cal.App.2d 891, 254 P.2d 899. He here cites the same authorities and advances the same reasons there advanced as grounds for his release under this writ. He expresses the claim that the trial court acted arbitrarily in revoking his probation order.

The contentions here made are sufficiently discussed and fully answered in that case. In addition, *In re Davis*, 37 Cal.2d 872, 236 P.2d 579, holds that the validity of such an order, when reviewed by habeas corpus, should first be sought from the revoking court.



116 Cal.App.2d 883

PEOPLE v. McMAHON.

Cr. 2384.

District Court of Appeal, Third District,
California.

March 24, 1953.

Defendant was convicted in the Superior Court of Shasta County, Eaton, J., of assault with intent to commit sexual perversion on boy, and defendant appealed. The District Court of Appeal, Peek, J., held that evidence sustained conviction.

Judgment affirmed.

1. Indictment and Information ⇨130

Court properly permitted joinder for trial of one count charging defendant with assault with intent to commit sexual perversion with first boy, and count charging defendant with commission of perversion with second boy, and count charging commission of perversion with third boy. Pen. Code, § 288a.

2. Indictment and Information ⇨130

In order to justify joinder for trial of several counts of indictment, it is not necessary that all offenses should have grown out of same transaction or that they occurred on same date, or that they were perpetrated against same person, or that evi-

dence of one would prove element of substantial importance in others.

3. Criminal Law ⇨742(2)

Mere fact that each of two prosecuting witnesses with whom defendant was charged with having committed sexual perversion was an accomplice of defendant with respect to particular act allegedly engaged in by each with defendant, did not render each an accomplice, as a matter of law, with respect to alleged act charged against defendant with the other, and whether each was an accomplice as to the other was for jury, and therefore court properly refused defendant's motion to dismiss charges because complaining witnesses were not corroborated. Pen.Code, § 288a.

4. Criminal Law ⇨1171(1)

Where reference by district attorney to failure of defendant to call his wife as witness related solely to alibi which defendant sought to establish concerning his whereabouts on evening alleged offenses charged in counts three and four allegedly occurred, but defendant was acquitted on counts three and four and was convicted only on count one, such reference by district attorney was not prejudicial error. Pen.Code, § 1322.

5. Criminal Law ⇨1171(1)

In prosecution for assault with intent to commit sexual perversion on boy and for alleged commission of sexual perversions on two other boys, statement of district attorney to jury, in referring to the defendant in a prior case by name, that there were such persons who would kill a small child in order to avoid detection, was not prejudicial error, where jury acquitted defendant on counts charging commission of the offense. Pen.Code, § 288a.

6. Criminal Law ⇨722(2)

In prosecution under the Penal Code for assault with intent to commit sexual perversion and for commission of alleged sexual perversions, action of district attorney in referring to defendant as a "filthy pervert" was not error. Pen.Code, § 288a.

7. Criminal Law ⇨723(3)

In prosecution for assault on boy with intent to commit sexual perversion and for alleged commission of sexual perversions on

other boys, reference by district attorney to necessity of protection of children from individuals such as defendant, was not error. Pen.Code, § 288a.

8. Criminal Law ⇨1186(4)

In prosecution for assault with intent to commit sexual perversion on boy and for alleged commission of sexual perversions on two other boys, statement of district attorney that defendant was a "filthy pervert", and that it was necessary to protect children from individuals such as defendant, did not constitute reversible error. Pen.Code, § 288a; Const. art. 6, § 4½.

9. Sodomy ⇨6

Evidence was sufficient to sustain conviction for assault with intent to commit sexual perversion on boy. Pen.Code, § 288a.

10. Criminal Law ⇨1172(1)

Act of court in re-writing correct instruction requested by defendant, so as to make one immaterial change, was not prejudicial error.

George P. Kading, Chico, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction of the crime denounced by Section 288a of the Penal Code.

By an indictment found by the grand jury of Shasta County defendant was charged in Count 1 thereof with an assault with intent to commit the crime prohibited by that section; Count 2 charged a like offense—however this count was stricken prior to the trial, and counts 3 and 4 charged prior violations of the same section. Following the overruling of his demurrer and the denial of his motion to set aside the indictment the cause proceeded to trial, at the conclusion of which the jury found him guilty as to Count 1 and not guilty as to Counts 3 and 4. Thereafter a hearing was had by the court on its own motion under the provisions of the Welfare and Institutions

Code, § 5500 et seq., relating to sexual psychopaths. The court determined that the defendant did not come within the provisions of that Code and he was sentenced to state prison for the term prescribed by law. However, the execution of the sentence was suspended and defendant granted probation for a term of ten years, the first six months of which to be spent in the Shasta county jail.

A detailed summary of the evidence appears unnecessary. Suffice it to say that the record shows that while a fifteen year old boy was hitchhiking from his school in Redding to his home near Central Valley he was accosted by defendant who offered to drive him home. During the course of the ride, which the defendant endeavored to prolong, he attempted to commit the acts denounced by said section 288a. The defendant continued in his attempt until threatened with physical violence by the boy whereupon defendant stopped the car and the boy got out. The boy immediately reported the incident to a deputy sheriff. In his report to the officer he identified with particularity the defendant and the car he was driving. Three days later he identified the defendant at the Redding police station. According to the under sheriff of Shasta county the defendant stated that on the evening of the alleged crime he was at a bar drinking, but when asked the name of the bar he was unable to recall the same, merely stating "It's down that way", and when asked if he did not pick up a hitchhiker whom he took to Central Valley, the defendant replied, stating, "The kid is lying, I have never seen that kid before * * *." The defendant, testifying in his own behalf, denied that he ever knew or had even seen the boy prior to the date of the questioning at the police station. He further called witnesses in his own behalf to substantiate his alibi that he was with friends on the evening in question.

Five contentions are made by defendant. (1) That the trial court erred in permitting the joinder for the trial of three counts of the indictment; (2) that the trial court erred in denying his motion to dismiss counts 3 and 4; (3) that the district attorney was guilty of prejudicial misconduct;

(4) that the evidence was insufficient to support the verdict, and (5) that the court erred in giving an amended cautionary instruction.

[1,2] His argument in support of his first contention is that the three counts in question do not contain a common element of substantial importance in their commission as required under the provisions of section 954 of the Penal Code. This, he says, is true since in Count 1 he was charged with an assault with the intent to commit the offense, while in Counts 3 and 4 he was charged with the commission of the offense prohibited by said section 288a. It seems unnecessary to labor this point since it is readily apparent that the offenses charged were of the same class and that the common element of substantial importance in each of the counts was the intent to violate said section 288a. It was not necessary that all of the charged offenses should have grown out of the same transaction or that they occurred on the same date or that they were perpetrated against the same person or that the evidence of one would prove the element of substantial importance in the others. In *re Pearson*, 30 Cal.2d 871, 186 P.2d 401.

[3] Defendant's second contention is predicated upon the action of the trial court in denying his motion to dismiss Counts 3 and 4. His argument in support of this contention proceeds upon the theory that since both of the boys involved in these counts were over the age of fourteen years they were therefore accomplices, and since their testimony was not corroborated it was error for the court to deny his motion. Our examination of the record does not sustain such a contention. While each of the boys was an accomplice with respect to the particular act in which he participated the evidence does not disclose as a matter of law that he was an accomplice with respect to the acts perpetrated by defendant on the other. Both of the complaining witnesses were present at the time and place; each was the recipient of the same offer and proposition and each identified the defendant as the one who had picked them up in his car and made the propositions to

them. The mere fact that each was an accomplice of the defendant with respect to the particular act engaged in by each did not in and of itself render him an accomplice as a matter of law as to the act charged against defendant with the other complaining witness. This was a question of fact to be determined by the jury and the court properly left that to the jury for its determination. *People v. Griffin*, 98 Cal. App.2d 1, 219 P.2d 519.

Defendant next contends that the district attorney was guilty of prejudicial misconduct (1) in calling attention to the failure of the accused to have his wife testify; (2) in calling attention to the *Stroble* case, and (3) in his language in referring to the defendant.

[4] We find no merit to the first charge of misconduct. The reference by the district attorney to the defendant's failure to call his wife as a witness related solely to the alibi which defendant sought to establish concerning his whereabouts on the evening the offenses charged in Counts 3 and 4 were alleged to have occurred. After mentioning that she was the one person who could substantiate the alibi but she was not called, the district attorney then concluded with an observation concerning the operation of Penal Code section 1322. Then following a short exchange between counsel as to whether or not the defendant had been asked to waive the privilege of said section, counsel for the defendant stated "we object" and proceeded to further discuss the manner of issuance of process and how a spouse may or not testify according to the provisions of said section 1322. Thus it becomes readily apparent that the situation in the present case is substantially different from that presented in the case of *People v. Klor*, 32 Cal.2d 658, 197 P.2d 705, which is relied upon by defendant. What has been heretofore said is not to be taken as approving the conduct of the district attorney. Since under such circumstances the testimony of the wife could only refer to those counts and since it was as to those that he was acquitted, it cannot be said that the defendant was prejudiced thereby. *People v. Hickman*, 31 Cal.App.2d 4, 87 P.

2d 80. Since such testimony had no reference to the first count we cannot see how it was prejudicial as to that.

[5] It is also true that we do not commend the manner in which the prosecuting attorney injected the Stroble case into his argument. However, the only mention of that case was the use of the name only during the conclusion of the prosecutor's comments relative to defendant's attempt to establish an alibi by stating his residence to be in cities other than Redding, and that his drug store, where it was charged some of the acts occurred, was not owned by him but in fact was owned by a friend. The district attorney then told the jury that the fear of discovery causes a pervert to do many things to avoid detection and when such fears become advanced "you have got your Strobls who will kill a small child to avoid detection." Counsel for defendant immediately objected and requested the court to admonish the jury to disregard the remarks. The court did admonish the district attorney and did so instruct the jury.

While the Stroble case was one which received a great deal of publicity in and around the city of Los Angeles, yet, elsewhere in the state the publicity thereof decreased in direct ratio to the geographical remoteness of any given community. Furthermore the facts of the case itself was not discussed as was the situation in *People v. Adams*, 14 Cal.2d 154, 93 P.2d 146, which has been cited and relied upon by defendant herein. Here it appears that the word "Stroble" was used to describe sex crimes generally and not to describe the facts shown in the instant case as being comparable to those in the Stroble case. Furthermore it is difficult to see how the defendant was prejudiced thereby when the jury acquitted him of Counts 3 and 4 which were far more adequately sustained by the record than the crime of assault with intent to commit the offense which was charged in Count 1 and upon which he was convicted.

[6-8] The third assignment of error made by defendant in support of this contention is that the action of the district attorney by referring to him as a "filthy pervert" was such prejudicial misconduct

as would compel a new trial; his argument being that such comment was wholly outside the issues of the case and served no purpose other than to inflame the minds of the jurors against him; that he was not being tried as a sex pervert under the Welfare and Institutions Code but to the contrary was being tried upon an indictment charging the commission of certain acts. It is true he was not being tried under the provisions of the Welfare and Institutions Code but he was being tried on charges which the courts have characterized as sexual pervers. See *People v. Coleman*, 53 Cal.App.2d 18, 127 P.2d 309. Nor do we find misconduct in the remarks of the district attorney referring to the necessity of protection of children from individuals such as defendant, since in each of the offenses the defendant was accused of misconduct with teenaged boys. Again, even assuming such remarks to have been misconduct, certainly it was not such as would constitute prejudicial error under Article VI, section 4½ of the Constitution.

[9] Appellant's next contention that the evidence was insufficient to support the verdict of the jury is likewise without merit. Immediately after the alleged offense, the complaining witness reported the alleged act to a police officer. He testified without equivocation that the defendant propositioned him to commit an act in violation of section 288a of the Penal Code. This testimony, standing alone, if believed, as it was, was of itself sufficient to support the conviction. *People v. Peterman*, 103 Cal. App.2d 322, 229 P.2d 444. The defendant and the car he used were identified by the complaining witness. Additionally, there was the testimony of the police officer concerning the acts and the conduct of the defendant at the time he was apprehended. Defendant's argument in support of this contention, particularly in relation to his alibi defense, presented merely a factual problem to be resolved by the jury, and hence is an argument more properly addressed to the jury than to this court on appeal.

[10] Defendant's final contention attacks a cautionary instruction given by the trial court in its charge to the jury. It is

difficult to understand why the trial court, rather than giving the instruction as proposed by defendant, re-wrote the same so that as given it was, with but one immaterial change, the same as Sir Matthew Hale's statement in 1 Pleas of the Crown, 634. There could have been no question concerning the instruction as submitted by the defendant since it followed with particularity the one approved in *People v. Putman*, 20 Cal.2d 885, 129 P.2d 367. Certainly contemporary language is to be desired, but whatever may have been the reason which motivated the trial court the defendant was not prejudiced thereby. The fact remains that the jury was given a cautionary instruction, and although not in the phraseology the defendant desired we cannot say that the court in so instructing the jury thereby committed prejudicial error.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



116 Cal.App.2d 824

**BOARD OF DIRECTORS OF TURLOCK
IRR. DIST. v. CITY OF CERES et al.**

Civ. 8179.

Sac. 6266.

District Court of Appeal, Third District,
California.

March 20, 1953.

Action for declaratory relief to determine whether improvement district or city and owners of property adjacent to district's pipeline were responsible for protection, maintenance and upkeep of that portion of the pipeline which lay in and was crossed by public streets in the city. The Superior Court, Stanislaus County, entered judgment for the city and property owners, and plaintiff appealed. The District Court of Appeal, Schottky, J., held, *inter alia*, that plaintiff had acquired a prior easement for its pipeline, and

the city had the duty to so construct and maintain the crossings over the pipeline that no damage would result thereto.

Reversed with directions.

1. Appeal and Error ⇨770(1)

Failure to file brief in support of appeal amounted to abandonment of appeal.

2. Waters and Water Courses ⇨242

Where open irrigation ditch had existed more than 34 years prior to organization of improvement district in 1938, and thereafter ditch was replaced by pipeline in the same location, improvement district owned easement for maintenance of pipeline. Water Code, § 23600 et seq.

3. Easements ⇨36(1)

Where open and uninterrupted use of easement for sufficient length of time to create presumption of grant is shown, elements of hostile intent and adverse user under claim of right will be presumed, and party relying upon fact that acts were permissive or in nature of license, or given as matter of accommodation, has burden of rebutting presumption.

4. Municipal Corporations ⇨269(3)

Waters and Water Courses ⇨264

Where improvement district had right of way for its pipeline, rights of city and owners of property adjacent to pipeline would be subject to such easement and city and such owners would have no right to interfere with the easement, but city, upon accepting subdivision maps and streets designated thereon, had right to establish streets to cross the pipeline.

5. Waters and Water Courses ⇨264

Where improvement district had right of way for its pipeline, city, which had right to establish streets and alleys crossing the pipeline, had duty of so constructing and reinforcing such crossings that use of easement for pipeline would not be interfered with and that no damage would result to pipeline from traffic passing over it.

6. Waters and Water Courses ⇨264

If city breached its duty to so construct and reinforce crossings over pipelines that no damage would result to pipeline from

traffic passing over it, city would be liable for cost of repairs to pipeline, but would not be required or permitted to make actual repairs, in view of fact that operation and repair of pipeline should be exclusively under control of irrigation district.

7. Adverse Possession 95

The burden is on party contesting title by adverse possession to show that taxes have been assessed on easement and that claimant has not paid them.

W. Coburn Cook and H. E. Gleason, Turlock, for appellant.

Myron Moyle, Modesto, for City of Ceres.

Zeff & Halley, Modesto, for Fair.

SCHOTTKY, Justice.

The Board of Directors of the Turlock Irrigation District as trustees and officers of Improvement District No. 14A, commenced an action for declaratory relief for the purpose of having it judicially determined whether the plaintiff or the defendants are responsible for the protection, maintenance and upkeep of that portion of plaintiff's irrigation pipeline which lies in and is crossed by certain public streets in the city of Ceres.

Some time prior to the year 1904 a ditch known as "Lateral A" was constructed as a farmers' or community ditch leading from a canal belonging to the Turlock Irrigation District, known as the "Ceres Main Canal", and extending southerly to and through a portion of what is now, but was not then, the City of Ceres and again in open country. This ditch was used for irrigating a large number of farms within said irrigation district. In the year 1938, the farmers using water from this ditch, desired to replace it with a pipeline, whereupon they petitioned the Turlock Irrigation District for the organization of an improvement district and "Improvement District No. 14-A" was organized under the provisions of Section 23600 et seq., of the Water Code of the State of California. The district so organized contained within its boundaries the land which was being irrigated from

said "Lateral A" ditch and all the land within it was assessed the cost of constructing such pipeline and a pipeline was built in the location of and for the purpose of replacing said Lateral A ditch.

About the year 1911, the public began to travel over a strip of land approximately 40 feet in width, lying east of and contiguous to said Lateral A ditch, and the public continued to use said road until the year 1937, at which time the said road, known as North Central Avenue, was deeded by the owners of the land to the County of Stanislaus, the strip of land so deeded being 40 feet in width and being contiguous to the easterly line of the strip of ground 10 feet in width which contained the irrigation pipeline hereinbefore referred to.

In the year 1948, the defendants Richard Fair and Lois Fair subdivided a portion of land within the City of Ceres, the easterly boundary of which was the easterly boundary line of said North Central Avenue. The map of the subdivision designated certain portions of the land in the tract as streets and alleys, and was submitted to, and passed upon and accepted by, the Planning Commission and the City Council of the City of Ceres. The plat showed a street named North Central Avenue along the easterly border of said tract, which contained not only the 40 foot road known by that name, which had been previously deeded to the County of Stanislaus, as aforesaid, but also contained as part of that street the 10 foot strip lying contiguous to the westerly boundary of said street, which 10 foot strip contained the irrigation pipeline hereinabove mentioned. The map also showed three streets in said tract named Darrah, Sequoia and Hollister, running easterly and westerly across said tract from said North Central Avenue to the westerly boundary of said tract. The pipeline referred to hereinbefore lies in the westerly 10 feet of North Central Avenue, as shown on said map, but lies outside of North Central Avenue, as originally used and as deeded to Stanislaus County. Traffic flowing from Darrah Street, Sequoia Street and Hollister Street into said North Central Avenue and from said North Central Avenue into said Darrah, Sequoia and

Hollister Streets would naturally cross said pipeline and result in the necessity of said pipeline being reinforced and repaired from time to time at such crossings, and it was for the purpose of determining who was liable for such reinforcing and repairing that the action was brought.

The complaint alleged in substance the foregoing facts, and alleged further the resulting flow of traffic over and across said pipeline from North Central Avenue into said Darrah, Sequoia and Hollister Streets and in passing from said last mentioned three streets into North Central Avenue and that unless the pipeline at such points were repaired and reinforced, water would leak from said pipeline at the places where the crossing traffic damaged the same, and flood the surrounding territory and do great damage.

The answer of defendant City of Ceres, in addition to denying most of the complaint, defended affirmatively with the allegation that no claim had been presented to the city nor any demand made upon it by plaintiff. The answer of defendants Richard and Lois Fair, consisting of an almost general denial, affirmatively alleged that any flood damage to surrounding territory would be due to plaintiff's negligent construction and maintenance of the pipeline; the element of the foreseeability of the growth and expansion of the City of Ceres was introduced by the Fairs' affirmative allegation that plaintiff negligently constructed and installed the pipeline in 1938 when it permitted it to be placed alongside a public highway, without making it sufficiently sturdy so as to accommodate traffic then existing and to be expected from subdivisions reasonably to be anticipated because of the then steadily increasing population and prosperity of the area.

Following a trial the court found in substance as follows: That the Improvement District had never received conveyance of fee title, right of way or easement of the land upon which the pipeline is situated, but that by use thereof, the District had acquired an easement to maintain the pipeline; however, except for this limited easement, the property owners along or ad-

jacent to the pipeline had not given up any rights to their property, but retained full rights thereto, including the right to construct streets and alleys across the pipeline and to subdivide for residential purposes, the said owners being liable only for such damage as they might do to the pipeline wilfully or negligently by removing dirt therefrom or otherwise injuring it. The defendants Fair were found to have not removed earth from above the pipeline nor to have contributed in any manner to the damage thereof. It was also found that: Unless the pipeline be properly maintained and repaired, water is likely to leak therefrom and thereby cause damage to adjoining landowners; that the pipeline had not been properly maintained in the past, with leakage occurring therefrom. The court also found that in 1936, plaintiff knew that the county and the community about Ceres was growing, with circumstances indicating that new subdivisions would be opened and that the population and traffic in the area where the pipeline is located would increase, so that they were obliged to construct the pipeline so as to be safe for such increasing traffic; if this original construction was inadequate, plaintiff is responsible for making whatever repairs may be necessary to keep the pipeline safe for the traveling public to pass over it from regularly established roads or alleys, and no obligation of maintenance or repair of the pipeline rests upon the defendants. The court further found that no claim had been presented to or demand made upon the City of Ceres.

Judgment was entered in accordance with said findings, paragraphs 3 and 4 of said judgment reading as follows:

"3. That the defendants, Richard Fair and Lois Fair, his wife, and the defendant, City of Ceres, are not in any way liable to the plaintiff for maintaining the pipeline referred to herein, or for replacing or reinforcing the same, and are not liable to the plaintiff for any damage claimed by plaintiff, and that the said Richard Fair and Lois Fair, and the City of Ceres, have a right to maintain the alleys and streets in the subdivision known as Sequoia Tract.

"4. That the owners of real property adjoining said pipeline, the defendants herein, are liable and will be liable for damages to the plaintiff for willfully or negligently removing dirt from the pipeline resulting in damage thereto, or in any other way willfully or negligently causing damage or injury to the said pipeline, but will not be liable otherwise."

[1] Plaintiff has appealed from the judgment and defendant City of Ceres has appealed from that portion of the judgment declaring that plaintiff had a 10 foot easement for maintenance of the pipeline. Defendants Richard and Lois Fair have also appealed from the same portion of the judgment but have filed no brief in support of their said appeal, so it is apparent that they have abandoned their appeal.

Plaintiff makes a number of contentions in attacking the judgment but these contentions are summarized in the following quotation from plaintiff's closing brief:

"It would seem to us to be only a common, ordinary sense of right and justice, that when one public agency has a right of way over certain land for conducting water, that any other right of way acquired thereafter by another public agency would be subject to a first easement, and that the owner of the second easement would have to exercise its easement in such manner that it would not interfere with the first easement. In other words, applying it to the case at bar, the Improvement District 14-A had an easement for its pipeline and continuously used the same to the present time. Later the City of Ceres acquired rights of way for streets for public travel across the pipeline, and we submit that it is obliged to exercise those rights in such a way as not to interfere with the use of the easement belonging to the district for conducting water through the pipeline. Whenever the streets are constructed across the pipeline so that the flow of traffic thereon would injure the pipeline, it would naturally be incumbent upon the City to so reinforce

and reconstruct, if necessary, the portion of the pipeline under the street that the traffic would not injure the pipeline at the crossing, because any injury to the pipeline is an interference with the use by the Improvement District of its easement. This action was brought to have it determined whether the plaintiff or the City of Ceres is bound to keep the pipeline in repair and in a safe condition at the crossings so that it will not become damaged, interfering with plaintiff's use of the pipeline and endangering the general public and likely subjecting to damages parties who are bound to keep the pipeline in repair at such crossings."

[2, 3] It is clear from the record that the open ditch which preceded the pipeline was constructed more than 50 years prior to the commencement of the instant action and that after Improvement District No. 14-A was organized in 1938, the open ditch was replaced by a pipeline in the same location. Under the facts appearing in the record there can be no doubt that the finding of the court that Improvement District No. 14-A is the owner of an easement for the maintenance of its present pipeline is fully supported. For as was said in *Pacific Gas & Electric Co. v. Crockett L. & C. Co.*, 70 Cal.App. 283, at page 291, 233 P. 370, at page 372:

"Accordingly, it has been held in this state that where an open and uninterrupted use of easement for a sufficient length of time to create the presumption of a grant is shown, the law will presume the elements of hostile intent and that the use is adverse and under a claim of right. *Franz v. Mendonca*, 131 Cal. 205, 63 P. 361; *Fleming v. Howard*, 150 Cal. 28, 87 P. 908; *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10. If the other party relies upon the fact that these acts were permissive or in the nature of a license, or merely given as a matter of accommodation, it is incumbent upon him to rebut the presumption of a nonappearing grant. Otherwise the presumption stands as sufficient proof and establishes the right."

And in *Chapman v. Sky L'Onda Mutual Water Co.*, 69 Cal.App.2d 667, at page 678, 159 P.2d 988, at page 994, the court said:

"Moreover, it is the law that, when one who claims an easement by prescription offers satisfactory evidence that all the required elements existed, the burden of showing that the use was merely permissive shifts to the owner of the land. *Matthiessen v. Grand*, 92 Cal.App. 504, 268 P. 675. Where the claimant shows exclusive, open and notorious possession, and acts evidencing domination and control throughout the statutory period, the inference arises that the use was adverse and under a claim of right. The rule was clearly stated in *Wallace v. Whitmore*, 47 Cal.App.2d 369, 372, 117 P.2d 926, 928, as follows: 'But clear and satisfactory evidence of the use of the road in that manner creates a *prima facie* title to the easement by prescription. Such evidence raises a presumption that the road is used with an adverse claim of right to do so, and in the absence of evidence of mere permissive use of the road, it will be sufficient upon which to sustain a judgment quieting title to the easement therein.'"

Also see *Jones on Easements*, section 186.

[4-6] We agree with the contention of plaintiff that the district having a right of way for its pipeline, the rights of defendants would be subject to said easement, and that defendants have no right to interfere with plaintiff's easement. Therefore, when the defendant City of Ceres accepted the subdivision maps and the streets designated thereon, it had a right to establish streets to cross said pipeline, but it was obligated and required to construct and maintain said crossings in such a manner that no damage would result to said pipeline from the use of said streets or alleys. This being so, the said defendant City of Ceres was and is charged with the duty of so constructing and reinforcing said crossings that the use by plaintiff of its easement for its pipeline would not be interfered with and that no damage would result to

said pipeline from traffic passing over it. If said defendant failed to do this it would be liable for any damage resulting to plaintiff by reason of said failure, but we do not believe that defendant should be required or permitted to make the actual repairs to the pipeline as the operation and repair thereof should be exclusively under the control of plaintiff, although said defendant is and shall be liable for the cost of any repairs made necessary by its failure to properly construct and maintain said crossings.

In 4 California Jurisprudence 527, after discussing and quoting law which provided for the construction of ditches across public highways which are already in existence, it is stated:

"However, the above provisions of the code have no application to make it the duty of a person to construct bridges on highways established after the construction of the canal. Hence, where a municipality lays out or establishes a street or highway which crosses a canal or ditch previously constructed by its owner, the duty of erecting the necessary bridge at such crossing devolves upon the municipality and not upon the owner of the canal or ditch."

And in *City of Madera v. Madera Canal & Irrigation Co.*, 159 Cal. 749, at page 755, 115 P. 936, at page 939, the court said:

"Reading all these sections together, we think the respondent is right in its contention that the Legislature did not intend to impose upon the owners of ditches or other artificial conduits of water the duty of bridging the same whenever the public, after the construction of the canal, ditch, or other conduit, should undertake to lay out a new road across the water conduit."

In *South Yuba Water Company v. City of Auburn*, 16 Cal.App. 775, at page 779, 118 P. 101, at page 102, this court said:

"When this case was first under submission, there was a question, not then finally determined, whether canal owners were required to build and maintain bridges over their ditches or canals

at crossings of highways laid out and established after the construction of such ditches or canals. The point has been before the Supreme Court in a recent case (*City of Madera v. Madera Canal & Irr. Co.* [159 Cal. 749] 115 P. 936. The question was thoroughly considered, and the court held that, where municipalities lay out or establish a street or highway which crosses a canal or ditch previously constructed by its owner, the duty of erecting the necessary bridge at such crossing devolves upon the municipality, and that section 551 of the Civil Code imposes no duty on the owner of the canal or ditch to construct the crossing. This case seems to be decisive of the point on which appellant relies, and adverse-ly to its contention."

And in *Galiano v. Pacific Gas & Electric Company*, 20 Cal.App.2d 534, at page 544, 67 P.2d 388, at page 393, this Court, after referring to the foregoing cases, said:

"As to the duty of the authority constructing the highway over the waterways or canals subsequent to the construction of the canal or waterway to maintain the highway in a safe condition, a number of additional cases might be cited, but those to which we have referred appear to us to be conclusive."

We conclude, therefore, that plaintiff was entitled to a judgment declaring that it was the duty of the defendant City of Ceres to maintain, construct and reinforce the crossings over said pipeline in such a manner that no damage shall result to said pipeline from traffic passing over said pipeline, and that defendant City of Ceres is and shall be liable for any damage to said pipeline caused by its failure to do so. The

trial court was in error in concluding that the defendant City of Ceres had no such obligation or liability. If plaintiff's easement consisted of an open ditch instead of a pipeline, there can be no doubt that defendant City of Ceres would be required to construct its crossings over the ditch in such a manner that it would not be damaged or the flow of water through said ditch interfered with. The fact that the easement has been changed from an open ditch to a pipeline does not change or lessen the obligation of said defendant.

[7] The cross-appeal of defendant City of Ceres attacking the portion of the judgment declaring plaintiff to have an easement for the maintenance of the pipeline is without merit. Said defendant argues that right by adverse user was not shown, that there was no evidence of payment of taxes, and further that the use was permissive and hence the element of hostile possession was lacking. So far as the point as to nonpayment of taxes is concerned, the burden is, of course, on the party contesting title by adverse possession to show that taxes have been assessed on the easement and that claimant has not paid them. *Redemeyer v. Carroll*, 21 Cal.App.2d 217, 68 P.2d 739; *McMorris v. Pagano*, 63 Cal. App.2d 446, 146 P.2d 944. No such showing was here made. We have already pointed out that the finding that plaintiff is the owner of an easement for its present pipeline is amply supported by the record.

No other points raised require discussion.

The judgment is reversed with directions to the trial court to enter a judgment declaring the rights of the parties in accordance with the views herein expressed.

VAN DYKE, P. J., and PEEK, J., concur.

117 Cal.App.2d 32

PERKINS et al. v. SOMMERS et al.

Civ. 19336.

District Court of Appeal, Second District,
Division 3, California.

March 26, 1953.

Hearing Denied May 21, 1953.

Action wherein purchasers, who alleged that lot which they contracted to buy from defendant vendor was part of subdivision made by vendor without compliance with Business and Professions Code, sought to have contract declared void but prayed judgment requiring vendor to accept unpaid balance of purchase price and to convey title to the property. The Superior Court of Los Angeles County sustained demurrer to complaint and rendered judgment on pleadings, and purchasers appealed. The District Court of Appeal, Shinn, P. J., held that purchasers, on facts alleged, could have affirmed or disaffirmed contract, but, having affirmed by suing for deed, were entitled to have contract enforced only according to its terms and were not, thus, entitled to pay balance and get deed in absence from contract of provisions for anything but payment by installment.

Judgment affirmed.

1. Vendor and Purchaser ⇨39, 42, 334(1)

If vendor, in subdividing unimproved realty into lots, failed to comply with Business and Professions Code, his agreement to sell one of such lots was void and the purchasers, upon disaffirmance of agreement, would have right to recover sums they had paid less any allowable offsets; but vendor, as against innocent purchasers, would be estopped from asserting the invalidity of the agreement if purchasers chose to affirm. Business and Professions Code, § 11010(e).

2. Specific Performance ⇨126(2)

Purchasers who, by suing for deed, affirmed contract for sale of lot by vendor who, in subdividing unimproved realty into lots, allegedly failed to comply with Business and Professions Code, were not entitled to get deed by paying balance of purchase price, but were entitled only to enforcement of contract, which provided for payment on installment basis. Business and Professions Code, § 11010(e).

3. Judgment ⇨525

Where judgment declared rights of vendor and purchasers under agreement for sale of lot which purchasers alleged was part of a subdivision of unimproved realty, made by vendor without compliance with Business and Professions Code, it was immaterial that judgment also recited that purchasers' action to declare contract void but obtain deed was barred by the statute of limitations. Code Civ.Proc. § 343; Business and Professions Code, § 11010(e).

Larwill & Wolfe and Herbert C. Meade,
Los Angeles, for appellants.

Fred Horowitz and Alvin F. Howard,
Los Angeles, for respondents.

SHINN, Presiding Justice.

This action was denominated by plaintiffs as one for declaratory relief. By the second amended complaint it was sought to have declared void a contract under which plaintiffs agreed to purchase from defendant, Morris A. Sommers, a residential lot improved with a single family dwelling in the city of Long Beach, but on the same facts plaintiffs prayed for a judgment requiring Sommers to accept payment of the unpaid balance of the purchase price and to convey title to the property. Defendants Morris A. Sommers, Sylvia W. Sommers, and Louis H. Boyar, demurred to the complaint. At the time of the hearing defendants made an oral motion for a judgment on the pleadings, plaintiffs waiving notice of the motion. The court sustained the demurrer and rendered a judgment on the pleadings declaring the written contract of purchase and sale to be valid. The judgment also declared that plaintiffs' action was barred by § 343 of the Code of Civil Procedure, and that Morris A. Sommers is estopped to deny the validity of the contract. Plaintiffs appeal.

We are of the opinion that the judgment was a proper declaration of plaintiffs' rights on the facts pleaded in the complaint. It was alleged that prior to the 5th day of May, 1945, plaintiffs orally agreed to purchase the property from Morris A. Sommers for \$6,000, \$200 down and \$42.50 per

month including interest, plus taxes, assessments, mortgage and fire insurance premiums, and that on or about that date the agreement was reduced to writing; plaintiffs have made all the payments as they fell due; on or about the 1st day of December, 1951, plaintiffs discovered that Sommers had subdivided certain unimproved real property of which the lot in question was a part, and that before selling lots in the subdivision he had failed to comply with the requirements of § 11010(e) of the Business & Professions Code, in that he had failed to notify the Real Estate Commissioner in writing of the terms and conditions on which it was intended to dispose of the lots and to file copies of the proposed contracts of sale; plaintiffs thereupon tendered the unpaid balance of the purchase price to Sommers, and demanded a deed; Sommers refused to accept the money or give a deed for the reason that the written agreement contained no provision for prepayment of the monthly instalments.

[1] We shall assume in plaintiffs' favor that the facts alleged were sufficient to show failure to meet the requirements of § 11010(e). It would then follow that the agreement of sale was void. *Murphy v. San Gabriel Mfg. Co.*, 99 Cal.App.2d 365, 222 P.2d 85. However, plaintiffs were innocent parties in the transaction and Sommers would be estopped from asserting the invalidity of the agreement, due entirely to his failure to comply with the law. *Eberhard v. Pacific Southwest L. & M. Corp.*, 215 Cal. 226, 9 P.2d 302; *Security First National Bk. v. J. G. Ruddle Properties, Inc.*, 218 Cal. 435, 23 P.2d 1016; *Bliss v. California Co-op. Producers*, 23 Cal.App.2d 245, 72 P.2d 885; *Hedlund v. Sutter Med. Service Co.*, 51 Cal.App.2d 327, 124 P.2d 878. Although plaintiffs, upon the facts alleged, would have had a right, upon disaffirmance of the agreement, to recover the sums they had paid less any allowable offsets, they did not demand or desire to pursue that remedy, but demanded title to the property.

[2] The theory of the plaintiffs appears to be that inasmuch as the agreement would

not be enforceable at the instance of Sommers, he should be required to accept the balance of the purchase price and convey title. This is an untenable theory. Plaintiffs have a written agreement to purchase the property which is enforceable against Sommers because he is estopped to urge its invalidity. They say they are not standing on that agreement and do not wish to enforce it. In that view of the case they have no agreement. If they claim under an oral agreement, partially performed by their occupancy of the property and the making of the instalment payments, their theory is faulty, in that it was alleged that the oral agreement was to purchase for the price and upon the terms and conditions stated in the written agreement. They have no agreement to purchase the property for cash, nor otherwise than in instalment payments. The only controversy appears to be whether the trial court should have entered a judgment ordering Sommers to accept the unpaid balance and execute a deed. The effect of the present judgment is that he does not have that duty, but that plaintiffs may complete their purchase upon the agreed terms and conditions of the written agreement. If plaintiffs had disaffirmed the agreement which they pleaded and had demanded the return of their money, they would have been entitled to a money judgment. But they sued for a deed and the judgment properly stated the terms upon which they may acquire title to the property. It does not require them to complete their purchase.

[3] Inasmuch as the judgment declares the rights of the parties, it seems to be quite immaterial that it also recites that plaintiffs' action is barred by the statute of limitations. No point is made of the fact that judgment was rendered on the pleadings although a demurrer to the complaint was sustained in the same hearing in which the motion for judgment on the pleadings was granted.

The judgment is affirmed.

PARKER WOOD and VAILLÉE, JJ., concur.

LANGLEY v. PACIFIC GAS & ELECTRIC CO. *
Civ. 15164.

District Court of Appeal, First District,
Division 2, California.

March 24, 1953.

Rehearing Denied April 23, 1953.

Hearing Granted May 21, 1953.

Action against electric company by customer, for breach of contract to furnish power. The Superior Court, Santa Clara County, entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Dooling, J., held that where court properly instructed jury that, under the circumstances, defendant's duty to use reasonable diligence to prevent loss or damage from interruptions in service, as defined in written contract, might carry with it duty of giving notice to plaintiff of such interruption, but improperly instructed jury that if they found that a collateral oral agreement to give such notice was made and was breached, they should find for plaintiff, error required reversal; on ground that it could not be ascertained which instruction was followed by jury.

Judgment reversed with directions

1. Evidence ⇨442(1)

The portion of parol evidence rule as applied to integrated written contracts which prohibits recovery on a collateral oral agreement upon a matter expressly covered by written contract, does not apply to collateral oral agreement as to matter outside terms of written contract and upon which written contract is silent.

2. Evidence ⇨442(1)

In action against electric company for breach of contract to furnish power, collateral oral agreement that company would notify plaintiff in event of suspension of power was inadmissible, where written contract covered duties of company in such contingency.

3. Electricity ⇨11.1(2)

If in exercise of reasonable diligence, knowing that customer depended upon a continuous supply of electric power to provide fresh water for fish at his hatchery, electric company, under its written contract with customer, should have notified customer of interruption of service, and loss or

* Subsequent opinion 262 P.2d 846.

damage to customer resulted from its failure to do so, customer would be entitled to recover for breach of this contractual duty.

4. Appeal and Error ⇨1064(1)

In action against electric company for breach of contract to furnish power, where in court properly instructed jury that company's duty to use reasonable diligence to prevent loss or damage from interruptions of service, as defined in written contract, might carry with it the duty of giving notice of such interruption to plaintiff, but improperly instructed jury that if they found that a collateral oral agreement for giving plaintiff such notice was made and breached, they should find for plaintiff, error required reversal of judgment for plaintiff, on ground that it could not be ascertained which instruction was followed by jury.

5. Evidence ⇨455

In determining whether electric company's contractual duty to use "reasonable diligence" to prevent damage from a suspension or interruption of power, ambiguously expressed, would include duty to give notice of interruption to purchaser, evidence of prior oral negotiations between company and customer would be relevant to acquaint jury with facts known to company which would bear on the question.

6. Evidence ⇨458

Parol evidence of surrounding circumstances is invoked and employed only in cases where on face of contract itself there is doubt, and evidence is used to dispel that doubt by showing what parties meant by what they said, but not by showing that they meant something other than what they said.

7. Appeal and Error ⇨172(1)

In action against electric company for breach of contract to furnish power, plaintiff's theory of estoppel to deny oral contract, which was neither pleaded nor submitted to jury, could not avail him on appeal.

Robert H. Gerdes, San Francisco, Campbell, Hayes & Custer, San Jose, W. R.

Dunn, Burlingame, of counsel, for appellant.

James F. Boccardo, San Jose, Edward J. Niland, Santa Clara, of counsel, for respondent.

DOOLING, Justice.

The plaintiff recovered a judgment against defendant pursuant to a jury verdict. The action was based upon breach of contract. The contract was alleged to be "an oral and written contract, whereby defendant agreed to furnish to plaintiff the necessary power for the operation of plaintiff's fish hatchery, and further agreed that in the event it was necessary to suspend temporarily the delivery of electric energy, said defendant would give a reasonable notice to plaintiff." It was further alleged that on July 4, 1948 "defendant without warning to plaintiff did cause an interruption in the supply of electrical power to plaintiff's fish hatchery" thereby causing the death of 78,000 trout for lack of fresh water.

The evidence showed that about midnight the delivery of power to plaintiff's fish hatchery was interrupted by a short circuit in a piece of equipment on defendant's power line, that plaintiff was not notified of this by defendant, that the difficulty was not located and the supply of power not resumed until about 5 a. m. and that the fish died as a result of the lack of fresh water which was pumped into the tanks in which they were kept by an electric motor operated by the current supplied by defendant.

The plaintiff testified that when he made the first arrangement with an employee of defendant to purchase power from defendant he told this employee that the raising of trout was a hazardous business. "He said, 'Yes, we understand.' He said, 'You couldn't very well leave 100,000 trout you propose to get without water.' I said, 'That is exactly what I want to find out, and I want to know if you people have a man here, or service, 24 hours a day, whereby I could receive notice in the event that there is to be a suspension of power', and he said, 'Now, let me see a minute', and conferred with somebody across the lobby and came back and said, 'We can take

care of that for you.' He said, 'Now that is all right.' I said, 'I want to be sure. Otherwise I will put in a gasoline pump.' He said, 'That is all right.'"

Later plaintiff testified of this same conversation: "I was assured they would notify me of any suspension of power."

A written contract with defendant was introduced, executed in 1948 when plaintiff installed a larger motor, which expressly incorporated by reference "the applicable rules and regulations duly and regularly established * * * by or under authority of law and on file with the Railroad Commission of California." Rule and Regulation No. 14 of the Public Utilities Commission (the parties make no point of the designation "Railroad Commission" in the contract) thus made a part of the written contract reads as follows:

"Shortage of Supply and Interruption
of Delivery

"The Company will exercise reasonable diligence and care to furnish and deliver a continuous and sufficient supply of electric energy to the customer, but does not guarantee continuity or sufficiency of supply. The Company will not be liable for interruption or shortage or insufficiency of supply, or any loss or damage of any kind or character occasioned thereby, if same is caused by inevitable accident, act of God, fire, strikes, riots, war, or any other cause except that arising from its failure to exercise reasonable diligence.

"The Company, whenever it shall find it necessary for the purpose of making repairs or improvements to its system, will have the right to suspend temporarily the delivery of electric energy, but in all such cases, as reasonable notice thereof as circumstances will permit, will be given to the customers, and the making of such repairs or improvements will be prosecuted as rapidly as may be practicable, and, if practicable, at such times as will cause the least inconvenience to the customers."

[1, 2] It will be seen that this Rule, thus made a part of the written contract, covers the duties of the defendant in case of all interruptions of the supply of electrical energy. This being so that portion of the

parol evidence rule as applied to integrated written contracts which prohibits recovery on a collateral oral agreement upon a matter expressly covered by the written contract is applicable. *Kunz v. Anglo & London Paris Nat. Bank*, 214 Cal. 341, 346-347, 5 P.2d 417; *Pacific States Securities Co. v. Steiner*, 192 Cal. 376, 220 P. 304; *Heffner v. Gross*, 179 Cal. 738, 742, 178 P. 860; *United Iron Works v. Outer Harbor, etc., Co.*, 168 Cal. 81, 84-85, 141 P. 917; *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 594, 96 P. 319. There is a recognized exception to this rule that a collateral oral agreement may be proved as to a matter outside of the terms of the written contract and upon which it is silent. *Crumley v. Walter M. Ballard Corp.*, 100 Cal. App.2d 698, 703, 224 P.2d 455. This exception can have no operation in this case, because the contract itself through Rule 14 makes provision for the very contingency which is the basis of the cause of action.

The court instructed the jury that if they found that this collateral oral agreement was made and was breached they should find for plaintiff. This was clearly error.

[3] There is a theory upon which plaintiff might have recovered. Rule 14 above quoted imposes upon defendant a liability for interruption of supply "or any loss or damage of any kind or character occasioned thereby, if *same* is caused by * * * its failure to exercise reasonable diligence." Defendant would limit the reference of "same" to "interruption etc. of supply". Naturally construed it refers also to "loss or damage". If in the exercise of reasonable diligence, knowing what it did, defendant should under its written contract have notified plaintiff of the interruption of service and the loss or damage to plaintiff resulted from its failure to do so plaintiff would be entitled to recover for the breach of this contractual duty.

[4] Defendant argues that the only provision for notice is in the second paragraph of Rule 14, that is where it becomes necessary to suspend service for repairs or improvements. The only express provision for notice is in that paragraph, but the duty to use reasonable diligence to prevent loss

or damage from other interruptions might carry with it the duty of giving notice as we have indicated. The jury was instructed on this theory, but since they were also instructed on the theory of a binding oral agreement to give notice absolutely we cannot tell on which theory the jury acted. The error in such a situation is prejudicial. *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 280, 201 P. 599; *Sebrell v. Los Angeles Ry. Corp.*, 31 Cal.2d 813, 817, 192 P.2d 898; *Rackson v. Benioff*, 111 Cal.App.2d 124, 129, 244 P.2d 9.

[5,6] In construing Rule 14 to determine whether or not the contractual duty to use "reasonable diligence" to prevent "loss or damage" from a suspension or interruption of power would include the duty to give notice of such suspension or interruption to plaintiff evidence of the prior oral negotiations of the parties would be relevant to acquaint the jury with the facts known to the defendant which would bear on the question whether in view of those facts the exercise of reasonable diligence would require the giving of such notice. We are further of the opinion that the contractual duty assumed by defendant to "exercise reasonable diligence" is sufficiently uncertain and indefinite to permit such evidence in aid of the construction of that language. *Decter v. Stevenson Properties, Inc.*, 39 Cal.2d 407, 416, 247 P.2d 11. "This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said." *United Iron Works v. Outer Harbor, etc., Co.*, *supra*, 168 Cal. at page 84, 141 P. at page 920.

[7] Plaintiff's theory of estoppel to deny the oral contract, *Hunter v. Sparling*, 87 Cal.App.2d 711, 197 P.2d 807, was neither pleaded nor submitted to the jury and cannot avail him on appeal.

Since plaintiff must recover, if at all, solely on the written contract the complaint must be amended in the event of a second trial. We need not therefore notice

defendant's attacks on the complaint as drawn nor the claim of variance. Also since plaintiff is limited to the written contract embodying Rule 14 we need not notice the question of discrimination among customers argued by defendant as invalidating the collateral oral agreement since Rule 14 applies to all customers.

The judgment is reversed with directions to the trial court to permit plaintiff to amend his complaint if he so requests.

NOURSE, P. J., and GOODELL, J., concur.



117 Cal.App.2d 62

LEVY et al. v. GREENBERG et al.
Civ. 15303.

District Court of Appeal, First District,
Division 2, California.
March 27, 1953.

Suit by lessors against lessees for unpaid rent. The Superior Court, San Mateo County, entered judgment from which lessors appealed. The District Court of Appeal, Nourse, P. J., held that evidence was insufficient to sustain finding that payment of arrears had been waived by lessors.

Judgment reversed, with directions.

Landlord and Tenant ☞231(8)

In action by lessors against lessees under written lease for unpaid rent, wherein there was no dispute but that rent was unpaid, evidence was insufficient to sustain finding that payment of arrears had been waived by lessor.

Livingston, Leeker & Feldman, San Francisco, for appellants.

F. E. Hoffmann, San Mateo, for respondents.

NOURSE, Presiding Justice.

Plaintiffs as owners and lessors sued defendant lessees under a written lease for unpaid rent. There is no dispute as to the terms of the lease nor of the fact that the rent was unpaid. The trial court gave judgment for defendants upon findings of fact which in every material instance were either directly contrary to the undisputed evidence or were wholly unsupported by any evidence, presumption or inference.

Paragraph 12 of the lease provided: "The lessee shall not assign this lease, or any interest therein, and shall not lease or underlet the said premises, or any part thereof, or any right or privilege pertinent thereto, without the written consent of the lessor first had and obtained. * * *

In January, 1949, defendants notified plaintiffs of their inability to comply with the terms of the lease and offered the name of a proposed assignee. Plaintiffs answered that they would be willing to grant a release if the prospective assignees were reliable and if all arrears in rent were paid. They requested a financial statement covering the prospective assignees. Defendants refused to cover arrears or to procure such a financial statement. Later another prospective tenant was suggested who demanded a new lease for a five year term. Plaintiffs agreed to these terms on condition that the unpaid rent at that time be liquidated. Defendants refused to meet that request. Thereafter the parties hereto executed a written agreement terminating the lease and relieving all parties from any claims arising after the date of the release, August 15, 1949. It expressly reserved to these plaintiffs all claims for rent for the period of abandonment—February 1, 1949 to August 15, 1949.

In this action to recover these arrears the only question for the trial court was to determine whether they had been paid. It is conceded that they were not paid hence the trial court attempted to excuse payment on a finding that in some undisclosed manner and at some undisclosed time payment had been waived. But all the evidence both oral and documentary

discloses that this was not so. In support of the judgment defendants argue that we must consider the presumptions and inferences as sustaining the finding. But there can be no presumption or inference of a waiver of payment in face of a contract in writing which declares in express language that there is no waiver.

The judgment is reversed with directions to the trial court to amend its findings and enter judgment for plaintiffs as prayed.

GOODELL and DOOLING, JJ., concur.



116 Cal.App.2d 615

VANGEL et al. v. VANGEL.

Civ. 19180.

District Court of Appeal, Second District,
Division 2, California.
March 11, 1953.

Action for dissolution of a partnership and for an accounting. The Superior Court of Los Angeles County, Robert Clifton, J., entered a judgment adverse to the defendant and entered an order fixing bond upon appeal and defendant appealed from the judgment and from the order. The District Court of Appeal, Fox, J., held that trial court properly concluded that defendant partner had wrongfully caused dissolution of partnership and properly permitted remaining innocent partners to purchase defendant's interest in partnership and to continue the business.

Judgment reversed with directions and order affirmed as modified.

1. Partnership ⚡277

Where brothers entered into partnership in contemplation of purchase of citrus ranch, with each being entitled to devote entire time to operation of ranch, but one brother usurped management of ranch and in violation of partnership agreement refused to sign note secured by his inter-

est in ranch for money remaining brothers advanced as such brother's share of down payment, court properly concluded that such brother had wrongfully caused dissolution of partnership and properly permitted remaining innocent brothers to purchase such brother's interest and continue the business. Corporations Code, § 15038 (2)(b).

2. Equity ⚡65(2)

Partnership ⚡328(3)

In action for dissolution of partnership formed to acquire a citrus ranch, on ground that defendant partner had wrongfully caused dissolution of partnership, finding that plaintiff partners, who took from bank a check which grew out of refinancing of ranch through a loan, and who cashed check although check had been delivered to defendant, and misapplied a portion of proceeds, did not intend to cheat or defraud defendant, was justified under evidence, and clean hands doctrine was not applicable to preclude plaintiffs from purchasing defendant's interest in partnership. Corporations Code, § 15038(2)(b).

3. Partnership ⚡85

Where one partner of partnership was found to have wrongfully caused dissolution of partnership and trial court permitted remaining partners to purchase such partner's interest and to continue partnership business, and large portion of loan to partnership was unpaid and had number of years to run, and there was twenty year marketing agreement with a packing house, partner found to have wrongfully caused dissolution was entitled under statute to be indemnified by remaining partners against present or future partnership liabilities. Corporations Code, § 15038(2)(b).

4. Partnership ⚡58

Where partnership agreement did not mention term of partnership but provided that money advanced by one partner to enable another to make his share of down payment should be repaid only out of funds accumulated from sale or operation of ranch, to acquire which partnership was formed, duration of partnership was until money advanced by two partners to third partner to make his share of down payment

was paid, and there was therefore an "agreed term" within statute authorizing innocent partners to continue business during agreed term for partnership where a partner wrongfully causes dissolution of partnership. Corporations Code, § 15038(2)(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Agreed Term".

5. Partnership ⇨323

Where one member of partnership breached partnership agreement by excluding remaining partners from management of ranch the partnership was formed to acquire, such exclusion did not ipso facto dissolve the partnership but merely provided grounds for application to court of equity for dissolution of partnership. Corporations Code, § 15038(2)(b).

6. Trial ⇨71

Denial of defendant partner's motion, made after case was argued, submitted, and decided, to reopen case to introduce expert testimony relative to value of partnership property, was not abuse of discretion as matter of law under record. Corporations Code, § 15038(2)(b).

7. Evidence ⇨474(18)

Partners were competent witnesses on question of value of ranch partnership was formed to acquire. Corporations Code, § 15038(2)(b).

8. Partnership ⇨344

Where one member of partnership breached partnership agreement by excluding remaining partners from management of ranch partnership was formed to acquire, and remaining partners brought action for dissolution of partnership, action of court in fixing date of dissolution as date upon which introduction of evidence was concluded was not improper even though such date was prior to entry of judgment. Corporations Code, § 15038(2)(b).

9. Trial ⇨71

Whether, after case has been argued, submitted, and decided, to grant defendant partner's motion to reopen case to introduce

expert testimony relative to value of partnership property is discretionary in trial court. Corporations Code, § 15038(2)(b).

10. Partnership ⇨328(3)

In action for dissolution of partnership on ground that a partner had wrongfully caused dissolution of partnership, brought under statute authorizing innocent parties to continue business in same name provided they paid value of his interest in partnership to partner who wrongfully caused dissolution and indemnified him against present and future partnership liabilities, evidence sustained finding that ranch partnership was formed to acquire was worth \$235,000. Corporations Code, § 15038(2)(b).

11. Partnership ⇨306

Where a partner was found to have wrongfully caused dissolution of partnership, and innocent partners were permitted pursuant to statute to purchase interest of such partner in partnership and to continue partnership business, such partner was entitled to a pro-rata share of profits until winding up and termination of partnership. Corporations Code, §§ 15030, 15038(2)(b), 15042.

12. Partnership ⇨277

A partnership is not terminated by its dissolution but continues until partnership affairs are wound up.

13. Partnership ⇨83

Generally, in absence of expressed or implied agreement, a partner is not entitled to compensation for his services to partnership other than his share of profits, and fact that one partner contributes greater skill and takes over management of business does not give rise to a right to extra compensation without an agreement therefor.

14. Contracts ⇨25

Neither law nor equity provides remedy for breach of agreement to agree in future.

15. Partnership ⇨83

Provision of partnership agreement that parties should agree from time to time upon a fixed amount to be drawn by each

party by way of drawing account, living expenses or wages, reserved fixing of compensation for future determination, and where parties reached no agreement a partner who was found to have wrongfully caused dissolution of partnership was not entitled to compensation for his services to partnership from its inception to date of final judgment declaring partnership to be dissolved and authorizing innocent party to purchase such partner's interest and to continue partnership business. Corporations Code, § 15038(2)(b).

16. Appeal and Error ⇨460(2)

Judgment finding that defendant partner wrongfully caused dissolution of partnership, and permitting innocent partners to purchase interest of such partner in partnership and to continue partnership business, was not a "judgment directing execution of conveyance" within code provision that if appealed from judgment directs execution of a conveyance execution of judgment cannot be stayed by appeal until conveyance is executed and deposited with clerks, to abide judgment of appellate court, and defendant's compliance with such provision did not stay execution on appeal. Code Civ.Proc. §§ 944, 945.

17. Appeal and Error ⇨465(2)

In innocent partners' successful action for dissolution of partnership formed to acquire citrus ranch, on ground that defendant partner had wrongfully caused dissolution of partnership, brought under statute authorizing innocent parties to continue business in same name provided they paid value of his interest in partnership to defendant and indemnified defendant against present and future partnership liabilities, \$100,000 bond on appeal required of defendant to stay execution of judgment was excessive under circumstances by \$80,000. Corporations Code, § 15038(2)(b); Code Civ.Proc. § 945.

Pacht, Tannenbaum & Ross, Isaac Pacht, Clore Warne, Jerry Pacht, Maxwell E. Greenberg, Los Angeles, for appellant.

J. Howard Sullivan and Joseph T. Enright, Los Angeles, for respondents.

FOX, Justice.

The parties, who are brothers, entered into a partnership agreement in May, 1944, in contemplation of the purchase of the Cascade Ranch of some 330 acres. Approximately one half thereof consisted of producing orange and lemon groves. Each was to furnish his pro rata share of the down payment. It was provided, however, that in the event one of the group could not otherwise raise his one third of such required payment and one of the other brothers should advance sufficient money to pay the same, that the one for whom the advance should be made would execute a promissory note for such amount, bearing interest at a rate to be agreed upon, in favor of the brother who had made the loan. Such note was to be secured by a mortgage or trust deed covering his interest in the property. Any such note, however, was to be paid only out of funds accumulated from the operation of the ranch or realized from its sale. After specifying the order in which the revenues from the ranch should be applied in payment of its operations the agreement finally provided that the balance should be divided equally between the parties, except that in the event one of the parties advanced a portion of the down payment for one of the others, the amount that would normally be paid to the latter should be paid to the one who made the advance until such loan had been liquidated. Each party agreed to devote his entire time to the operation of the ranch as soon as he liquidated his current business. The parties were to agree from time to time upon a fixed amount to be drawn by each party by way of a drawing account, living expenses or wages.

During the following June the three brothers made a contract with the owners of the Cascade Ranch for its purchase for \$340,000, including a down payment of \$120,000. Charles did not have available his one third of this amount. As a consequence Nick and Ernest were required to advance \$25,000.00 to him to make up his share of the initial payment. In order to raise the funds it was necessary for Nick and Ernest to sell their restaurant in Los Angeles, which they did in September.

Charles, too, was in the restaurant business in Hollywood. Some months prior, however, to this deal he had acquired another but much smaller ranch. Although all the down payment had not been made, Charles, on October 1st, moved onto the ranch where he has since resided.

Because of the lack of experience of the purchasers in the management of citrus properties and because the down payment had not been made in full, a Mr. Culbertson, who had originally planted the citrus groves and managed the ranch for 20 years and who was a representative of the sellers, was employed as manager and adviser until the Vangels completed their down payment in April, 1945.

The parties almost immediately began to have difficulties. Nick and Ernest claimed that Charles usurped the managerial responsibilities excluding them from participating therein. Charles complained because they would not agree upon the amount he should be paid for operating the partnership enterprise. Nick and Ernest insisted that Charles execute a note, together with a mortgage on his interest, to secure the \$25,000 they had advanced for him. This he refused to do until they agreed upon his salary. The result was that Nick and Ernest filed this action in April, 1946, for a dissolution of the partnership and for an accounting.

Following a protracted second trial, the court decreed a dissolution as of June 15, 1950, and permitted the parties to participate in the profits of the ranch until January 1, 1951, excluding therefrom, however, expenses for pruning and fertilizing the groves. Charles was found to have wrongfully caused the dissolution. As a consequence the plaintiffs were given the privilege, pursuant to the provisions of section 15038(2)(b), of the Corporations Code, to purchase defendant's interest. The court found the value of the partnership property to be \$235,000 as of the date of dissolution. After making various adjustments in the accounts of the parties the court determined that defendant's total interest in the assets of the partnership was \$58,600.25, and plaintiffs were given the

privilege of buying Charles' interest for that amount. Defendant appeals from this judgment.

Charles insists he did not prevent plaintiffs from participating in the management of the ranch; that he was not to blame for the dissolution of the partnership; that plaintiffs are not in court with clean hands; and that they should not be permitted to purchase his interest.

The court found that plaintiffs had been prevented by defendant from participating in the management and operation of the ranch and from putting in equal time with defendant in the partnership business although they had been at all times ready, able and willing so to do, and had frequently requested defendant that they be permitted to put their full time and efforts into the operation and conduct of the partnership enterprise. In support of this finding it appears that defendant directed the day to day operations of the ranch, determined what work was to be done, when and by whom it would be performed. Charles objected to plaintiffs' going around talking to the employees, and refused to tell Ernest what their duties were. He told Ernest to mind his own business and even threatened him with bodily harm if he interfered with the employees. He said, "I'm going to run this ranch."

When Culbertson's services were terminated he gave the parties instructions relative to the operation of the citrus groves. The State Agricultural Inspector also gave advice as to when the trees should be sprayed. Plaintiffs insisted that Charles should carry out these recommendations, but he refused. He told plaintiffs, "You guys [are] sticking your nose too much in this ranch business. You are nothing but nincompoops." He refused to employ any expert or technical services although plaintiffs requested such employment. The foregoing evidence lends support to the court's finding that defendant did not "permit plaintiffs to participate in the operation and management of said property in relation to the cultivation, pruning, irrigation, fertilization or smudging of the orchards, excepting that he did state that they might

work as laborers under him on said ranch and to that extent participate in the operation of the ranch. * * *

Charles argues that as to the financial and executive phases of the management of the partnership venture plaintiffs participated fully. He bases this argument upon the finding that plaintiffs participated in particular phases of the partnership business and had access to certain of its financial records. These findings recite that plaintiffs, since this action was filed, have examined all bills from concerns with which the partnership did business and the periodic statements of the orange and lemon organizations through which the partnership marketed its citrus products, but prior thereto plaintiffs were permitted to examine only a portion of the statements from the marketing groups; that they have been permitted to inspect all payrolls, and, since the filing of the action, one of plaintiffs has signed with defendant all checks drawn on the partnership bank account, and have discussed with defendant the purpose for which the checks were drawn and the propriety or impropriety of their issuance. After the employment of a certified public accountant plaintiffs, from time to time, received copies of the periodic audits. They joined in the execution of marketing agreements covering all the orange crops with one exception, joined in the execution of crop mortgages, promissory notes and refinancing arrangements. In this connection it is to be noted that the court further found that "said acts of the plaintiffs have been in the nature of checking on or examining the acts of the defendant after they were done, and they have been prevented by defendant from consulting with him and participating with him in decisions relating to expenditures or the operation of the ranch before they were done."

This explanatory finding derives inferential support from the nature of the items in which plaintiffs participated and the character of their participation. For example, it is plain that the participation of all partners in the execution of promissory notes and the refinancing program was essential to the very existence of the enterprise. On the other hand inspection of the

payrolls, cancelled checks, and reports from the marketing organizations, while important, obviously falls short of managerial participation.

Further support of this explanatory finding is furnished by the testimony that in February, 1946, defendant, without consulting plaintiffs, borrowed \$10,000 from Mr. Chess, who owned a large citrus packing plant, securing the same by a crop mortgage, and that Charles endorsed plaintiffs' names on three checks totaling more than \$8,000 and opened a new bank account without their knowledge so that the plaintiffs would not know what defendant was doing. Defendant's position in this entire matter appears to be accurately reflected in his statements to one of plaintiffs' attorneys, prior to the filing of this action, to the effect that he was manager of the ranch and as manager he would decide matters of policy; that he was the oldest brother and his younger brothers had no right to ask him any questions regarding their dealings, and that being the oldest brother it was his province to make the decisions for the "brotherhood" as he called it. This attitude undoubtedly accounts for the fact that upon various occasions prior to this action it was necessary for plaintiffs to go to the orange packing house, the lemon association, and to the banks to ascertain the financial condition of the partnership business. Without further detailing the evidence, it is clear there is ample support for the court's finding that defendant excluded plaintiffs from participation in the management and operation of the ranch.

Not only did the defendant usurp the management and direction of the partnership enterprise, but, in violation of the plain terms of the partnership agreement, he refused to sign a promissory note secured by his interest in the ranch in favor of his brothers for the \$25,000 which they advanced as his share of the down payment. Defendant's refusal cannot be justified upon the ground that the note was only payable out of funds from either the operation or sale of the ranch. Such a note was property to which plaintiffs were entitled. They might have desired to discount it,

put it up as collateral, or just hold it and draw the interest. Defendant also seeks to excuse his failure to execute the note secured by his interest in the property upon the ground that the parties did not obtain title to the ranch until March, 1948. However, it would not have been a difficult matter to prepare and execute a document which would have been a substantial and good faith compliance with the provisions of the partnership agreement and which would have constituted a strict compliance upon the actual acquisition of legal title. Defendant may not excuse his failure to execute such a note, with the required security, on the ground that plaintiffs did not present the documents for his signature, since he had stated that he would not sign such a note under any circumstances. The law does not require a person to do an idle act.

[1,2] Because of defendant's arbitrary attitude and unwarranted refusal to give plaintiffs any substantial or sustained voice in determining managerial policies or any responsible part in operating the ranch, and because of defendant's apparent deliberate violation of the partnership agreement, the court was justified in concluding that defendant had wrongfully caused the dissolution of the partnership. As a consequence it was proper to apply the sanctions of section 15038(2)(b) of the Corporations Code and permit plaintiffs to purchase defendant's interest and continue the business provided plaintiffs may be considered innocent parties in the vicissitudes of the partnership leading up to its dissolution. On this point defendant contends that plaintiffs are not in court with clean hands. In support of his contention he points to the manner in which plaintiffs got possession of a check made out to defendant and his wife and the plaintiffs in the sum of \$51,418.81 and the disposition plaintiffs made of the funds derived therefrom. This transaction took place in May, 1949, some three years after this action was filed. The check grew out of the refinancing of the ranch through a loan of \$160,000 from the Prudential Life Insurance Company. After the existing indebtedness of the partnership was paid the escrow company issued its check for the balance of \$51,418.81 and

delivered it to Charles. He and his wife endorsed the check and delivered it to the bank for credit to the partnership account. The bank manager asked plaintiffs to endorse the check which they declined to do, requesting, however, that they be permitted to take the check for the purpose of showing it to their attorney. This request was refused. A few days later plaintiffs came into the bank again and asked the manager to see the check. He produced it and stepped back to his desk to answer the telephone. When he returned to the counter plaintiffs and the check were gone. They cashed the check through their own banking facilities and deposited the proceeds as follows: \$9,418.81 was deposited to the partnership bank account, \$14,000 each was paid to Nick and Ernest, and the remaining \$14,000 was applied by them to the credit of Charles on account of the \$25,000 they had advanced for him on the purchase of the ranch. Plaintiffs notified defendant of the manner in which the proceeds of the check had been disbursed. The court found that plaintiffs knew such disbursement was against the wishes of defendant, but that they believed they had a right to thus disburse these funds under the partnership agreement. Defendant, however, challenges this finding as being without any evidentiary support. It is true, as the court also found, that the partnership agreement did not authorize such distribution of this money but it was not unreasonable for the court to infer from all the circumstances that these business men considered the money thus realized from the refinancing of the ranch as having been accumulated from its operations. Plaintiffs had reason to regard the major portion of the proceeds from this check as in the nature of an accumulation and available for distribution because they had insisted that the Prudential loan should be \$110,000 instead of \$160,000. This would indicate that they did not believe it necessary to have a large amount of additional working capital. They did, however, put \$9,418.81 into the partnership account. Thus they could reasonably conclude that the \$42,000 was available for distribution. That this appraisal of the partnership needs for operating funds was

reasonably good is indicated by the court's finding that the \$9,418.81 deposited by plaintiffs in the partnership account, together with other income from the ranch, was sufficient to pay the usual operating costs, and that the erroneous distribution of the \$42,000 by the plaintiffs did not impede, delay or damage the ranch operations or impair the credit of the partnership. Taking into consideration all the facts and circumstances surrounding this \$51,418.81 check the trial court could reasonably infer that plaintiffs did not intend to cheat or defraud defendant, *Belling v. Croter*, 57 Cal.App.2d 296, 306, 134 P.2d 532, and that this misapplication of the \$42,000 did not injure him or the partnership. *Wiley v. Wiley*, 59 Cal.App.2d 840, 842, 139 P.2d 950. Consequently the court was not required to find plaintiffs were in court with unclean hands and therefore not entitled to purchase defendant's interest under section 15038(2)(b), Corporations Code. *Watson v. Poore*, 18 Cal.2d 302, 312, 313, 115 P.2d 478; *Tobola v. Wholey*, 75 Cal.App.2d 351, 358, 170 P.2d 952; *Belling v. Croter*, supra.

[3] The trial court erred in failing to require plaintiffs to indemnify defendant "against all present or future partnership liabilities" as provided in section 15038(2)(b), Corporations Code. A large portion of the Prudential loan is apparently unpaid and has a number of years still to run. Also; the twenty year marketing agreement executed with the Chess packing house is an item of substantial importance. Under the plain language of the section defendant is entitled to be protected against these and other liabilities. The amount and character of such indemnity should be fixed by the trial court upon the taking of such evidence as may be required.

[4] Defendant insists there was no "agreed term for the partnership" hence section 15038(2)(b), Corporations Code,

is not applicable and for that reason plaintiffs are not entitled to purchase his interest in the partnership.¹ It is true the agreement does not mention the term of the partnership. But it does provide that money advanced by one partner to enable another to make his share of the down payment shall be repaid "only out of funds accumulated from the operation of the ranch or a sale" thereof. This seems to negate any idea of a partnership at will for it cannot be assumed that it was the intention of the parties that the borrower was at liberty to walk out of the partnership until the loan had been paid from either the operation or sale of the ranch. In this respect, the case is strikingly similar to *Owen v. Cohen*, 19 Cal.2d 147, 119 P.2d 713, where, as here, the parties did not expressly fix any definite period of time for the duration of their undertaking. There, one of the partners advanced a substantial sum to the partnership for the purpose of buying necessary equipment with the understanding that the advance was to be considered a loan and was to be repaid to the lender out of the prospective profits of the business as soon as it could reasonably do so. In holding (contrary to the finding of the trial court) that this was not a partnership at will the Supreme Court pointed out that "While the term of the partnership was not expressly fixed, it must be presumed from this agreement that the parties intended the relation should continue until the obligations were liquidated in the manner mutually contemplated." 19 Cal.2d at page 150, 119 P.2d at page 715. In the instant matter there was a definite and "particular undertaking", see section 15031(1) (a & b), Corporation Code, voluntarily agreed to by all the parties, and the duration of the venture was, at least impliedly, until the \$25,000 which had been advanced by the plaintiffs for the benefit of Charles had been paid in the manner provided in the partnership agreement.

1. Section 15038(2)(b) reads in part: "The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, * * * may do so, during the agreed term for the partnership and for that purpose may possess the partnership

property; provided, they * * * pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, * * * and * * * indemnify him against all present or future partnership liabilities."

Zeibak v. Nasser, 12 Cal.2d 1, 13, 82 P.2d 375; Meherin v. Meherin, 93 Cal.App.2d 459, 463, 209 P.2d 36; Owen v. Cohen, supra. The partnership was therefore not at will but for an agreed term.

The evidence on this trial was concluded on June 15, 1950. The court filed a memorandum opinion and caused a minute order to be made on June 30 ordering judgment for plaintiffs and fixing the date of dissolution as June 15th. The interlocutory judgment, however, was not filed until March 27, 1951, and the final judgment was entered October 16, 1951. Defendant insists that it was error to fix the date of dissolution as of a time prior to judgment. He argues that June 15 is wholly without significance.

[5,6] It is, of course, clear that a court may, because of a breach of the partnership agreement, decree the dissolution of the partnership as of a date prior to the judgment. In some cases where the breach is serious and unequivocal the dissolution may be decreed as of the date of the breach. In such cases the misconduct really dissolves the partnership, the court decree merely giving legal effect thereto. But here the acts of Charles in excluding plaintiffs did not *ipso facto* dissolve the partnership. His acts simply provided grounds for an application to a court of equity for such relief. Zeibak v. Nasser, supra, 12 Cal.2d at page 16, 82 P.2d at pages 382, 383. Upon having heard all the evidence the court properly concluded that the partnership could not go on and consequently had to decree its dissolution and fix a date upon which the respective interests of the partners would be determined. Here the court chose the date upon which the introduction of evidence was concluded. Such a date was entirely reasonable since the whole story of the controversy was before the court as of that time. See Zeibak v. Nasser, supra, 12 Cal.2d 14-16, 82 P.2d 381-383. Defendant is not prejudiced by fixing that date because, as we hereafter point out, he is still entitled to his pro rata share of the profits.

Defendant contends that the court erred in refusing to reopen the case for further

evidence relative to the value of the partnership property. He argues that during the trial there was no indication that the question of the value of the ranch would become vitally important or that one of the parties would be allowed to purchase the interest of the other at a price fixed by the court. The record, however, does not support the argument. At the very outset of the trial the judge called attention to the possibility that in the event of a decree of dissolution the innocent party might be given the opportunity of buying out the other party at a value to be fixed by the court; that "both parties should be concerned with fixing the true valuation"; that these issues should not be separated; and that "the court should consider both the issues as to the conduct of the parties and the valuation of the property at the same time so that * * * all of the issues may be determined at the same time. * * *". Again, when both sides rested, the court called attention to the importance of the testimony concerning the value of the property, suggesting that a session be held that afternoon at which time the parties would again take the witness stand and be examined by the court as to the bases of their respective valuations. This suggestion was followed, each of the parties being given an opportunity to state the reasons for the value he placed on the property. There was then no request by defendant that the court should appoint an expert appraiser. The case was thereupon argued and submitted, and decided some two weeks later. It was not until then that defendant sought to reopen the case in order to introduce expert testimony relative to the value of the ranch.

[7,8] The ruling on such a motion is largely a matter of discretion. Here the court called attention to the matter of the valuation of the ranch twice during the course of the trial, and, on its own motion, took steps to explore the reasons for the valuation which the parties had given. They had been adequately warned of the importance of the issue, and had ample opportunity to suggest the advisability of expert testimony. It cannot be said, as a matter of law, that the court abused its discre-

tion in refusing to reopen the case to hear such additional evidence.

[9, 10] Defendant also argues that the valuation of \$235,000 fixed by the court is not supported by credible evidence. The partners, as owners, were, of course, competent witnesses on that question. In estimating the value of the ranch at \$200,000 Ernest explained that their groves had gone down in value, in quality, and in relative standing with other groves that patronized the same packing house. He also indicated that the market price of citrus groves had declined considerably since they purchased this property in 1944. Charles, however, placed the value at \$275,000 and insisted that their groves were in good condition. It was for the trial court to determine the credibility of the witnesses and the weight to be given their testimony. Certainly it cannot be said as a matter of law that the court's valuation of the ranch does not have substantial, credible support.

[11, 12] Defendant contends the court erred in terminating his right to participate in the profits of the partnership as of January 1, 1951, which was prior to the winding up and termination of the partnership and ten months prior to the rendition of final judgment. This argument is well founded, being in accord with the principle that where the business of a partnership is continued after dissolution with the employment of the assets of the retiring partner, the latter is entitled to a pro rata share of the profits, based upon the value of his interest in the partnership ascertained as of the date of dissolution. *Ruppe v. Utter*, 76 Cal.App. 19, 243 P. 715; *Hall v. Watson*, 73 Cal.App.2d 735, 167 P.2d 210; 40 Am.Jur., Partnership, p. 388. See Annotation, 80 A.L.R. 12. This derives from the fundamental fact that a partnership is not

terminated by its dissolution, but continues until partnership affairs are wound up. Corp. Code, § 15030; *McNeny v. Touchstone*, 7 Cal.2d 429, 437-438, 60 P.2d 986; *Citizens' Nat. Trust & Savings Bank v. McNeny*, 10 Cal.App.2d 488, 490, 52 P.2d 492. The mere fact that the court decreed a dissolution by applying the sanctions expressed in section 15038(2)(b) of the Corporations Code does not justify the imposition of a drastic penalty not only outside the contemplation of the statute, but contrary to established law and equitable considerations. By invoking section 15038(2)(b), defendant is obliged to retire from the partnership and he loses his right to any share in the good will of the enterprise. However, he is not required to forfeit the share of the profits of the business earned by the use of his assets subsequent to the dissolution.

In this connection section 15042 of the Corporations Code² has a material and significant bearing on the rights of the parties in the circumstances here under consideration. That section relates to the situation where a partnership is dissolved and the business is carried on "under any of the conditions set forth in Section 15041 (1, 2, 3, 5, 6), or Section 15038(2b)". The conditions thus referred to are where the business is continued without liquidation of the partnership affairs, see *Jacobson v. Wikholm*, 29 Cal.2d 24, 172 P.2d 878 or, paralleling what occurred in the present case after June 15, 1950, where, after a partner is retired by a dissolution under section 15038(2)(b) the business is continued without a liquidation of the partnership and "without any settlement of accounts". In such a situation section 15042 provides that the retiring partner, as against the partners continuing the business, "may have the value of his interest at

2. Section 15042 reads in part:

"When any partner retires * * * and the business is continued under any of the conditions set forth in Section 15041 (1, 2, 3, 5, 6), or Section 15038 (2b) without any settlement of accounts as between him * * * and the person or partnership continuing the business, unless otherwise agreed, he * * * as against such persons or partnership may

have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option * * * in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; * * *."

the date of dissolution ascertained, and shall receive * * * an amount equal to the value of his interest in the dissolved partnership with interest or, at his option * * * in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership". From the position defendant has taken on this appeal it is fair to say that he has elected to take profits rather than interest on the value of his share in the partnership.

An application of this principle is clearly reflected in the case of *Nuland v. Pruyn*, 99 Cal.App.2d 603, 222 P.2d 261, (hearing denied by the Supreme Court), which involved the rights of a partner in a business which was taken over by another partner and the use of joint partnership assets and property continued after dissolution without an accounting. The court there states: "If the partnership was * * * rightfully dissolved on September 6, 1944, appellant's rights would have been as follows: They would have been entitled to have their ownership in the assets determined as of that date and paid over to them in money or in kind; if this was not done and their property was used in the business they would have had, on account being taken, an election to receive their property and to share in the profits made thereafter in the proportion their property bore to the whole or to be paid interest on the value of their property so used." 99 Cal.App.2d at page 613, 222 P.2d at page 268.

In the instant case, the court fixed the date of dissolution as of June 15, 1950. Defendant was entitled to have the value of his interest in the business fixed as of that time. In ascertaining such interest not only is the value of the ranch to be considered as of that date as well as other capital assets, liabilities and expenses, but also the claims which the partnership had against the brothers and their set-offs among themselves should have been computed as of June 15, 1950, with interest to that time. This was never properly done. Meanwhile the business operations were continued, using joint partnership assets to accumulate further profits. Defendant was allowed to participate in profits only as of January 1,

1951, although the business continued without interruption and no settlement of accounts had been accomplished. It is clear that the accounting ordered by the court in its interlocutory decree of March 27, 1951, was patently based upon erroneous principles, the court having failed to properly provide for the correct ascertainment of Charles' interest as of June 15, 1950, and having failed to make provision for determining his pro rata share of profits earned after dissolution. Under these circumstances the court's order for an accounting without due regard for the requirements mentioned had the effect of depriving Charles of his rightful share as a retiring partner in a continuing business whose accounts were not properly settled, and he was not required to accept the offer made to purchase his share after the rendition of final judgment, since the accounting should have proceeded "upon different principles than did the accounting which was actually taken." *Nuland v. Pruyn*, supra. Furthermore, it appearing from the briefs and from the oral argument that the status quo with respect to the partnership operations has remained unaltered during the pendency of this appeal, defendant is entitled to his proportionate share of any profits which have accrued from the employment of his property in the business of the partnership while awaiting the final outcome of this appeal. *Clark v. Jones*, 50 Cal. 425.

Also, in view of the time required to produce a citrus crop, and the employment of defendant's capital in the production thereof, it would be inequitable to cut off completely his participation in the proceeds therefrom upon the filing of the remittitur in the event there should then be such a crop substantially matured and soon ready for market. While no formula or precise definition can be laid down to determine when such fruit has substantially matured, this determination can properly be left to the sound judgment of the chancellor.

[13-15] Defendant asserts that it was error to deny compensation to him for his services to the partnership from its inception to the date of final judgment. He relies upon a portion of the partnership agreement which reads: "The parties shall

from time to time agree upon a fixed amount to be drawn by each party by way of a drawing account, living expenses or wages." The mere recital of this clause establishes the weakness of defendant's claim. The general rule is that, in the absence of an express or implied agreement, a partner is not entitled to any compensation for his services to the partnership other than his share of the profits. In re Estate of McConnell, 6 Cal.2d 493, 497, 58 P.2d 639; Cook v. Bryson, 89 Cal.App. 445, 447, 265 P. 289. This is predicated on the theory that during the lifetime of the partners each of them is required to donate his time and talents to the affairs of the partnership, the service and labor of the one offsetting that of the others. Griggs v. Clark, 23 Cal. 427. The fact that one partner contributes greater skill and takes over the management of the business does not give rise to a right to extra compensation without an agreement therefor. Cook v. Bryson, supra; 68 C.J.S., Partnership, § 94, page 532. An examination of the quoted part of the partnership agreement clearly indicates that although the fixing of compensation for *each* of the partners was in the contemplation of the parties, it was cast in the form of an agreement reserving this matter for future determination. However, the parties were unable to reach an agreement on this deferred subject. Under such circumstances, "neither law nor equity provides a remedy for breach of an agreement to agree in the future." Autry v. Republic Productions, Inc., 30 Cal.2d 144, 151, 180 P.2d 888, 893. See Dillingham v. Dahlgren, 52 Cal.App. 322, 330, 198 P. 832. The court may not imply or speculate upon what the parties will agree. Autry v. Republic Productions, supra, 30 Cal.2d at page 152, 180 P.2d at page 893; Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp., 61 Cal.App.2d 55, 56-57, 141 P.2d 938; Dillingham v. Dahlgren, supra. A statement of this rule is to be found in Volume I, Williston on Contracts (1936), section 45, p. 131, where the author says: "* * * if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future

agreement. Since either party by the very terms of the promise may refuse to agree on anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." There is no practical reason under the facts of this case to depart from these principles. Defendant's conduct was materially instrumental in preventing an agreement. Furthermore, defendant is in nowise prejudiced by failing to receive compensation, since plaintiffs would have been equally entitled to compensation for their services under the partnership agreement. Also, since defendant is entitled to a share in the profits during the entire time his assets and services were employed by the partnership without a settlement of its accounts, he may not in addition claim an allowance for his services in the absence of an agreement therefor.

[16] In a separate appeal, which has been consolidated with the appeal from the judgment, defendant appeals from a post-judgment order in which the court fixed the bond on appeal under section 945, Code of Civil Procedure, at \$100,000. Defendant first contends that the judgment in the instant case is a "judgment directing the execution of a conveyance" within the meaning of Code of Civil Procedure section 944, and that defendant's compliance with the provisions of this statute by depositing with the clerk of the superior court a "Conveyance of Ownership Interest" suffices to invoke the statutory stay of execution on appeal. However, this contention is untenable when the judgment is considered in its entirety, as it must be, without isolating particular clauses from the context. Freeman v. Donohoe, 188 Cal. 170, 172, 174, 204 P. 593. It is clear from a reading of the whole judgment that it directs the sale of defendant's share of the partnership enterprise and delivery of possession to plaintiffs upon their payment of the purchase price. The language of the decree ordering the execution of the deed is merely ancillary to the principal purpose of the judgment which was to subject defendant's interest to a purchase by plaintiffs if they so desired, accompanied by a delivery of exclusive possession of the

real property involved. Section 945 of the Code of Civil Procedure was, therefore, applicable and defendant was properly required to file an undertaking in compliance with the provisions of that section in order to stay execution of the appeal. *Archer v. Miller*, 192 Cal. 67, 70, 218 P. 410. See 40 Cal. Law Rev. 249, 263.

[17] Defendant further contends that, assuming section 945 to be applicable, the fixing of the bond at \$100,000 is grossly excessive. This objection is well taken. Section 945 requires an undertaking to the effect that appellant will not commit waste, and, if the judgment is affirmed, that he will pay the value of the use and occupation of the property during the pendency of the appeal. While it is the function of the trial judge to fix the size of the appeal bond, this discretion must be exercised in a manner compatible with the potential injury which respondents might suffer during the period of appeal. Since defendant is not exclusive manager of the partnership affairs, and his activities are subject to daily scrutiny by the other partners, it is clear that his opportunities to commit any extensive waste are limited. Furthermore, there is not the slightest intimation in the record that such acts of waste are contemplated and, in view of defendant's own interest in increasing the profits of the enterprise, it would be contrary to his economic interests for him to commit serious waste. So far as his use and occupation of the property is concerned, defendant and his family are in exclusive possession of only a small part of the ranch, he and his family residing on one of several houses on the property. In the light of all these facts, the sum of \$100,000 fixed for the undertaking on appeal was "excessive and an abuse of the discretion of the court." *Huston v. Huston*, 87 Cal.App.2d 8, 10, 195 P.2d 551, 552. A bond in a much smaller amount would adequately protect the plaintiffs. It would seem that under all the circumstances a \$20,000 bond would be ample.

A retrial of the issues is unnecessary, but an accounting must be had and a new judgment entered. The first phase of the accounting is for the purpose of determin-

ing the value of the respective interests of the partners as of the date of dissolution, viz., June 15, 1950. In arriving at that figure the valuation of \$235,000 placed on the property by the trial court is definitive of that question. However, in determining the respective financial interests in the partnership business as of that date consideration must be given to the \$25,000 which plaintiffs advanced for defendant, and to the \$42,000 which plaintiffs improperly withheld and distributed, together with interest on said sums to date of dissolution. All other assets and liabilities of the partnership, together with any claims of the parties *inter se*, must be included in the ascertainment of the respective interests of the plaintiffs and the defendant.

The second phase of the accounting covers the period from June 15, 1950, to the filing of the remittitur herein. This should establish the net profits of the partnership for that period and defendant's share therein should be allocated to him in proportion to his interest in the business on June 15, 1950. The judgment should contain an appropriate provision permitting plaintiffs the privilege of purchasing defendant's interest in the partnership enterprise pursuant to the provisions of section 15038(2)(b) Corporations Code, and providing that in the event plaintiffs elect to make such purchase they shall pay defendant interest at the rate of seven percent per annum on the amount found to be due him as of the date of the remittitur until paid. The judgment should also contain an appropriate provision for the indemnification of defendant in the event plaintiffs purchase his interest. Section 15038(2)(b). The judgment should further provide for defendant's participation, on a pro rata basis, in the proceeds of the sale after deducting picking and other marketing expense of such, if any, of the citrus crop as may be substantially matured upon the filing of the remittitur. This provision should require plaintiffs to assign to defendant his share of the proceeds from such maturing crop so that they may be paid directly to defendant by the marketing organization, and thus not delay the

accounting or rendition of a final judgment for this case has already been in the courts for almost seven years.

The judgment is reversed with directions to take the accounting and enter a judgment in accordance with the views herein.

The order fixing the bond on appeal is modified by reducing the amount thereof to \$20,000, and as so modified, affirmed.

Plaintiffs shall bear one half of the costs on appeal, defendant the other half.

MOORE, P. J., and McCOMB, J., concur.



117 Cal.App.2d 66

BAUER et al. v. HELENE CURTIS INDUSTRIES, Inc.

Civ. 15381.

District Court of Appeal, First District,
Division 2, California.

March 27, 1953.

Hearing Denied May 21, 1953.

Action was brought to recover purchase price paid for certain merchandise, on ground of breach of warranty. The Superior Court, City and County of San Francisco, Frank T. Deasy, entered an order granting plaintiffs a new trial, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that where evidence on pertinent issues was far from conclusive and undisputed, action of trial court in granting a new trial on ground of insufficiency of evidence to justify decision would not be disturbed on appeal.

Order affirmed.

1. Common Law ⇨9

The law does not care for trifling matters.

2. New Trial ⇨137

When adverse party has been given due notice that motion for new trial will be made and is fully appraised of grounds to be urged, jurisdiction is complete. Code Civ.Proc. §§ 657, subd. 6, 659.

3. Appeal and Error ⇨222

Where motion for new trial is argued and submitted without any objections being made to defects in notice of intention to move for new trial, any irregularities therein are waived and may not be urged upon appeal. Code Civ.Proc. § 659.

4. Appeal and Error ⇨1072

Defendants were not prejudiced by form of notice of motion for new trial by plaintiffs who requested new trial on ground of insufficiency of evidence to justify "verdict", and who were granted new trial on ground of insufficiency of evidence to justify "decision." Code Civ. Proc. §§ 657, subd. 6, 659.

5. Appeal and Error ⇨1015(1)

Where evidence on pertinent issues was far from conclusive and undisputed, action of trial court in granting a new trial on ground of insufficiency of evidence to justify decision would not be disturbed on appeal. Code Civ.Proc. § 657, subd. 6.

Shapro & Rothschild and Raymond T. Anixter, San Francisco, for appellant.

Mark M. Coleman, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued to recover the purchase price of certain merchandise delivered to them as distributors under contract with defendants who were the manufacturers. The basis of the action was a purported breach of warranty of the merchandise sold. In a trial before the court sitting without a jury judgment was entered for the defendant. In due time the plaintiffs moved for a new trial specifying eight grounds. The only ground urged and determined was that numbered 6 which read, "Insufficiency of the evidence to justify the verdict." The order granting a new trial specified as a ground therefor, "insufficiency of the evidence to justify the decision." Because of the use of the word "verdict" in the notice of motion and the use of the word "decision" in the order, the appellant contends first, that the trial court was without jurisdiction to hear the motion since such power

is conferred by section 657, subd. 6, Code Civ.Proc., to a case of "Insufficiency of the evidence to justify the verdict or other decision * * *" and second, because in granting the motion on the specified ground "Insufficiency of the evidence to justify the * * * decision" the court relied on a ground not specified in the notice of motion. To restate the highly technical argument, it is that the trial court had jurisdiction to grant a new trial only subject to a notice specifying insufficiency of the evidence to "justify the verdict or other decision" and since the notice did not specify the "decision" there was no jurisdiction to base the order on that ground.

[1] Appellant relies on the case of *Martin v. Matfield*, 49 Cal. 42, which was followed in *Sawyer v. Sargent*, 65 Cal. 259, 3 P. 872, both holding that when the notice of motion used the word "judgment" instead of the word "decision" the court was without jurisdiction to grant a new trial. Both cases were written before the days of open plumbing and are no longer authority. Though we do not find that the *Martin* case has been expressly overruled such is not the case as to *Sawyer v. Sargent* which was expressly overruled in *Locke v. Moulton*, 96 Cal. 21, 30 P. 957; *Hoover v. Wolfe*, 167 Cal. 337, 139 P. 794, and rejected in *O'Connell v. Main, etc., Hotel Co.*, 90 Cal. 515, 27 P. 373. Adopting the ancient maxim (which is still sound under modern plumbing) that "de minimis non curat lex" the later decisions hold that if the notice of motion distinctly informs that a new trial will be asked for it is sufficient. The *Hoover* case went a step further where it is said, 167 Cal. at pages 339, 340, 139 P. at page 795: "In the first place, the notice stated that motion for a new trial would be made. This is all that is required by the statute. *Bauder v. Tyrrel*, 59 Cal. 99; *Heinlen v. Heilbron*, 71 Cal. 557, 12 P. 673. The statement that the moving party would ask to have the judgment vacated was unnecessary, and may be treated as surplusage. *Locke v. Moulton* [96 Cal. 21, 30 P. 957]. Besides, the grounds of motion were such as are applicable only to a motion for new trial, and the statement of such grounds

sufficiently apprised the adverse party of the nature of the relief to be asked."

[2,3] Though the language quoted may be too broad in view of the amendment to section 659, Code Civ.Proc. requiring the notice to designate the grounds upon which the motion will be made, the principle is sound that when the adverse party has been given due notice that such a motion will be made and is fully apprised of the grounds to be urged the jurisdiction of the court is complete. Furthermore, when the motion is fully heard without objection to its form (the record does not show that any objection was made) and no prejudice was suffered by the plaintiffs because of the wording of the notice we can properly make the same inquiry as that of the Supreme Court in *O'Connell v. Main, etc., Hotel Co.*, supra, 90 Cal. at page 518, 27 P. at page 374: "[C]ould any attorney imagine such a motion, based upon the ground of insufficiency of the evidence, or errors at law occurring at the trial, or for newly-discovered evidence, and made upon a statement of the case, unless it were a motion for a new trial under the statute authorizing and requiring these things?" The same result was reached in *Secreto v. Carlander*, 35 Cal.App.2d 361, 364, 95 P.2d 476, 477, where the court said that where "a motion for a new trial is argued and submitted without any objection being made to defects in the notice of intention to move for a new trial, any irregularities therein are waived and may not be urged upon appeal. *Christy v. Spring Valley Water Works*, 68 Cal. 73, 8 P. 849; *Cormond v. United Railroads*, 41 Cal.App. 683, 686, 183 P. 218; *Starkweather v. Eddy*, 196 Cal. 73, 75, 235 P. 334 [734]."

[4] We hold that appellant was not prejudiced by the form of the notice.

[5] The second ground urged by appellant is that the evidence was insufficient to support a judgment for plaintiffs in any event. In argument it is suggested that respondents must have known of the defective condition of the merchandise and must have delayed an unreasonable time in making their rescission. These were the per-

tinent issues tried by the court and the evidence is far from conclusive and undisputed. In granting the new trial the court necessarily determined that such evidence was not conclusive and such holding cannot be disturbed.

Order affirmed.

GOODELL and DOOLING, JJ., concur.



TERRY v. CITY OF BERKELEY et al.*

Civ. 15324.

District Court of Appeal, First District,
Division 2, California.

March 27, 1953.

Rehearing Denied April 25, 1953.

Hearing Granted May 21, 1953.

Retired mounted patrolman brought action against city to recover additional pension. The Superior Court, County of Alameda, entered judgment for patrolman, and city appealed. The District Court of Appeal, Dooling, J., held that where city ordinance fixed measure of pension to be paid retired patrolman as pension equal to one-half of average salary attached to rank or ranks held during three years immediately preceding date of retirement, pension of retired mounted patrolman, who held same rank for three years preceding retirement, was one-half of salary that he had received, and he was not entitled to increase in pension because salary of mounted patrolmen was increased after his retirement.

Judgment reversed.

1. Municipal Corporations ⇨187(7)

Where city ordinance fixed measure of pension to be paid retired patrolman as a pension equal to one-half of average salary attached to rank or ranks held during three years immediately preceding date of retirement, pension of retired mounted patrolman, who held same rank for three years preceding retirement, was one-half of salary that he had received, and he was not entitled to increase in pension because

Cal.Rep. 253-254 P.2d-57

* Subsequent

salary of mounted patrolmen was increased after his retirement.

2. Statutes ⇨206

Statutes must be construed to give effect to every word if possible.

3. Statutes ⇨190

Where only one sensible meaning can be given to statute, legislative discretion cannot be usurped by court to give statute another meaning.

Fred C. Hutchinson, City Atty., and Robert T. Anderson, Asst. City Atty., Berkeley, for appellants.

Cornish & Cornish, Francis T. Cornish and Howard W. Wayne, Berkeley, for respondent.

DOOLING, Justice.

Plaintiff, a mounted patrolman in the police department of defendant, City of Berkeley, was retired in 1940 on a pension of \$92.50 per month. The trial court awarded him a judgment covering the period not barred by the statute of limitations for the difference between \$92.50 per month actually paid him and his pension calculated upon the salary of mounted patrolmen as increased after his retirement and further adjudging that future pension payments to him should be made on the same basis.

The plaintiff was retired under section 13 of Ordinance No. 2250-N.S. which fixed the measure of the pension to be paid in the following language: "he shall be paid from the Fund during the period of his disability a pension equal to one-half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement."

[1] Plaintiff relies in support of the judgment on the cases which have held that where a pension is measured by the salary "attached to the rank" of the pensioner at the time of his retirement the pension is a fluctuating one which increases with corresponding increases in the pay for the rank. *Casserly v. City of Oakland*, 6 Cal.2d 64, 56 P.2d 237; *Klench v. Board of Pension Fund Com'rs*, 79 Cal.App. 171, opinion 263 P.2d 833.

249 P. 46. We agree with defendants and appellants that in view of the peculiar wording of the ordinance here in question such a construction cannot be given to it.

The measure of the pension here involved is "one-half of the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement." Where the pensioner held only one rank during the three years preceding his retirement there can only be one effective construction placed upon these words.

"One-half of the average salary attached to the rank" is arrived at by taking the sum of two or more salaries attached to that rank and dividing the total by the number of salaries thus added together. Upon retirement of a pensioner who had held the same rank for the preceding three years it would require an averaging of the salary attached to that rank during that three year period to determine the initial pension. If, for example, during the first year the salary attached to such rank was \$160 per month, during the second year \$185, and during the third year \$195; the average salary attached to the rank held during the three years preceding retirement would be one-third of the sum of the three salaries, or \$180 per month. Suppose then after the pensioner's retirement the salary attached to the rank is increased to \$200, with what would \$200 be averaged to fix the measure of the pension, if it is fluctuating? The average is required to be of the salaries attached to that rank and unless "held during the three years immediately preceding the date of retirement" fixes the salaries to be averaged there is no way of determining what salaries are to be taken into consideration in determining the average salary. The only possible measure of the *average* salary attached to a single rank held by the pensioner for three years immediately preceding retirement is the average of the salaries attached to that rank during that three year period.

Respondent points out that in his case his salary was constant during the three year period immediately preceding his retirement. This accidental fact can have no bearing on the proper construction of the

ordinance. While the average of a constant figure is that constant it is still impossible to average that constant over the three year period immediately preceding retirement and give any recognition to a new figure which did not occur in that three year period, and it is equally impossible to find in the language of the ordinance any other group of salaries of which the average is to be taken.

It is obvious that if the singular noun "rank" had been omitted the average salary attached to the plural "ranks" held during the three year period immediately preceding might be calculated on a fluctuating basis. As the salaries attached to the several ranks changed the average of the new salaries could be taken; but there is no conceivable fashion in which such a formula can be applied in the case of a single rank.

[2] Respondent would have us read the ordinance as if "average salary" qualified only the plural "ranks" and not the singular "rank", or as if it read: "equal to one-half the salary attached to the rank or one-half the average salary attached to the ranks held during the three year period." This we cannot do. The order of the words makes it too clear for argument that "average salary attached to" qualifies "rank" which follows it immediately as well as "ranks". Statutes must be construed to give effect to every word where possible, 23 Cal.Jur., Statutes, sec. 133, pp. 758-760; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 641-642, 122 P.2d 526, and the construction which we put upon the ordinance is the only one which gives sensible meaning to the singular word "rank" in conjunction with the other words used in the ordinance.

Respondent suggested for the first time on oral argument that the "average salary attached to the rank" might be intended to take care of cases where a range of salary was attached to the same rank, e. g., from a minimum of \$160 to a maximum of \$180. The very fact that this construction did not occur to respondent earlier suggests that it is not a normal or natural one. The average of \$160 and \$180 is \$170. If this construction was placed on the ordinance

and policeman A receiving \$160 and B receiving \$180 were both retired, each by that formula would receive the same pension, $\frac{1}{2}$ of \$170, although before retirement B was receiving \$20 per month more than A. Furthermore when applied to more than one rank held during the three year period this suggested formula breaks down since the "average salary attached to the * * * ranks" clearly contemplates averaging the salary attached to rank X with that attached to rank Y, where the pensioner has occupied both ranks during the three year period.

[3] Respondent argues that pension statutes are to be liberally construed and that a fluctuating pension is the more equitable type. We may concede both of these statements and it still remains true that where only one sensible meaning can be given to a statute the legislative discretion cannot be usurped by a court to give it another.

The judgment is reversed.

NOURSE, P. J., and GOODELL, J., concur.



116 Cal.App.2d 856

**MORRIS et ux. v. CITY OF
LOS ANGELES.**

Civ. 19234.

District Court of Appeal, Second District,
Division 3, California.

March 24, 1953.

Rehearing Denied April 9, 1953.

Hearing Denied May 21, 1953.

Action to enjoin a city from prosecuting plaintiffs for alleged misdemeanors in selling part of a city lot and maintaining the remaining part in violation of a provision of a zoning ordinance prohibiting separation in ownership or reduction in size of the lot below the minimum width and area required thereby, and for a declaratory judgment that such provision and other provisions of the ordinance are invalid. From a judgment of the Superior Court of Los Angeles County,

Dudley G. McGregor, Judge Assigned, declaring the provisions unconstitutional as to plaintiffs and permanently enjoining the city from bringing any civil or criminal action based thereon against plaintiffs, the city appealed. The District Court of Appeal, Shinn, P. J., held that the ordinance provision alleged to have been violated was invalid and unenforceable as to such sale and plaintiffs' ownership of the remainder of the lot.

Judgment affirmed.

1. Municipal Corporations Ⓒ625, 626

The question whether zoning ordinance is unreasonable, arbitrary and discriminatory is related to its application to particular property involved, as it may be valid in its general aspects and as to some properties and invalid as to other properties.

2. Municipal Corporations Ⓒ601(7)

Provisions of city ordinance that every lot in multiple dwelling zone shall have minimum width of 50 feet and minimum area of 5,000 square feet and that no lot held under separate ownership when ordinance became effective shall be separated in ownership or reduced in size below minimum width or area required by ordinance are generally valid.

3. Appeal and Error Ⓒ931(1)

On city's appeal from judgment declaring certain zoning ordinance provisions unconstitutional as to respondents and permanently enjoining city from prosecuting respondents for violations thereof, all intendments must be indulged to sustain trial court's findings of conditions bearing on reasonableness and validity of provisions as applied to respondents' property.

4. Evidence Ⓒ11

It is matter of common knowledge among persons at all familiar with history of City of Los Angeles that section thereof east of river, approached by Brooklyn Avenue and known as Brooklyn Heights, is one of original sections of city, into which Los Angeles pueblo expanded.

5. Municipal Corporations Ⓒ601(18)

Though zoning measures are essentially prospective in operation, regulations primarily designed for development of new districts, but framed in terms rendering

them applicable to fully improved sections of city, which cannot be made to conform to entirely new scheme of development, must be reasonably applied to such sections.

6. Municipal Corporations ⇐601(22)

A provision of city ordinance that every lot in multiple dwelling zones shall have minimum width of 50 feet and minimum area of 5,000 square feet must be assumed to have been enacted with understanding that it would not be given effect, where result would be to oppress owners of property in old settled districts, developed under different standards, without accomplishing any good, though it does not exempt such districts from its operation.

7. Municipal Corporations ⇐601(12)

A provision of city ordinance that no lot held under separate ownership in multiple dwelling zone when ordinance became effective shall be separated in ownership or reduced in size below minimum width of 50 feet and minimum area of 5,000 square feet required by ordinance is invalid and unenforceable as to sale of 40 by 45 feet portion of corner lot, with house thereon, in old settled residential district of small houses on small lots, or vendors' ownership of remaining 45 by 80 feet portion thereof.

Ray L. Chesebro, City Atty., Bourke Jones and Alan G. Campbell, Assistant City Atty., Los Angeles, for appellant.

Eugene L. Wolver, Los Angeles, for respondents.

SHINN, Presiding Justice.

Prior to March, 1950, Sam Stephanian owned a lot at the corner of Pennsylvania Avenue and Fickett Street in the City of Los Angeles. The lot has a frontage of 45 feet on Pennsylvania Avenue and depth of 120.9 feet on Fickett Street. There are two houses and a double garage on the lot; one house faces Fickett and the other faces Pennsylvania. The area is zoned R4 (multiple dwelling zone) and the Los Angeles Comprehensive Zoning Plan, adopted as a part of the Municipal Code by ordinance No. 90,500, by an amendment adopted in 1950, provides that in an R4 zone "every

lot shall have a minimum width of fifty (50) and a minimum area of five thousand (5,000) square feet." (Mun.Code, § 12.11-C, 4.) Although Stephanian's lot was non-conforming as to minimum area it did not violate the ordinance. This, because the lot was so constituted at the time the ordinance was adopted and the ordinance by its terms did not apply to such lots. However, the zoning ordinance further provides: "No lot or parcel of land held under separate ownership at the time this Article became effective shall be separated in ownership or reduced in size below the minimum lot width or lot area required by this Article * * *." (12.21-C, 1(k), Ordinance No. 92,066 adopted August 19, 1947.) In March, 1950, Stephanian sold the entire lot to plaintiffs and they, in turn, sold the northerly 40 feet (40 x 45) and the house fronting on Fickett Street to other persons. The remaining portion of the lot (45 x 80) with the other house was retained by plaintiffs. Section 11.00(m) of the Los Angeles Municipal Code declares that it shall be unlawful for any person to violate any provision or to fail to comply with any of the requirements of the code and provides punishment by fine or imprisonment for such offenses. After the sale by plaintiffs a criminal prosecution was commenced in the Los Angeles Municipal Court by the People against Mr. and Mrs. Morris complaining that by the division and sale of their lot they had committed misdemeanors, not only in selling the 40 x 45 foot part, but also maintaining the 45 x 80 that remained. That proceeding is still pending.

Plaintiffs brought this action seeking to enjoin prosecution of the municipal court action and for a declaratory judgment that §§ 12.11-C, 4 and 12.21-C, 1(j) and (k) are invalid for various reasons and for an injunction against criminal prosecution or other interference with the use of their property. The trial court found that both residences have been on the subject property for more than 25 years as have the majority of the buildings in the neighboring area and that practically all of the corner lots in the area have more than one dwelling unit thereon. The court further

found that each of the dwelling units had separate utility connections and that: "Corner lots having thereon two or more separate and unconnected dwelling units, when such lots are divided and sold, together with a residence, to separate owners who occupy the same, are better kept, maintained or occupied by a better type of occupant and have fewer occupants than those which are tenant occupied, and neither public health or sanitary regulations are adversely affected where such corner lots are sold and the residences thereon are occupied by separate owners." From the findings the court concluded that: "Sections 12.11-C, 4, 12.21-C, 1(j) and 12.21-C, 1(k) of the Los Angeles Municipal Code, as applied under the evidence in this case to the subject property, are invalid, arbitrary, discriminatory and unconstitutional and are not a reasonable use of the police power vested in the City of Los Angeles, and the enforcement of the said sections, as against the subject property, would in no way tend to accomplish the purposes for which the Comprehensive Zoning Plan and the other provisions of the Los Angeles Municipal Code were intended." The court further concluded that the sale of the northerly 40 feet of the property was legal, proper and valid and that insofar as the above mentioned sections of the Los Angeles Municipal Code purport to forbid the sale of the remaining 80 feet of the property, such sections are void. On the basis of its conclusions the court adjudged §§ 12.11-C, 4, 12.21-C, 1(j) and 12.21-C, 1(k) to be unconstitutional as to plaintiffs and permanently enjoined the City of Los Angeles from prosecuting or bringing any civil or criminal action based on said sections against either of the plaintiffs by reason of the accomplished sale of the northerly 40 feet or by reason of the maintenance or future sale of the southerly 80 feet. (§ 12.21-C, 1(j) would apply only as § 12.21-C, 1(k) applies to the present case.) From this judgment the defendant city appeals.

It is defendant's contention that all the issues of this case were settled adversely to plaintiff by *Clemons v. City of Los Angeles*, 36 Cal.2d 95, 222 P.2d 439, and the trial

court erroneously refused to follow that decision. We cannot agree.

The *Clemons* decision went no further than to sustain the ordinance as applied to the particular state of facts established by the agreed statement of facts and the findings of the trial court.

The pertinent facts were the following: *Clemons* had acquired a bungalow court on Beverly Boulevard in Los Angeles, some 20 years old, containing 9 units; by deeds or 99 year leases he subdivided the court into 9 parcels, each with a building thereon, and proceeded to sell or lease them separately; two of the units had no access to a street or alley; with each parcel was conveyed an easement over the walkways of the court to Beverly Boulevard; the entire property was serviced by only one incinerator and two sewer connections. From the facts, "experts in the field of community development" evolved certain theories which impressed the trial court as realities and were carried into the findings. These related to the distressing conditions which the experts envisioned as a result of separate ownership of units in the bungalow court. These opinions of the experts were received as evidence and furnished the foundation of the trial court's findings, which, in turn, were deemed controlling on the appeal. We quote from the opinion in 36 Cal.2d at page 99, 222 P.2d at page 442: "In support of its view that the 'ordinance is an important factor in the orderly development of the city,' the trial court found that the 'attempted cutting up' of such property as plaintiff's bungalow court would 'tend to create and accelerate the creation of slum conditions' and 'overcrowd(ing),' thus 'militating against orderly, quiet and peaceful living'; that 'health and sanitary regulations and laws would be more difficult to enforce' if the bungalow units 'were sold to various separate owners'; and that therefore 'said ordinance has a reasonable relation to the public health, safety and general welfare, and was enacted for the public good.'" Referring to a written opinion of the trial judge the court said 36 Cal.2d at pages 100-101, 222 P.2d at page 442: "The com-

ment is there made that according to the view of experts in the field of community development, the subdivision of 'bungalow courts into separate parcels' tends 'to create slum conditions' because it would be unlikely that a uniform state of repair would be maintained by the various owners and a 'hodge-podge appearance' would result, with a consequent depreciation in value of the entire property; 'overcrowding' develops because where it is 'a common practice for landlords to limit the number of people who may occupy a bungalow in a court,' such restriction would not apply under separate ownership of the various units, and the probable increase and concentration of people within the limited area would 'add to the noise and other irritations and militate against orderly, quiet and peaceful living'; 'health and sanitary regulations' become 'more difficult to provide for and enforce,' and particularly where such 'close living' in separately owned bungalow units contemplates 'each person * * * constantly making use of easements over the others' property, and where there is no one to make or enforce any rules touching items of common necessity to all, such as, for example, use of incinerators or other disposal of trash, and keeping clean the common walkways,' the situation could create disturbing tensions. As is further there said, the 'City Council may well have had all these matters in mind in passing the ordinance here under attack and may have concluded that it was necessary in furtherance of the general welfare of the city and its orderly development.'" And in discussing the case of *Simon v. Town of Needham* (population about 16,000), 311 Mass. 560, 42 N.E.2d 516, 141 A.L.R. 688, which upheld a zoning law of the town of Needham prescribing a minimum area of one acre for residential lots, it was said in the *Clemons* case 36 Cal.2d at page 101, 222 P.2d at page 443: "Among the factors considered pertinent in relation to the municipality's power to so regulate the size of

house lots in a district which appeared 'admirably suited for one family residences' were the following, 42 N.E.2d at page 518: avoidance of 'congestion in the streets'; prevention of 'overcrowding of land'; facilitation in furnishing 'transportation, water, light, sewer and other public necessities'; provision of recreational space for 'children to play'; encouragement of the 'cultivation of flowers, shrubs and vegetables.'" And at page 100 of 36 Cal.2d, at page 442 of 222 P.2d the court said: "Where from a consideration of the evidence the trial court has found certain physical facts and conditions to exist in relation to the particular property restriction involved as would justify regulation by the city through the exercise of its police power, all intendments must be indulged to sustain such findings and resulting judgment." And again in 36 Cal.2d at page 104, 222 P.2d at page 445, it was said: "The various factors above reviewed as found by the trial court to be possible motivating forces in the city's adoption of the ordinance show it to have a reasonable relation to the interests of the community as a whole in establishing a recommended residential pattern through regulation of minimum lot areas under single ownership."

We have quoted the court's findings on the material facts in the instant case. The properties here involved front on public streets; those in the *Clemons* case did not; there are separate utility services and customary outbuildings, whereas in the *Clemons* case there were but two sewer connections and one incinerator for 9 units. We now come to a comparison of other factual matters covered by the findings in the two cases. According to expert opinion in the *Clemons* case, separate ownership would "tend to create and accelerate the creation of slum conditions."¹ There was no expert testimony on this or any other subject in the present case, which is a fact of considerable significance. Such opinions as were expressed in the *Clemons* case would have

1. Slum: "A thickly populated street or alley, especially one marked by squalor, wretched living conditions, or the degrada-

tion of its inhabitants." (Webster's New International Dictionary, Second Edition.)

been opposed to the actual conditions shown to exist in plaintiffs' neighborhood. The direct evidence and the findings were that there are actually fewer occupants in the owner-occupied properties than in the rental properties. The owner-occupied properties were kept in better condition. In the Clemons case the experts were of the opinion that if the units were owned separately "health and sanitary regulations and laws would be more difficult to enforce." In the instant case the court was considering actual, existing conditions and found: "Neither public health or sanitary regulations are adversely affected where such corner lots are sold and the residences thereon are occupied by separate owners."

[1,2] It is well established that the question whether a zoning ordinance is unreasonable, arbitrary and discriminatory, is related to its application to the particular property involved. It may be valid in its general aspects and as to some properties and invalid as to others. *Reynolds v. Barrett*, 12 Cal.2d 244, 83 P.2d 29; *Skalko v. City of Sunnyvale*, 14 Cal.2d 213, 93 P.2d 93; *Bernstein v. Bush*, 29 Cal.2d 773, 177 P.2d 913; *Hagenburger v. City of Los Angeles*, 51 Cal.App.2d 161, 124 P.2d 345. It is settled that the provisions of the ordinance under consideration are generally valid. The question is whether they are valid as applied to conditions as found by the trial court.

[3] The findings of the trial court in the present case of conditions which bear upon the reasonableness of the ordinance and which reflect upon its validity are entitled to the same consideration and weight that was given to the findings in the Clemons case which tended to establish the reasonableness of the application of the ordinance to the Clemons property.

The conditions considered in the Clemons case were novel and they were extreme conditions. Those of the instant case are common and of long duration in the neighborhood. The trial court in our case was not compelled to rely upon theories and opinions of experts, but was dealing with established facts and matters of general knowledge.

[4] It is of common knowledge among those who are at all familiar with the history of the City of Los Angeles that the section of the city east of the river, approached by Brooklyn Avenue, and known as Brooklyn Heights, is one of the original sections of the city into which the pueblo expanded. The property herein involved is a part of J. W. Browning's Subdivision of lots 4 and 5 of Mathews and Fickett Tract, map of which was filed for record August 6, 1886. It was an old and well developed section before Hollywood and Beverly Hills emerged from grain fields and orchards. For at least 75 years the property owners had been permitted to develop the district as it now exists without interference by city authority. There was evidence that the average house is of four or five rooms and its average age from 25 to 35 years, from which it would be inferred that many of them have stood since the early days. Property values have been declining. It was shown by a map in evidence that in the vicinity of the subject property there are 26 corner lots. One of them is occupied by the Jewish Community Center; 13 of them have been divided into separate ownership; 8 of the remainder, although not divided in ownership, have two or more houses on them, some as many as four houses; only four remain with a single residence. Where lots have been divided the usual size of the lot is around 50 x 60, or 40 x 70 feet.

This particular zoning regulation, as applied to the Brooklyn Heights area, comes fifty years too late. That section of the city belongs to the citizens who live there. They have built it to suit themselves, as they had a right to do. It was argued to the trial judge that this old district, which has been by-passed by modern development, may sometime become the scene of new and intensive apartment house development, and that the owner of a small parcel might refuse to sell at a fair price and thus "sit back and hold up the economic progress of the area." It was said: "But sometimes people just have eccentricities and they want to live where they have always lived and they are not going to move." We do not recognize this desire as an eccentricity,

but as one of the virtues of a sturdy society, to be cultivated and protected, and not throttled by mischievous legislation.

[5,6] Although zoning measures are essentially prospective in their operation, it frequently occurs that regulations which are primarily designed for the development of new districts are framed in terms which render them applicable to sections of a city that have been fully improved and which cannot be made to conform to an entirely new scheme of development. Application of such regulations must be reasonable. However desirable it may be that each residence be situated on a lot of 5,000 square feet, it would be futile to make that a requirement in a residential district of small houses built on small lots. Although the ordinance provision in question does not except from its operation old settled districts which were developed under different standards, it must be assumed that it was enacted with the understanding that it would not be given effect where the result would be to oppress the property owners without accomplishing any good whatsoever.

[7] We are concerned only with the facts of the plaintiffs' case and the factual conclusions of the trial court. Plaintiff has done nothing out of conformity with the general conditions in his neighborhood. Under the findings the purchaser of the 40 x 50 foot lot has all the usual residential facilities; plaintiff has the same on the 45 x 80 foot parcel which he retained. Many other property owners in the district are in the same situation. Their occupancy interferes in no manner with the health, safety or welfare of the community. They do not have 5,000 square feet for each of their dwellings and are thus prohibited from selling less than all of their property. Plans developed through years of thrift and careful investment would thus be frustrated. The ordinance would stand in the way of a sale of part of a lot to pay off an indebtedness on the whole, or giving a deed to a marrying son or daughter. Such oppression would be beyond reason.

Upon the facts found, the trial court properly concluded that the ordinance pro-

vision in question is invalid and unenforceable as to plaintiffs' sale of a part of his property or to his ownership of the remainder.

There are other substantial questions as to the power of the city to legislate with respect to transfers of real property and the constitutionality of the ordinance provision in question. We have considered the sole ground upon which the trial court rendered its judgment and deem it unnecessary to decide whether it is sustainable on other grounds.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; GIBSON, C. J., and SPENCE, J., dissenting.



117 Cal.App.2d 132

In re WOOD'S ESTATE.

EHNI et al. v. WOOD.

Civ. 19514.

District Court of Appeal, Second District,
Division 3, California.

April 1, 1953.

Proceedings on creditor's claim against estate. The Superior Court of Los Angeles County, Victor R. Hanson, J., entered order striking claim from the files, and claimant appealed. The District Court of Appeal held that motion of executors to strike and order striking claim amounted to a refusal to approve it, and not a decision on merits, and order was not appealable.

Appeal dismissed.

1. Executors and Administrators ⇨256(2)

No appeal lies from an order rejecting a claim in probate, but proper procedure is to bring suit on creditor's claim. Probate Code, §§ 714, 1240.

2. Executors and Administrators ⇨256(2)

Motion by executors to strike claim of creditor and order of court striking claim from files was not an adjudication as to

merits of claim, but was merely refusal to approve it, and no appeal could be taken from order. Probate Code, §§ 714, 1240.

Harry C. Mabry, Los Angeles, for appellant, Anna N. Wood.

Edward S. Shattuck, Los Angeles, for respondents, William R. Ehni and Hugh W. Darling, as executors of estate of Jacob H. Wood, deceased.

McCutchen, Black, Harnagel & Greene; Harold A. Black; William S. Lee, Los Angeles, for certain other respondents.

PER CURIAM.

Anna N. Wood gave notice of appeal from an order of the superior court in the matter of the estate of Jacob H. Wood, deceased, striking from the files a creditor's claim against the estate which she had theretofore presented to the executors. The order was made pursuant to a motion of the executors to strike the claim upon the grounds that it was fictitious, sham, based upon a false allegation of lack of knowledge of notice to creditors, was an abuse of the processes of the court for the purpose of delaying distribution, and that the interests of justice would be served by striking it from the files. The motion was resisted and was heard upon voluminous affidavits, counter affidavits and the testimony of one witness on behalf of the executors.

The respondent executors now move to dismiss the appeal upon the ground that the order sought to be appealed from is nonappealable, that the purported appeal is frivolous, and that the question presented by the appeal has become moot. Certain other individuals interested in the estate have joined in the motion.

[1,2] It appears from the affidavits filed herein that after the order was made striking the creditor's claim, Anna N. Wood brought suit in the superior court upon said creditor's claim and the demand upon which the claim was based, which action is now pending. It is said in the points and authorities of respondents in support of the motion to dismiss that the action of the

executors in moving to strike the claim was clear evidence of their intention to reject and disallow the claim and further: "Any act in writing by the executor or by a judge indicating an intention to reject a creditor's claim is tantamount to an indorsement of rejection on the claim. (San Francisco Bank v. St. Clair, 47 Cal.App.2d 194 [117 P.2d 703]; *Faias v. Superior Court*, 133 Cal.App. 525 [24 P.2d 567].) Hence the Notice of Motion To Strike the claim filed by the executor in the estate coupled with the court's order granting the motion can hardly be interpreted as anything but a rejection of the appellant's claim." We agree. No appeal lies from an order rejecting a claim in probate, either under section 1240 of the Probate Code or any other code section specifying orders and judgments from which an appeal may be taken. The procedure is to bring suit under section 714 of the Probate Code. *Miller v. California Trust Co.*, 15 Cal.App. 2d 612, 59 P.2d 1035. The motion to strike was a rejection of the claim by the executors and the order striking it from the files was, as conceded by respondents, merely a refusal to approve it, and adjudicated nothing as to the merits of the claim.

The appeal is dismissed.



117 Cal.App.2d 73

PAULEKAS v. PAULEKAS.

Civ. 18674.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1953.

Action by wife for separate maintenance. The Superior Court, Los Angeles County, Clarence M. Hanson and William B. McKesson, JJ., entered final decree awarding wife specified property and monthly payments for support of wife and minor children and an order denying husband's motion to set aside defaults and decree, and husband appealed. The District Court of Appeal, Moore, P. J., held that denial of motion to set aside de-

faults and decree of separate maintenance on ground that husband did not know action had been changed from divorce suit to action for separate maintenance and had relied on wife's attorney to protect his interests, was not abuse of discretion.

Order and decree affirmed.

1. Judgment ⇨162(4)

Denial of husband's motion to set aside defaults and decree of separate maintenance on ground that he did not know action had been changed from divorce suit to action for separate maintenance and did not know the difference until after entry of decree and had relied upon wife's attorney to protect husband's interests was not abuse of discretion, in view of affidavits as to information given husband and his understanding thereof and fact that decree was not entered until four months after service of amended complaint demanding separate maintenance. Code Civ. Proc. § 473.

2. Judgment ⇨143(3)

Attorney was bound to obtain judgment in action by client for separate maintenance as speedily as circumstances would allow and to obtain for client the maximum advantage consistent with the circumstances of the parties, and husband had no right to rely on wife's attorney to protect his interests in the matter, regardless of personal friendship between attorney and client's husband.

3. Appeal and Error ⇨920(1)

On appeal from order determining an issue on ex parte affidavits, those favoring demands of prevailing party are taken as establishing facts declared therein and also such facts as may reasonably be inferred therefrom.

4. Judgment ⇨143(3)

Where a liberal amount of time has elapsed from date of service of summons until trial of case, excusable neglect in not defending action may not be relied on as ground for setting aside default. Code Civ. Proc. § 473.

5. Judgment ⇨138(1)

In proceeding to set aside defaults and final decree of separate maintenance, de-

creed was not open to attack on ground that it was not justified by the evidence. Code Civ. Proc. § 473.

6. Appeal and Error ⇨934(3)

Reviewing court must indulge all reasonable presumptions and intendments in favor of a default judgment.

Vito A. Paulekas, in propria persona.

Mendel H. Lieberman, Los Angeles, for respondent.

MOORE, Presiding Justice.

In this action for separate maintenance, appellant was by the judgment required to pay monthly to his wife for the support of herself and two children \$175; also, bills for their medical and dental care. Additionally, she was awarded the home, the movable property where the couple had lived and the savings bank accounts in her name.

On receipt of notice of the decree, appellant moved promptly under section 473 of the Code of Civil Procedure to set aside the several defaults that had been entered against him and the judgment on the grounds of his inadvertence, surprise and excusable neglect. He submitted with his motion an answer and a cross-complaint and now comments that his "affidavit reveals that he has a good and sufficient defense to plaintiff's cause of action and * * * a good and sufficient cause of action for divorce in his own right." In his affidavit he averred that he and Mr. Lieberman, his wife's attorney, were close friends; that he "relied on" that attorney to protect appellant's interests; that all papers directed to him were served in the attorney's office and with one exception by the attorney; that the latter never told appellant at any time the action had been changed from a divorce suit to an action for separate maintenance; that appellant did not know the difference between a cause for divorce and one for separate maintenance until after the decree had been entered and at all times thought he was being sued for divorce; that the attorney never explained to him that he was re-

quired to file an answer. He averred that he did not consult an attorney until twelve days after the judgment but at all times relied upon Mr. Lieberman "as my friend to protect my interests"; that on February 27, 1950, he appeared in court when he was ordered to make certain payments; that Lieberman then told him there would be a subsequent trial of which appellant would be notified, but the attorney did not explain that appellant was required to file an answer; that "I relied upon Lieberman's friendship to protect me." He sets forth that on April 3, 1950 at Lieberman's office he was served with "amended summons and amended complaint" but nothing was said to the effect that this changed the divorce action to one for maintenance. He cites the salutation, "Dear Vito" and the familiarity of subscribing his communications "Mendel," as proof of the friendship on which he was entitled to rely.

However, the averments of appellant were on all material points either controverted or explained by the affidavits of Mr. Lieberman and of Mrs. Paulekas. He was told after the first hearing that Mr. Lieberman would set the case for trial and if the judge believed respondent, she would obtain judgment; "you won't have a right to do or say anything because you are letting Margaret take judgment without a contest." The averments continue: appellant is "exceptionally intelligent, clever, keen, inquiring and analytical; also he is suspicious. He read the complaint promptly on receipt of it; said the house, car, furnishings and bank account go to Margaret; they are hers." He was told that if he wished a trial he must file an answer within ten days or get a lawyer to do so. He replied that he preferred not to contest the matter, but he "won't pay more than I can afford to pay, that's all. * * * When I can pay more, I will. And when I can't, I won't."

When Mr. Lieberman told him that if he desired to contest the case he should file an answer, appellant stated his preference for the court to determine the amount Margaret should be paid. Therefore, they both attended the hearing on February 27, 1950, and thereafter Lieberman told him that

since appellant was not contesting the case he would not be privileged to say a word at the trial.

On March 28, 1950 respondent had her counsel file an amended complaint demanding separate maintenance only. By telephone the lawyer requested appellant to call to be served with the new pleading and save some expense. Pursuant to promise appellant called on April 3. At the time service was made, Lieberman stated that the original complaint was for divorce but that the amended pleading was different as shown by the prayer. The lawyer then instructed appellant to read the entire amended complaint to see the differences and to "answer within the next ten days if you want to have a contest and a trial." Default was duly entered on April 17 and on the day fixed for trial the case went off calendar because of the birth of the second child. That event necessitated the filing of a supplemental complaint. The attorney then advised appellant that the latter was not required to be at any court session until he had been served with notice of the decree. The supplemental complaint was forwarded to appellant on June 1, 1950. Subsequently, he called at Lieberman's office and was served with the latest pleading. His default on the supplemental complaint having been duly entered, a trial was had on August 2, 1950. Six days later, appellant called on Lieberman and was served with a copy of the decree. He thereupon read the decree and stated that he had no questions; that he understood it fully but "of course" he would not make these payments; that if he paid as much as he could "they can't do anything to me." He expressed no "anger, surprise, doubt or bewilderment." He thanked the lawyer "for everything."

[1] From the averments of the supporting affidavits of respondent which were adopted as the facts, it cannot reasonably be said that the court abused its discretion. Such documents, if believed, served to establish that appellant knew the *amended complaint asked for separate maintenance only* and not for divorce. Not only did he read the document on April 3, 1950 but thereafter he had it in his possession for

four months before the matter was tried. From the chronological table of events on the margin¹ it will be observed that, from the date of the service of the amended complaint demanding support and maintenance to the day judgment was rendered, 121 days elapsed. During that period appellant met with his wife's lawyer and was, in the latter's office, served with official copies of her demands. For one of the quickness of perception and of the ready understanding of events that characterized appellant, it cannot be said that the trial court, as a matter of law, abused its discretion.

[2] By what standard of ethics or of logic could appellant have relied upon the opposing attorney "to protect" his interests? Mr. Lieberman's duty was to obtain a judgment as speedily as the circumstances would allow; to get for his client the maximum advantage consistent with the circumstances of the parties. Appellant knew this and if he had one thought that the lawyer would not do so, all the more reason why he should have been suspicious. Nothing is shown by appellant that indicates he was induced by the lawyer not to file an answer and a cross-complaint. It is not proved that he relied upon Lieberman to give legal service to him while representing the wife. Whenever he called on Lieberman it was to see the lawyer doing some service for respondent. It appears that appellant seized upon his "friendship" to bring the controversy to a close with no more cost to himself than the payment of his wife's expense of the litigation. He induced himself to believe he would get more advantages than he was paying for and was disappointed.

[3,4] In the trial of an issue on ex parte affidavits, those favoring the demands of the respondent establish the

facts declared and also such facts as might reasonably have been inferred therefrom. *Doak v. Bruson*, 152 Cal. 17, 19, 91 P. 1001; *Kettelle v. Kettelle*, 110 Cal.App. 310, 313, 294 P. 453. The fact that the court believed the averments of respondent and rejected those of appellant is shown by the decision which, in turn, demonstrates there was no abuse of discretion. *Morton v. Morton*, 117 Cal. 443, 446, 49 P. 557. Where a liberal amount of time has elapsed from the time of the service of summons the defendant cannot maintain that he was guilty of excusable neglect in not defending the action. *Mills v. Mills*, 101 Cal.App. 248, 251, 281 P. 707. If he did not read the amended complaint, as he asserts, he was grossly culpable; if he read it, as the court found, he swore falsely. In either event it cannot be said the court acted capriciously, arbitrarily or corruptly in denying the motion.

The authorities cited by appellant, *Garcia v. Garcia*, 105 Cal.App.2d 289, 233 P. 2d 23; *Mulkey v. Mulkey*, 100 Cal. 91, 34 P. 621, and *Karlein v. Karlein*, 103 Cal. App.2d 496, 229 P.2d 831, are readily distinguishable by their facts.

[5,6] Appellant seeks to upset the judgment on the ground that it is not justified by the evidence. The decree in this action is final and is not open to attack in a proceeding to set aside the judgment under section 473, *supra*. Where a default judgment is on appeal, the reviewing court must indulge all reasonable presumptions and intendments in favor of the judgment. *Kreling v. McMullen*, 158 Cal. 433, 434, 111 P. 252.

The decree of separate maintenance and the order denying defendant's motion to set aside defaults are affirmed.

McCOMB and FOX, JJ., concur.

1. Feb. 16, 1950	summons served
March 7, 1950	default entered
March 23, 1950	off calendar
April 3, 1950	amended complaint served
April 17, 1950	default entered

May 2, 1950	cause off calendar, second child born
June 30, 1950	service of supplemental complaint
July 14, 1950	default entered
August 2, 1950	trial

117 Cal.App.2d 96

NELSON v. PORTERVILLE UNION HIGH SCHOOL DIST. et al.

Civ. 4617.

District Court of Appeal,
Fourth District, California.

March 30, 1953.

Action for damages arising out of intersection collision between truck driven by plaintiff and bus driven by a defendant. The Superior Court, Tulare County, Frederick E. Stone, J., entered judgment on verdict in favor of plaintiff, and defendants appealed. The District Court of Appeal, Mussell, J., held that under evidence, instruction as to stopping distances for vehicles equipped with adequate brakes was inapplicable and should not have been given, but that in view of facts that no reference was made therein as to whether either of drivers involved was negligent, and that jury was elsewhere fully instructed as to all principles of law involved in the case, jury was not misled by such instruction to the prejudice of the defendants.

Judgment affirmed.

4. Appeal and Error ⇨1066

An instruction, erroneous or correct, which relates to matters as to which there is no evidence, will not justify a reversal unless it has misled jury to prejudice of the appellant.

2. Trial ⇨296(3)

In automobile negligence action where court, in giving for plaintiff an instruction with respect to Vehicle Code section relating to adequacy of brakes which was inapplicable under evidence, made no reference as to whether either of drivers involved was negligent, and elsewhere fully instructed as to all principles of law involved in case, the giving of such instruction could not have misled the jury to prejudice of defendant. Vehicle Code, § 670.

3. Appeal and Error ⇨1060(1)

Where plaintiff's counsel remarked in opening argument of automobile negligence action that he hoped there would be instruction given as to stopping distances, but jury was instructed that statements of counsel were not to be considered as

evidence in the case, such remark, even when considered in light of the subsequent giving of instruction on stopping distances which was inapplicable under evidence, did not constitute prejudicial error. Vehicle Code, § 670.

Chester O. Hansen, James H. Barstow, Fresno, and Ralph Jordan, Visalia, for appellants.

Allen L. Martin, Fresno, and Dickson F. Maddox, Visalia, for respondent.

MUSSELL, Justice.

This is an action for damages arising out of a collision between a Studebaker pickup truck driven by plaintiff and a Porterville Union High School bus driven by defendant William Bryan. A jury returned a verdict in favor of plaintiff. Defendants' motion for a new trial was denied and they appeal from the judgment.

The accident occurred about 7:15 a. m. on May 8, 1950, in the intersection of Terra Bella Boulevard and Highway 65 in the town of Terra Bella. Highway 65 runs north and south and Terra Bella Boulevard runs east and west. Plaintiff testified that he was driving north on Highway 65; that as he approached the intersection at Terra Bella Boulevard, he reduced his speed to 15 to 20 miles per hour; that the southwest corner of the intersection was unobstructed except for two umbrella trees; that he first noticed the school bus when he was about a block from the intersection, at which time the school bus was approximately 150 feet west and approaching from that direction; that the last time he saw the school bus prior to the time he entered the intersection it was 5, 10 to 15 feet from it; that he entered the intersection first and was traveling at a speed of approximately 15 miles per hour; that he estimated the speed of the bus at approximately 10 miles per hour; that it struck the left front end of his pickup and that he applied the brakes the moment of the impact.

An officer of the California Highway Patrol, who was called to the scene of the accident, testified that there were six feet

of skid marks running north and south in the intersection, followed by 21 feet of burn marks, which latter marks ran in a general northeasterly direction and were presumably made by the Studebaker pickup after it had been struck by the bus; that there were no skid marks running in an easterly or westerly direction which were in any way related to the school bus; that the intersection at the southwest corner was open and unobstructed; that the point of impact was in the northeast quadrant of the intersection; that he took a statement from William Bryan, the bus driver, in which Bryan said "I did not see any car and the first thing was when I heard a girl scream and the car hit me."

A witness who was walking toward the scene of the accident and about 150 feet west of it testified that he estimated the speed of the Studebaker pickup at about 20 to 30 miles per hour; that the school bus was going 15 miles per hour and was increasing its speed; that the pickup entered the intersection before the school bus.

Bryan testified that he stopped at the railroad track about 125 feet from the intersection and entered it at about 10 miles per hour; that he looked two or three times before he entered it, but did not look to his left or right at any time thereafter; that the first he knew of the presence of another car was when he was warned by one of the occupants of the bus; that he then lost control of the bus and it continued on, colliding with two parked vehicles.

Other witnesses testified giving various estimates as to the speed of the two vehicles and as to which first entered the intersection.

It is not contended that the evidence was insufficient to support the jury's verdict in favor of plaintiff or that the damages awarded were excessive. This appeal is based solely upon the contention that the trial court erred in instructing the jury, at the request of plaintiff, in the language of Vehicle Code Section 670, when in fact the adequacy of the brakes of the vehicles involved was not at issue. The questioned instruction is as follows:

"The Vehicle Code of this State, in effect at the time of the accident involved in this case, provided, in part, as follows:

"Section 670. Part (a) No person shall operate on any highway any motor vehicle or combination of motor vehicle or other vehicle or vehicles of a type subject to registration hereunder unless such motor vehicle or at least one unit of any such combination of vehicles is equipped with brakes adequate to bring such motor vehicle or combination of vehicles to a complete stop when operated upon dry asphalt or concrete pavement surface where the grade does not exceed one per cent at the speeds set forth in the following table within the distances set opposite such speeds. Ten miles per hour, stopping distance 9.3 feet; fifteen miles per hour, stopping distance 20.8 feet; twenty miles per hour, stopping distance, 37.0 feet; twenty-five miles per hour, stopping distance 58.0 feet; thirty miles per hour, stopping distance 83.3 feet; thirty-five miles per hour, stopping distance 113.0 feet; forty miles per hour, stopping distance 148.0 feet; forty-five miles per hour, stopping distance 188.0 feet."

[1] In the instant case there was no evidence that the brakes of either of the vehicles involved were defective and for that reason the instruction was inapplicable and should not have been given. However, it is well settled that an instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant. *Trelut v. Kazarian*, 110 Cal.App.2d 506, 512, 243 P.2d 104.

In *Hamm v. San Joaquin, etc., Canal Co.*, 44 Cal.App.2d 47, 60-61, 111 P.2d 940, 947, an instruction was given to the effect that it is unlawful to operate a motor vehicle upon a public highway at a speed in excess of 30 miles per hour unless it is equipped with brakes by means of which it may be stopped within a distance of 83.3 feet. The court, in commenting upon the effect of this instruction, said:

"Finally, the appellants assign as prejudicial error the giving of an instruction to the effect that it is unlawful to operate a motor vehicle on a public highway at a speed in excess of thirty miles an hour, unless it is equipped with brakes by means of which it may be stopped within a distance of 83.3 feet. It is contended by the appellants this instruction is not applicable to the issues of these cases for the reason that there is no evidence that the brakes of Mr. Fittje's machine were defective, and because it was not contended at the trial that they were defective. That claim is true. There is absolutely no evidence that the brakes of his car were defective. Mr. Fittje admitted that he did not apply his brakes or attempt to stop his car before the collisions occurred. It must be conceded the last-mentioned instruction was inapplicable, but we are unable to see how it could have been prejudicial, or that the absence of that instruction would have warranted the jury in returning a different verdict. It is a well-established rule that the giving of an instruction upon a question regarding which there is no evidence in the record will not justify a reversal of the judgment, even though the instruction is inapplicable, unless it appears that it was likely to mislead the jury or prejudice the appellant. *Mehollin v. Ysuchi-yama*, 11 Cal.2d 53, 57, 77 P.2d 855; *In re Estate of Clark*, 180 Cal. 395, 398, 181 P. 639; 2 Cal.Jur. 1027, § 611."

[2] Appellants rely upon the cases of *Ketchum v. Pattee*, 37 Cal.App.2d 122, 98 P.2d 1051 and *Moore v. Miller*, 51 Cal. App.2d 674, 125 P.2d 576. In the *Ketchum* case the jury was instructed that a violation of Section 670 of the Vehicle Code is negligence per se, and also that a violation of Section 528 of the same code, which was included in the instruction given, is negligence per se. In the instant case no reference is made in the instruction given as to whether either of the drivers involved was negligent, and the jury was elsewhere fully instructed as to all principles of law involved in the case. In the *Ketchum* case the court dwelled at length with the

inapplicability of that part of the instruction embodying subdivisions (a) and (b) of Section 528 of the Vehicle Code and held that the jury should not have been told that a violation of the statute constituted negligence as a matter of law and that under all of the circumstances of the case, prejudicial error appeared. In the *Moore* case, plaintiff complained of the refusal of the court to give an instruction in the language of Section 670 of the Vehicle Code and the court held that such an instruction was not required in the case. These cases present situations factually different from those before us and are not controlling here.

In *Sortino v. Loneoak*, 66 Cal.App.2d 876, 884, 153 P.2d 428, 432, the court said, quoting from *People v. Cochran*, 61 Cal. 548:

"If an instruction in a case is asked which refers to facts which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury was misled by it to the prejudice of the defendant."

While in our opinion the instruction given in the instant case was inapplicable and should not have been given, the record does not indicate that the jury was misled by it to the prejudice of the defendant or that the error requires a reversal of the judgment.

[3] Appellants state that plaintiff's counsel argued to the jury in connection with the questioned instruction stating that he hoped that there would be an instruction given as to stopping distances and that the jury was misled by this statement. However, the remarks were made in the opening argument and the jury was instructed that statements of counsel were not to be considered as evidence in the case. No prejudicial error appears in the remarks made by plaintiff's counsel.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

117 Cal.App.2d 70

APPLETON v. BECKHARDT et al.

Civ. 15412.

District Court of Appeal, First District,
Division 2, California.

March 27, 1953.

Rehearing Denied April 25, 1953.

Hearing Denied May 21, 1953.

Action for injuries to plaintiff as result of intersectional collision. The Superior Court, County of Santa Clara, entered judgment for defendants on their motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that evidence made question for jury on issue of plaintiff's alleged contributory negligence.

Judgment reversed.

1. Automobiles ⇨245(80)

In action for injuries to plaintiff as result of intersectional collision between his automobile and vehicle of defendant, wherein it was contended that plaintiff was contributorily negligent in matter of lookout, evidence required submission to jury of issue of contributory negligence.

2. Automobiles ⇨206

Where plaintiff enters intersection while defendant is approaching it, plaintiff has right to assume that defendant will obey the law, slow down, and yield right of way, if slowing down is necessary to prevent collision.

3. Automobiles ⇨208

A plaintiff who first arrives at intersection is not required to yield right of way to one a considerable distance away whose duty it is to slow down in crossing intersection. Vehicle Code, § 550(a).

Crist, Stafford & Peters and John M. Donegan, Palo Alto, for appellant.

Campbell, Hayes & Custer, San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued defendants for injuries arising out of an intersectional collision between motor vehicles. At the close of plaintiff's case the trial court entered judgment for the defendants on their motion for

nonsuit. The ground of the order was assigned as the contributory negligence of plaintiff. The only question requiring decision is whether the evidence unmistakably disclosed contributory negligence as a matter of law.

The testimony heard was that the collision occurred at the intersection of Hamilton Avenue and Waverley Streets in Palo Alto. The plaintiff was driving his car north on Waverley Street. The defendant David Beckhardt was driving west on Hamilton Avenue. (We will hereafter refer to David as the defendant.) The southeast corner of the intersection was a vacant lot giving both drivers a clear view of the intersection. As he approached the intersection plaintiff was driving at about 15 miles an hour. When he entered the intersection he saw defendant approaching about 75 feet from the intersection at a somewhat greater speed. One witness testified that, when he heard the squeal of defendant's tires he observed him entering the intersection at a speed of 25 miles an hour. The defendant's car left skid marks on the pavement from a point approximately 10 feet beyond the intersection to the point of collision. At the time defendant's car was approximately 10 feet from the intersection the plaintiff's car had travelled 34 feet through the intersection and was very nearly beyond the lane of east-west traffic. The accident occurred in this segment of the intersection—the north-east—where the front of defendant's car struck the right rear end of plaintiff's car. As a result plaintiff's car was turned over on its side and plaintiff suffered personal injuries.

The trial court granted the motion for a nonsuit on the expressed ground that the evidence showed that plaintiff did not look to his right before he entered the intersection. The court was in double error—the evidence did not show that plaintiff did not look and, if it had, it was for the jury to determine the proximate cause. The plaintiff testified that he "checked pretty good there before coming into it [the intersection]", and that he entered it carefully. He also testified that he could not say positively that he came to a stop nor that he looked

to the right before entering the intersection. But there was no proof that he had not. He did testify that when he was about four feet into the intersection he looked to his right and saw defendant's car about 75 feet away. If he had looked sooner that distance would have been considerably greater and thus a sounder basis for plaintiff's assumption that he had ample time to clear the intersection safely.

[1] But we do not need to indulge in any assumptions or inferences. The facts clearly demonstrate that plaintiff's conduct did not make a case of contributory negligence as a matter of law and that that issue should have been left to the jury.

[2,3] It would serve no purpose to discuss or analyze the numerous cases cited by both parties. Every case involves its own state of facts which are not like what we have here. Here the controlling point is that plaintiff had entered the intersection while defendant was approaching it and it was the duty of defendant to yield the right of way under section 550(a) of the Vehicle Code. It is sufficient to quote from *Couchman v. Snelling*, 111 Cal.App. 192, 195-196, 295 P. 845, 847: "Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. *Keyes v. Hawley*, 100 Cal.App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. *Whitelaw v. McGilliard*, 179 Cal. 349, 176 P. 679."

We rest our decision on the single ground that the evidence was such that the disputed issues should have been left with the jury.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

116 Cal.App.2d 833

CARDOZO v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N.

No. 15402.

District Court of Appeal, First District,
Division 1, California.

March 23, 1953.

Action to establish that executor of now deceased widow and executrix was holding property of testator's estate in trust for remainderman. The Superior Court, County of San Mateo, entered judgment for executor, and remainderman appealed. The District Court of Appeal, Bray, J., held that where executrix-widow failed to give remainderman notice of probate proceedings, wrote remainderman personal letter telling him that he had one-half interest in remainder but thereafter procured distribution of entire estate to executrix, remainderman was entitled to relief sought.

Judgment reversed.

1. Trusts ⇨110

In action by remainderman, who had not been notified by executrix of probate proceedings, to establish trust in estate of decedent, whose entire estate had been distributed to executrix, who under will had been given life estate with power to consume, evidence supported finding that executrix had not intended to deceive or defraud remainderman.

2. Fraud ⇨4

There can be no actual fraud without intent to deceive or to induce other party to act or not to act.

3. Fraud ⇨6

Failure of executrix who had known remainderman's address to send notice of probate proceedings to remainderman and executrix' obtention of undue advantage over remainderman by making erroneous statement in probate petition that executrix was decedent's next of kin and sole surviving heir and was entitled to succeed to all of decedent's estate constituted "constructive fraud." Civ.Code, §§ 1573, subd. 1, 2224.

See publication Words and Phrases, for other judicial constructions and definitions of "Constructive Fraud".

4. Wills Ⓒ269

Executrix had duty to notify remainderman of probate proceedings. Civ.Code, §§ 1573, subd. 1, 2224.

5. Trusts Ⓒ102(2)

Under will giving widow-executrix life estate with power to sell, convey or expend and giving entire remainder to testator's nephew, where widow wrote letter telling nephew that he had one-half interest in remainder of testator's estate and, thereafter, without having sent notice of probate proceedings to remainderman, procured distribution of entire estate to executrix, widow held property in trust for nephew, although widow had not intended to defraud remainderman. Civ.Code, §§ 1573, subd. 1, 2224.

6. Trusts Ⓒ102(2)

Fact that deceased executrix, who had been given life estate under will with power to sell, convey or expend and who had procured distribution of entire estate to herself, could have, under terms of will, consumed entire estate could not affect establishment of trust in assets of testator's estate not consumed by executrix in action by remainderman. Civ.Code, §§ 1573, subd. 1, 2224.

John H. Machado, San Jose, for appellant.

Lucille F. Athearn, San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendant in a fraud action to establish a trust in assets of the estate.

Question Presented.

Does the evidence support the court's finding of no extrinsic fraud?

Facts.

Taking the evidence and the reasonable inferences therefrom most strongly in favor of defendant, as we are required to do, the facts are as follows:

Mary Cardozo's husband, Jorge, died January 29, 1938, a resident of San Mateo

County. He left a will naming Mary as executrix and giving her a life estate in all his property, with full power, however, to sell, convey, or expend, and with remainder over to plaintiff, his nephew, residing in the Azores Islands, Republic of Portugal. Mary knew plaintiff's address as she had written letters to him theretofore. On February 8 Mary wrote plaintiff that his uncle had died on January 29. February 24, Mary signed and filed a petition prepared by her attorney for the probate of the will and her appointment as executrix. The petition stated that plaintiff's address was unknown. Notice of the hearing was mailed pursuant to section 328, Probate Code, to plaintiff, addressed, however, to Redwood City, California. No notice of any of the probate proceedings was ever sent plaintiff nor did he have any notice of them during their pendency. February 24, the same day she signed the petition for probate, Mary sent plaintiff a registered letter telling him that his uncle left a will leaving her a life estate and that the remainder be divided into two equal parts, one for him and one for her family. March 14, the will was admitted to probate, and Mary qualified as executrix. That same day in her attorney's office she executed a will leaving half her estate to plaintiff and giving his address. Her attorney could not recall what she stated to him about plaintiff's address at the time he prepared the petition for probate, nor what she said when she asked him to prepare her will. He presumed that he asked her for the names and addresses of her heirs. May 2, Mary wrote plaintiff stating that she was employing a 12-year old child to live with her. She also stated: "Your godfather made his will for me to enjoy everything as long as I live and upon my death all the debts to be paid and that the rest be divided in two parts equal, one part for you and one part for my family. * * *" This was erroneous in that the will left all the remainder, if any, to plaintiff, August 30, her petition for distribution was filed. In it, although she stated that Jorge died testate, she did not set forth the terms of the will, but merely stated that she was his next of kin and sole surviving heir and en-

titled to succeed to all of his estate and prayed that it be distributed to her. The attorney testified that he had a secretary at that time who prepared all the probate proceedings. He did not recall ever seeing the petition. The petition alleged that the whole of Jorge's estate was the community property of him and Mary. The inventory and appraisal listed the assets as community property. October 3, 1938, the decree of distribution was entered. It followed the allegations of the petition, found that due notice of hearing had been given, and distributed the entire estate to Mary.

In 1946, D. J. Macedo, plaintiff's attorney in fact, visited plaintiff in the Azores and plaintiff told him that he had no knowledge of any probate proceedings. September 16, 1946, Mary wrote a holographic will leaving nothing to plaintiff. In May, 1948, Mary, at the age of about 86, was adjudged incompetent, and the Bank of America was appointed her guardian. July 12, 1948, she died and the bank was appointed her executor. Plaintiff brought this action to establish that the executor was holding the property of Jorge's estate in trust for him. He alleged that Mary fraudulently concealed the pendency of the probate proceedings from him, acted with intent to deceive him and to get the estate for herself.

Findings.

Among other matters the court found that the petition for probate of Jorge's will stated that plaintiff's address was unknown, although it was then known to Mary; that formal notice was not given him, but that Mary wrote plaintiff advising him of Jorge's death, giving him ample information as to the death and the estate to put plaintiff on notice; that plaintiff had actual notice of the foregoing; that the failure to give formal notice to plaintiff was caused by Mary's advanced age, lack of complete literacy and ability to make herself understood, which resulted in error in communication between Mary and her attorney; that she did not intend to defraud plaintiff; perpetrated no fraud, extrinsic or otherwise, on plaintiff; that the decree of distribution in Jorge's estate has become final and plaintiff has no in-

terest in the assets of the estate. It also found that reciprocal recognition of inheritance exists between Portugal and the United States. The court refused to find that all of the property of Jorge's estate was community property or that the only traceable assets in Mary's estate coming from Jorge's estate are certain Bank of America and Transamerica shares. It is not necessary to discuss the question of the character of Jorge's estate or the amount of the assets thereof in Mary's estate. Defendant concedes a small amount of corporate stock is identifiable as coming from Jorge's estate.

Sufficiency of the Evidence.

[1] The evidence shows unquestionably that the statement in Mary's petition for probate of Jorge's will that plaintiff's address was unknown was incorrect as were the statements in the petition for distribution upon which the distribution of the estate solely to Mary was made. While there is evidence which might have supported a finding to the effect that Mary's actions were with intent to conceal plaintiff's address to obtain the estate for herself, had the court so found, we cannot say as a matter of law that that is the only reasonable conclusion from the evidence. The facts that Mary advised plaintiff of the death of the uncle, told him of the will and her interpretation of its terms, the making of a will giving him half of her property (even though revoked by a will made six years later), her age (76 years); that her life estate included the power to consume, her partial illiteracy as shown by her letters and subsequent will—all the circumstances of the case reasonably support the conclusion reached by the court that Mary's actions were not done with any intent to deceive or defraud plaintiff.

Actual Fraud.

[2] The main question is, do Mary's acts without intent to defraud constitute extrinsic fraud? It is well established that there can be no actual fraud without intent to deceive or to induce the other party to act or not to act. 12 Cal.Jur. 808, § 65; Hayter v. Fulmor, 92 Cal.App.2d

392, 398, 206 P.2d 1101. See the many definitions of fraud in 17 Words and Phrases, p. 550 et seq. See also Mercier v. Lewis, 39 Cal. 532, holding that an allegation of actual fraud is not sustained by proof of mistake. Therefore, the court's finding that there was no fraud, extrinsic or otherwise, is supported by the evidence so far as actual fraud is concerned. Counsel have cited and we have found no case holding that acts which constitute extrinsic actual fraud if done with the intent to defraud constitute such if done without the intent. Thus, in the cases cited by plaintiff the intent to defraud was always present. *Zaremba v. Woods*, 17 Cal.App.2d 309, 61 P.2d 976; *Purinton v. Dyson*, 8 Cal.2d 322, 65 P.2d 777, 13 A.L.R. 1230; *Olivera v. Grace*, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; *Larrabee v. Tracy*, 21 Cal. 2d 645, 134 P.2d 265; *Blair v. Mahon*, 104 Cal.App.2d 44, 230 P.2d 832; *Sipe v. McKenna*, 88 Cal.App.2d 1001, 200 P.2d 61; *In re Estate of Standing*, 99 Cal.App.2d 668, 222 P.2d 465, 223 P.2d 255. In *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 193 P.2d 728, and *Howard v. Howard*, 27 Cal. 2d 319, 163 P.2d 439, the court found no fraud whatever.

Constructive Fraud.

[3, 4] But a more serious question arises in connection with plaintiff's contention that Mary bore a fiduciary relationship towards him which required her to give him notice of the probate proceedings and to act in the utmost good faith towards him. Regardless of the reasons and of her lack of intent to defraud, her failure so to do and her obtaining an undue advantage of him by her erroneous petition for distribution constituted a constructive fraud. As executrix it was her duty to notify him of the probate proceedings. "A confidential relation existed between defendant as executrix of the will of Zuber and plaintiff as a legatee in the will. Defendant was an officer of the court and occupied the position of a trustee, holding the property devised and bequeathed for the benefit of the devisees and legatees." *Blair v. Mahon*, supra, 104 Cal.App.2d 44, 49, 230 P.2d 832, 836. "Constructive fraud consists: 1. In any breach

of duty which, *without an actually fraudulent intent*, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him * * *." Civil Code, § 1573; Emphasis added. "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civil Code, § 2224. "Executors occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary." *Bacon v. Bacon*, 150 Cal. 477, 489, 89 P. 317, 322. In that case the executors sent the legatee a copy of the will showing her legacy as only \$2000 when it actually was \$10,000. The same mistake was carried into the decree of distribution. There the executors had no intent to deceive; they were merely mistaken. It was held that this was an extrinsic mistake preventing the legatee from exhibiting fully her case and requiring that the distributee be deemed to hold the \$8000 difference between what the legatee received by the decree of distribution and what she should have received, in trust for her. In *Larrabee v. Tracy*, supra, 21 Cal. 2d 645, at page 651, 134 P.2d 265, at page 269, the court said: "In *Campbell-Kawanakoa v. Campbell*, 152 Cal. 201, 210, 92 P. 184, 187, it was said that a common case of extrinsic fraud is where a party is deprived of his opportunity to be heard 'by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party.' In 3 *Freeman on Judgments*, supra, section 1235, pages 2575-2576, the author declares that if there is a duty to speak because of a trust or confidential relation, a failure to do so is obviously a fraud for which equity may afford relief whether such fraud be regarded as extrinsic or an exception to the extrinsic fraud rule." "Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court." *Westphal v. Westphal*, 20 Cal.2d 393, 397, 126 P.2d 105, 107.

[5] Were this an action to set aside the decree of distribution and open up the probate proceedings on the sole ground of Mary's constructive fraud in not giving plaintiff formal notice of the proceedings, the court's finding that notice of the death and of the will put plaintiff sufficiently on notice of the probability of probate proceedings, might be supported and might justify the court in denying him that relief. But the statement made in *Bacon v. Bacon*, supra, 150 Cal. 477, 489, 89 P. 317, 322 concerning the executors there, applies to the executor here: "They were also residuary legatees, and hence whatever was lacking in full payment to the plaintiff was so much gained to them. They are therefore not in any position to claim that the plaintiff, in relying on their own statements regarding the amount of the legacy, was lacking in diligence." This action is not to open up the probate proceedings in Jorge's estate; it is to declare that Mary's estate holds in trust for plaintiff that portion of Jorge's estate which she received by the decree of distribution and which should have gone to plaintiff. It is the fact that Mary as executrix, after notifying plaintiff that he had an interest in the estate, and thereby lulled him to some extent into a sense of security, secured an unconscionable advantage by having the entire estate distributed to her that entitles plaintiff to relief. The fact that she did not intend to defraud him is not important. He was just as defrauded as if she had intended to defraud him. " * * if through accident, fraud, or mistake the distributees are holding property under the decree, to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. This principle is, of course, well established. [Citations.]" In re Estate of Walker, 160 Cal. 547, 549, 117 P. 510, 511, 36 L.R.A., N. S., 89. "Constructive fraud often arises in transactions where there exist confidential or fiduciary relationships which have been abused by the party in whom the confidence is reposed. In such cases there may be no actual fraud, but fraud is presumed

from the fact that the one in whom the confidence is reposed availed himself of that trust to obtain an advantage at the expense of the confiding party, without reference to the question of fraudulent intent." 12 Cal. Jur. p. 711, § 6. "Constructive fraud, which is sometimes referred to as negligent or careless misrepresentations, may be actionable even though material misstatements are made *without a fraudulent intent to deceive*." *Hayter v. Fulmor*, supra, 92 Cal.App.2d 392, 398, 206 P.2d 1101, 1105. "The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. The person holding the property may have acquired it through fraud, undue influence, breach of trust, or in any other improper manner * * *." *Bainbridge v. Stoner*, 16 Cal.2d 423, 428, 106 P.2d 423, 427. See *Hewett v. Linstead*, 49 Cal.App.2d 607, 122 P.2d 352, for discussion of intentional and unintentional acts of a distributee causing exclusion of an heir to the distributee's benefit.

McGavin v. San Francisco P. O. A. Soc., 34 Cal.App. 168, 167 P. 182, is not applicable. There the plaintiff was represented in the estate by attorneys. The petition for and decree of distribution was erroneous because of the mistake of the attorney for the executor. The executor did not profit by the mistake, nor was any fraud shown. Errors in a proceeding where the injured party has not been prevented from appearing or where the fiduciary does not gain an advantage for himself has been held, as it was held in that case, to constitute intrinsic, not extrinsic, fraud.

There is practically no difference in the situation in this case where the executor unintentionally had the entire estate distributed to her to the exclusion of plaintiff's interest therein from that in the case of *Bacon v. Bacon*, supra, 150 Cal. 477, 89 P. 317, where the executor unintentionally caused \$8000 less to be distributed to the heir than she was actually entitled to. Just as there, plaintiff here had the right to rely on the executrix. He was told he had an interest under the will. At no time did he have occasion for even a suspicion that

Mary as executrix would not perform her duty to him, or by any action of hers would exclude him from his distributive share.

[6] It is true, as pointed out by defendant, that had Mary intended to defraud plaintiff she could easily have done so by merely consuming Jorge's entire estate as she had a right to do under the will. That fact, however, makes her no less a trustee for plaintiff of the interest given him by the will in whatever assets of Jorge's estate Mary did not consume.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



116 Cal.App.2d 901

**COMMERCIAL CASUALTY INS. CO. et al.
v. INDUSTRIAL ACCIDENT COM-
MISSION et al.**
Civ. 19242.

District Court of Appeal, Second District,
Division 3, California,
March 25, 1953.

Rehearing Denied April 14, 1953.
Hearing Denied May 21, 1953.

Proceeding by corporations and their insurer to review award of Industrial Accident Commission to compensation claimant. The District Court of Appeal, Wood, J., held that evidence sustained finding that contract by which claimant, a resident of Oklahoma, was employed, was a California contract, vesting jurisdiction in Commission to make award.

Award affirmed.

1. Workmen's Compensation ☞1424

In compensation proceeding, evidence sustained finding that contract of employment between California corporation, employed by contractor to engage workmen to work for contractor in Saudi Arabia, and claimant, who at the time was a resident of Oklahoma, was entered into in California, vesting California Industrial Accident Commission with jurisdiction to make award. Labor Code, § 5305.

2. Workmen's Compensation ☞1182

Provision in employment agreement between California corporation, employed by contractor to engage workmen to work for contractor in Saudi Arabia, and claimant, a resident of Oklahoma, to effect that California compensation laws should be applicable if claimant sustained injury, was insufficient to give California Industrial Accident Commission jurisdiction, but such provision could be considered in determining whether parties intended that the contract should be one entered into in California. Labor Code, § 5305.

3. Contracts ☞22(1)

To effectuate contract, it was not necessary that acceptance of offer be written upon same document upon which offer was made, but offer and acceptance was sufficient where document upon which offer was accepted was in printed form identical with document upon which offer was made.

4. Contracts ☞22(3)

In order to constitute a contract, acceptance of an offer must be communicated to the offeror. Civ.Code, §§ 1582, 1583.

5. Master and Servant ☞3(1)

Where applicant for employment, a resident of Oklahoma, sent his application to California corporation, and corporation subsequently directed applicant by telegram to pick up airplane tickets, depart for New York, and see its representative there who would have corporation's acceptance, filing of telegram in California was in effect a communication of acceptance of applicant's offer, as was presentation in New York, by corporation's agent, of corporation's written acceptance. Civ.Code, §§ 1582, 1583.

6. Workmen's Compensation ☞1547

In compensation proceeding, evidence sustained finding that claimant sustained injury arising out of and occurring in course of his employment in Saudi Arabia, consisting of aggravation of a pre-existing coronary artery disease as a result of arduous living conditions.

—◆—
Tipton, Weingand & Tipton, Los Angeles, for petitioners.

Edmund J. Thomas, Jr., and T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

PARKER WOOD, Justice.

Petition to review an award of the Industrial Accident Commission. Bechtel International Corporation, a corporation, whose main office is in San Francisco, California, had entered into a written agreement with International Bechtel, Inc., a corporation, to engage persons in the United States to work for International Bechtel in Saudi Arabia. The corporation first above mentioned will be referred to as Bechtel, and the other one will be referred to as International. It was stipulated at the hearing before the referee that the applicant, Joseph R. Crawford, was employed by one or both of said corporations and that both corporations were insured by the Commercial Casualty Insurance Company. The insurance company and said two corporations are petitioners herein.

Petitioners contend that the Industrial Accident Commission did not have jurisdiction to make the award. Their argument is that applicant has not been a resident of California and that the contract of employment was not made in California. Section 5305 of the Labor Codes provides that the Industrial Accident Commission "has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State." The provision in said section requiring that the employee be a resident of this state has been held to be unconstitutional. *Quong Ham Wah Co. v. Industrial Accident Comm.*, 184 Cal. 26, 38, 192 P. 1021, 1026-1027, 12 A.L.R. 1190; *Commercial Casualty Ins. Co. v. Industrial Accident Comm.*, 110 Cal.App.2d 83, 89, 242 P.2d 13, 17. The question remaining, with respect to jurisdiction, is whether the contract was made in California.

On November 7, 1947, the applicant, Mr. Crawford, who then resided in Okla-

homa, wrote to the office of Bechtel at Houston, Texas, stating: "I am returning application which I have completed for your consideration. * * * May I state my reason for requesting Foreign Service. * * *" He enclosed in that letter an application for employment which consisted of four pages of a filled-in, completed, and signed printed form of application at the top of which were the words: "Employment Application Bechtel International Corporation." A question on said form was, "Are you available for Foreign Service?" His answer thereto was "Yes." The application also contained a detailed statement of his employment record from 1923 to the date of the application, November 7, 1947.

On December 16, 1947, Bechtel, in San Francisco, wrote a letter to Mr. Crawford stating: "Your application for assignment as a Clerk on one of our foreign projects has been forwarded to this Department. Since you are being considered for possible assignment we wish to determine whether or not you will be available at such time as a requisition for your classification may be received from the jobsite. Will you therefore kindly fill in the questions appearing below and return this letter at your earliest convenience. Upon receipt of confirmation regarding your availability, we will initiate our verification procedure. * * *" The "questions" referred to, as appearing below, were: "I am available for future assignment" and "I have certified proof of citizenship in my possession." On December 26, 1947, Mr. Crawford wrote the word "Yes" as an answer to each of those questions and affixed his signature thereto, and mailed the document to Bechtel at San Francisco.

On January 6, 1948, Bechtel, from San Francisco, sent a telegram to Mr. Crawford in Oklahoma, as follows: "Please advise collect wire within 24 hours if you are eligible and available possible assignment as section supervisor time and payroll at \$500 month no overtime plus board, lodging, medical care. * * * Also advise if birth certificate or proof of citizenship in your possession."

On January 8, 1948, Mr. Crawford, from Oklahoma, sent a telegram to Bechtel at San Francisco, as follows: "Eligible and available for assignment. Birth certificate in my possession."

On January 9, 1948, Mr. Crawford, in Oklahoma, received a telegram sent by Bechtel from Houston asking him to telephone to Bechtel at Houston. He telephoned as requested and was informed by Bechtel that all processing documents had been sent from the Houston office of Bechtel to Mr. Crawford in Oklahoma. Thereafter and before January 16th, Bechtel, at Houston, mailed to Mr. Crawford in Oklahoma a document entitled "General Instructions for Processing." Sixteen other documents were enclosed with those instructions. The instructions stated in part, at the beginning thereof: "We acknowledge receipt of notice of your availability and intent to prepare yourself to go forward to Saudi Arabia as Sec Supv Time & Payroll at \$500.00 per month plus extras. We are enclosing documents which must be completed, dated, and signed. * * *" At the end of those instructions it was stated: *"No definite departure time will be given until all papers have been received by the San Francisco office."*

One of the documents enclosed with the instructions was a printed blank form (Exhibit H. herein) entitled "Bechtel International Corporation Memorandum of Agreement." On January 17, 1948, Mr. Crawford, in Oklahoma, signed the memorandum of agreement and mailed it to Bechtel at San Francisco. Also on said date, he filled in the blanks on several of the other documents which were enclosed with the instructions, and he signed, and mailed those documents to Bechtel at San Francisco. Those additional documents pertained to his travel expenses, his fingerprints, his understanding that he would live in temporary quarters at the jobsite, and his possession of an Oklahoma license to drive a motor vehicle.

About February 2, 1948, he signed and mailed to Bechtel at San Francisco a form, furnished by Bechtel, wherein he directed

that certain of his earnings be sent to a bank in Oklahoma.

On February 17, 1948, he signed and mailed to Bechtel at San Francisco a printed form entitled "Baggage Statement."

On February 20, 1948, Bechtel at San Francisco telegraphed him at Oklahoma as follows: "You scheduled embark New York February 27. You scheduled depart Tulsa via American Airlines Flight No. 6 at 5:40 p m February 24 arriving New York at 1:25. Ticket paid for this end. Please pickup at Tulsa AAL Office Soonest. Necessary you wire collect when ticket obtained. Upon arrival New York contact Harry Heap. * * * He will have passport, processing documents and foreign transportation. * * *"

On February 21, 1948, Mr. Crawford, from Oklahoma, telegraphed Bechtel at San Francisco: "Flight reservation ticket picked up today Depart 24th."

On February 24th, he left by airplane from Oklahoma and arrived in New York City on February 25th. On the date of his arrival there, he contacted Mr. Coughlin, a representative in New York of Bechtel, and then signed a document entitled "Applicant's Acknowledgment." At the top of the front page of that document there were the words "Bechtel International Corporation Personnel Department * * * San Francisco 5, California." The document contained several specifications regarding his understanding as to the terms and conditions of his employment. He also signed a document entitled "Check Sheet on Papers Accompanying Employee," which listed several documents he was required to have while traveling and which he was to deliver to the manager at the jobsite. Also on said February 25th, in New York City, he signed a "Memorandum of Agreement," which was identical with the "Memorandum of Agreement" (Exhibit H.), which he had signed on January 17th in Oklahoma and mailed to Bechtel at San Francisco. This document states:

"To: Bechtel International Corporation, * * * San Francisco 11, Cal-

ifornia You have entered into a written agreement with International Bechtel, Inc., which latter Company is hereinafter referred to as the 'Contractor,' to engage persons in the United States of America who will render service for the Contractor on construction or other work in Saudi Arabia. * * * I understand that in signing below I am offering to enter into an Employment Agreement with the Contractor to perform services in Saudi Arabia * * * in accordance with the terms and conditions set forth in the attached form of Employment Agreement. * * * I understand that upon this Memorandum of Agreement being signed by me and in writing accepted by you at San Francisco, California, it shall become a binding State of California, United States of America Agreement and that the Workmen's Compensation Insurance provisions of the California Labor Code shall constitute the exclusive remedy for any injury * * * that I may sustain while this Memorandum of Agreement is in force and effect. * * * This Agreement shall not become effective until it is accepted by you and salary shall not commence until the date inserted in said acceptance.

Signature of Applicant."

The last paragraph of that memorandum, which is immediately below the line for signature of the applicant, is as follows:

"The services of the applicant whose signature appears above are hereby accepted pursuant to the terms and conditions above set forth and it is agreed that the salary shall commence on the 21st day of February, 1948; it is further agreed that subsistence Per Diem shall commence on the 24th day of February, 1948;

Dated February 25th, 1948

At San Francisco, California.

BECHTEL INTERNATIONAL CORPORATION

By George M. Wood

Read and Accepted:

The three dates appearing in said last paragraph, the word "San Francisco," and the signature "George M. Wood," had been placed thereon by said Wood at San Francisco. While in New York City, on February 25th, Crawford affixed his signature in the two blank spaces, provided for his signature, on said memorandum of agreement.

Mr. Crawford left New York by airplane on February 27th and arrived in Saudi Arabia on February 29th. On said last mentioned date he signed the "Employment Agreement" which was attached to said "Memorandum of Agreement." At that time, the controller for International Bechtel also signed the "Employment Agreement."

[1-5] The commission found that the contract of employment was entered into in California. The evidence supports that finding. Crawford, while in Oklahoma, signed the Memorandum of Agreement, which was an offer by him to accept employment, and sent it and his employment application to Bechtel at San Francisco. Bechtel acknowledged receipt of those documents. Later, Bechtel asked him by telegram if he was available for assignment and if he had a birth certificate. He replied by telegram in the affirmative. Later, Bechtel, in Houston, sent the "General Instructions for Processing," and many other documents regarding processing, to him. One of the instructions was that no definite departure time would be given until all papers had been received by the San Francisco office. Bechtel in San Francisco telegraphed him regarding schedule and transportation for the trip, and told him in that telegram to contact a certain person in New York who would have "processing documents." One of those documents was the "Memorandum of Agreement," which had been signed by Bechtel in San Francisco. That particular agreement was not the one which Crawford had signed in Oklahoma and sent to Bechtel at San Francisco, but in printed form it was identical with the one he had signed and sent. Crawford, in New York in the presence of a representative of Bechtel, signed that particular agreement. The agreement

Signature of Employee."

states that it was understood that upon its being signed by Crawford and in writing accepted by Bechtel at San Francisco it would become a binding California agreement. The agreement shows that it was signed by Bechtel at San Francisco. It also states: "The services of the applicant * * * are hereby accepted. * * *" Of course, the parties could not confer jurisdiction upon the Industrial Accident Commission by their agreement. The provision in the agreement to the effect that the Workmen's Compensation laws of California should be applicable if Crawford sustained an injury did not give the commission jurisdiction. That provision, however, may be considered in determining whether the parties intended that the contract should be one entered into in California. It was not necessary that the acceptance of Crawford's offer be written upon the same document upon which he made the offer. See *Twining v. Thompson*, 68 Cal.App.2d 104, 110, 156 P.2d 29. The document upon which the offer was accepted was in printed form identical with the document upon which the offer was made. An offer and acceptance under such circumstances may constitute a contract. See *Twining v. Thompson*, *supra*, 68 Cal. App.2d at page 110, 156 P.2d at pages 32, 33. It does not appear that Bechtel's acceptance in San Francisco was conditional upon Crawford's signing again in New York. The signature of Crawford, affixed in New York under the words "Read and Accepted," did not mean that he was then accepting an offer by Bechtel to employ him. His offer to become employed by Bechtel had been accepted theretofore in San Francisco. His additional signature under the words "Read and Accepted" pertain to his approval of the dates fixed by Bechtel for commencement of salary and subsistence payments. In order to constitute a contract, the acceptance of an offer must be communicated to the offeror. "If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted." Civ.Code, sec. 1582. Crawford's offer did

not prescribe any condition concerning the communication of its acceptance. "Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section." Civ.Code, sec. 1583. In the present case, after Crawford had sent to Bechtel at San Francisco his offer, his application for employment, his previous employment record, his list of references, reports of medical examinations, and various other documents relative to the proposed employment, Bechtel directed him by telegram to pick up airplane tickets, depart for New York, and see its representative there who would have the "processing documents" (which included its acceptance). When the telegram was filed in the telegraph office in San Francisco it constituted in effect a communication of acceptance of Crawford's offer. Also the presentation in New York, by Bechtel's agent, of Bechtel's written acceptance was a communication of the acceptance. Those methods of communicating acceptance, adopted by Bechtel, were reasonable and usual modes of communication. The case of *Commercial Casualty Ins. Co. v. Industrial Accident Comm.*, *supra*, 110 Cal.App.2d 83, 242 P.2d 13, is similar to the present case. Bechtel also was the employer therein and the employee was a resident of Georgia, who sustained a disability while performing services in Arabia. The "Memorandum of Agreement" therein was the same printed form as the one involved here. The factual situation therein, with reference to jurisdiction, is practically the same as that involved here. A difference is that in that case communication of acceptance was by letter mailed from San Francisco to the applicant in Georgia. That difference, however, is not significant. It was said therein, 110 Cal.App.2d at page 88, 242 P.2d at page 17, "The offer and the terms were definite and certain. They were accepted by International's duly authorized agent and the contract then was complete. On its return to Atlanta Porter signed 'Read and Accepted'—'Signature of Employee.'" This fact does not change the situation.

as the employer's acceptance at San Francisco was not conditional on Porter's again signing. This signature merely confined Porter's understanding of the date fixed for the commencement of his salary, even though it was contemplated that the formal Employment Agreement was to be later executed in Arabia." The discussions therein relative to the question of jurisdiction are applicable here. The commission had jurisdiction to make the award herein.

Petitioners also contend that the commission's finding that the injury was compensable is not supported by the evidence. The finding was that Mr. Crawford "sustained injury arising out of and occurring in the course of his employment consisting of aggravation of a pre-existing coronary artery disease as a result of arduous living conditions during the period February 29, 1948 to and including June 5, 1949." Petitioners argue that the heart condition occurred irrespective of, and unrelated to, the simple non-arduous duties of his clerical job. The referee's report states: "From this record it would appear that although applicant did not have the exertion in his work that we usually connect with the bringing on of an anginal syndrome, that the other working conditions including the heat, inferior food which in turn caused bloody diarrhea, were sufficient to aggravate the existent heart condition."

[6] It was in October, 1948, after applicant had been in Arabia about 8 months, that he, for the first time, noticed anything wrong with his physical condition. He could not eat. He had gas on his stomach and a form of dysentery. He was confined to his living quarters about 5 days. About 2 months later, he had a similar attack which lasted about 3 days; he had a more severe attack in May, 1949, which lasted about 3 weeks. On June 7, 1949, he left Arabia and returned to Oklahoma. While he was in Arabia, the temperature in the shade was as follows: in May, 110 to 118 degrees; in October, 105 to 110 degrees; in December, about 34 degrees. During a few days in September and March, when it rained, the atmospheric

condition was very humid. Most of their food was sent from the United States. Sometimes the shipments were delayed about 6 weeks on account of the Palestine war. Sometimes when the food arrived, some of it was discarded because it had deteriorated. Sometimes rats chewed the quarters of beef which were kept in underground compartments. Ferrets were brought in to kill the rats. The company cautioned the employees to not eat outside the mess halls. It is not disputed that applicant had arteriosclerosis before he was employed by petitioners. Dr. Goen of Tulsa, Oklahoma, who examined applicant in July, 1949, reported that his diagnosis of applicant's condition "is angina pectoris due to coronary artery sclerosis." He also reported that "It is highly inadvisable for you to attempt to return to Arabia or other overseas jobs because of the climate, heat and arduous living conditions. These factors undoubtedly have contributed toward your present illness." Dr. Rosenberg of Beverly Hills, California, reported that the most likely diagnosis would seem to be an anginal syndrome secondary to coronary artery disease; that he does not feel that applicant's service overseas caused him to develop coronary artery disease; that once this condition does exist, however, strain on the heart, such as exertion, excitement, emotion, overeating, may cause the development of anginal pain which would not have occurred if the exertion had not occurred. The evidence was sufficient to support the commission's said finding that the injury was compensable.

The award is affirmed.

SHINN, Presiding Justice, and VAL-LÉE, Justice (concurring).

We concur in the foregoing opinion and judgment. We feel that we are bound by the decision of the Supreme Court in *Quong Ham Wah Co. v. Industrial Accident Comm.*, 184 Cal. 26, 192 P. 1021, holding invalid the requirement for California residence of an employee injured without the territorial limits of the state. In view of the criticism that opinion has received, see 12 A.L.R. 1207; *Tedars v.*

Savannah River Veneer Co., 202 S.C. 363, 25 S.E.2d 235, 147 A.L.R. 914; Liggett & Meyers Tobacco Co. v. Goslin, 163 Md. 74, 160 A. 804, 807, and the further fact that for more than 30 years after the Quong Ham Wah decision the Legislature has retained the residential requirement, it seems to us that the point should be reexamined by the Supreme Court or the requirement should be deleted from the law by legislative action.



Guardianship of KENTERA.

KENTERA v. BOESEL.*

Civ. 15215.

District Court of Appeal, First District,
Division 2, California.

March 24, 1953.

Hearing Granted May 21, 1953.

Proceedings on petition of minor over fourteen years of age nominating his paternal grandmother to be guardian of his person. The Superior Court, City and County of San Francisco, denied petition, and petitioner appealed. The District Court of Appeal, Goodell, J., held that under guardianship statutes, child over fourteen years of age, and capable of intelligent preference, has absolute right to have guardian of his own selection provided he selects a proper person who is approved by the court, and minor is not deprived of such right by fact that his mother is a fit and proper person to have custody.

Order reversed, with directions.

Doolling, J., dissented.

1. Guardian and Ward ⇨8, 13(7)

In guardianship matters, courts do not act in exercise of their general equity powers, but special proceedings are involved, and validity of orders made therein must be determined from a consideration of the pertinent statutes. Probate Code, § 1405.

2. Guardian and Ward ⇨10

Guardianship statutes pertaining to right of child over fourteen years of age, and capable of an intelligent preference, to

nominate his own guardian, contemplate absolute right of such minor to have guardian of his own selection, provided person nominated is a suitable person, and existence of parental relationship on part of one objecting to person nominated and fact that parent is fit and proper person to have custody cannot support determination that appointment of guardian is not necessary or convenient and that appointment of guardian so nominated should not be granted. Probate Code, § 1406.

3. Guardian and Ward ⇨13(4)

In proceedings on petition of minor of the age of fourteen, nominating his paternal grandmother as guardian, wherein it appeared that minor was presently in the custody of his mother who was a fit and proper person, but that grandmother was also a fit and proper person, evidence was insufficient to support determination that there was no necessity for the appointment of guardian pursuant to request of minor. Probate Code, § 1406.

Marshall E. Leahy and John F. O'Dea, San Francisco, for appellant.

W. L. A. Calder, San Francisco, Lorne M. Stanley, San Francisco, for respondent.

GOODELL, Justice.

This appeal was taken from an order denying the petition of Richard Steven Kentera for the appointment of his grandmother as guardian of his person.

Richard's parents were divorced in 1940 and both remarried. In the divorce action his custody was vested jointly in both parents with physical custody in his mother. Following the divorce Richard lived with his mother and, after her remarriage, with her and his stepfather.

On July 13, 1951 appellant, then aged 14, filed a petition wherein he nominated his paternal grandmother Angelina Kentera, a resident of San Francisco, to be guardian of his person. At that time he was temporarily in San Francisco visiting his grandmother during his school vacation. His mother filed an opposition wherein, after setting forth the facts entitling her to Rich-

* Subsequent opinion 262 P.2d 317.

ard's custody, she denied that he was in need of a guardian, and denied that the grandmother was a fit and proper person to act as such. In connection with this last denial she averred that the grandmother was about 60; that she lived with her husband who is not related to Richard; that no young people reside in their home; that she and her husband operate a restaurant in San Francisco which consumes most of their time and attention; that for these reasons she would be unable to give Richard proper care and supervision, and that she and her husband do not use the English language in their home but converse in a foreign tongue.

She further averred that she resides with her present husband in Ukiah, and that in the family there are three other boys, aged 17, 9, and 7; that the four boys normally play and associate together, and that it would be to the best interest of the minor to remain with his mother.

After hearing, the court entered an order denying Richard's petition and ordering him returned to his mother in Ukiah. It found that since the divorce Richard has been in the general physical custody of his mother; that the appointment of a guardian was not necessary or convenient; that he had lived practically all his life with his mother; that she is a fit and proper person to have his care, custody and control, and that his mother's home in Ukiah is a suitable home for him.

At the hearing counsel for the boy contended from the outset that the only issue before the court was as to the suitability and fitness of the grandmother to act as guardian, which contention they consistently pressed throughout. Counsel for the mother contended with equal force and emphasis that the court could not appoint a guardian, however suitable, unless such appointment was necessary or convenient. From the outset the judge expressed his agreement with the latter view. At one point during the hearing he said: "If he has a fully qualified father and mother, or either one of them, who are taking care of him, it doesn't become necessary that a guardian be appointed * * *." Elsewhere he said: "I am trying to find out

if there is any necessity or any reason, or something in the background, that prompts and makes imperative a change in the domicile of this minor to be warranted, whether that is necessary."

The Boesel household in Ukiah consists of Richard's mother and stepfather and four boys. The oldest is the stepfather's son by a former marriage; next comes Richard; the two younger boys are the children of the present marriage.

It is clear that the reason why Richard nominated his grandmother was his dislike for his stepfather. It is likewise clear that this is of long standing. It is based, according to his testimony, on discriminatory treatment by the stepfather favoring his own three sons, as against Richard.

With respect to the long duration of the dislike a witness testified to an incident 3 years before the hearing when the boy, then only 11, and on a vacation trip to Santa Cruz with his grandmother, said that he was not happy at home. Richard himself testified: "I never did like my stepfather." Further:

"The Court: Q. You didn't have any idea of staying permanently with your grandmother when you came down here this year, did you; that is you didn't have any idea of filing a petition for guardianship, did you? A. Yes, sir, I did.

"Q. Who did you discuss it with before you came down here? * * * A. I didn't discuss it with anybody.

"Q. Then you didn't have any idea? A. Yes, my mother, two years straight I asked her if I could stay.

"Q. Stay permanently? A. For school.

"Q. And she said no, you would have to go back up there and go to school, is that right? A. That is right.

"Q. But this proceeding here wherein you ask that your grandmother be appointed guardian, when did you first give that thought and consideration? A. I have had it for a long time, ever since I can remember—in Eureka—I mean, I have never liked my stepfather."

(The Boesels had lived in Eureka, before they moved to Ukiah).

With respect to the underlying reason for the nomination, Richard testified:

"The Court: Why is it you prefer to live with your grandmother in preference to your mother? A. Your Honor, it is not my mother, it is my stepfather.

"Q. Well now, what is the difficulty there? A. Well, I never did like my stepfather * * * he usually takes the side of my other brothers * * * he never listens to my side of the story.

"Q. Story about what, for instance? A. If something happens between us brothers, like fighting or something.

"Q. Oh, you get in a fight with them once in a while? A. Sometimes.

"Q. And he doesn't listen to what your side of the story is, is that it? A. Yes.

"Q. What does he do, does he chastise you, shake you around a little, or what? A. Yes, your Honor.

"Q. When did that last occur prior to your coming down here for your vacation? A. Oh, about a week before I came down.

"Q. When you came down here you discussed it with your grandmother, did you? A. Yes, sir, I always have * * *."

"The Court: How often do you have occasion to want to tell him something about your side of the story? A. Whenever it happens.

"Q. How often does it happen, these disputes? A. Three or four or five times a week * * *."

With respect to the possibility of attempted alienation: Richard frankly admitted that he discussed the nomination with his grandmother. He was asked: "And she suggested that that would be the thing to do, did she?" and answered: "No. It is not her idea for me to stay. She said my place is with my mother but she would make a home with me if I wanted to stay." Further:

"Q. You were on perfectly friendly relations with your stepfather and mother when you came down here on vacation? A. Not my stepfather.

"Q. You weren't peeved at him every day year in and year out, were you? A. Mostly. I have never liked him.

"Q. You liked your mother, though? A. Yes.

"Q. Did your mother ever intercede in behalf of your stepfather and talk to you and tell you that you should try to get along with him, or anything of that sort? A. Not that I remember of."

Richard was questioned about the incident of a camping trip or outing to Lake Pillsbury and was asked if he was not willing and anxious to go, along with the other boys, and answered "I didn't really want to go, but I wanted to go with my mother to make her happy." Elsewhere, when asked "And you think a whole lot of your mother, don't you" he answered "Yes, sir." He testified further:

"Q. Did your * * * stepfather * * * ever * * * treat you rough, slap you around? A. Well, when he would hear the other side he did. I mean, if we had a fight or something, he would hear the other side first, and then he wouldn't let me talk, and several times he shook his fist at me * * *."

"Q. Did he ever hit you? A. No.

"Q. What have you got personally against the home of your mother? A. My stepfather.

"Q. And you think that your stepfather has treated you so cruelly that you want to be away from him, is that it? A. Yes. I mean * * * he never hears what I have got to say."

Richard had testified respecting his activities and amusements while on the annual vacation visits to his grandmother's home in San Francisco, and had given an answer which might have been taken to indicate that his reason for wanting to live in San Francisco was that there was more fun to be had there than in Ukiah. Toward the close of the hearing he resumed the stand to correct such an impression, and testified: "Well, your Honor, you asked me if * * * I hated to leave the city because of the fun I have. I said yes, but I meant that I didn't want to leave because I didn't want to go back to my stepfather. That is what I meant; not because I was leaving all the fun.

The Court: "Q. How does it come that you never told your mother up there that

you were unhappy and didn't like the treatment your stepfather gave you and all that, during all these years that you have been there? * * * A. I didn't want to bring it up, she might have gotten mad at me or something for me to say anything like that; she would probably tell Hank and he would just get mad at me.

"Q. You have heard all these witnesses here that seem to think the home life there has been happy, everyone got along all right, and you appeared to be normally enjoying your home, the same as the rest of the boys in the neighborhood and all; that is right, is it? A. Well, I don't like my stepfather."

Richard testified that his own father lived in Palo Alto and that on these vacation trips to San Francisco he would visit him about twice a week.

At the conclusion of the hearing and before the case was briefed the judge made the following statement: " * * * That insofar as the home of Dick and his mother and stepfather is concerned, I think it is a fit and proper home * * * in every respect. As far as the home of the grandmother is concerned, I am satisfied that that is a proper home * * *. However, it is recognized that there is no love like a mother's love. For a minor child, I don't care whether it is a girl or boy * * * if the home is proper and the mother is a suitable mother and conducts herself as a mother and wife should, *that is a very strong reason that she should have the custody of her own flesh and blood.* The only thing here that complaint is made upon, insofar as Dick is concerned, is that he doesn't like his stepfather * * * I think * * * that there is some discretion in the court in finding it necessary or convenient that a guardian be appointed. Now, on the face of the record I cannot say that I find it necessary. It might always be convenient, but *I cannot say that it is necessary by reason of anything that is occurring or has occurred where he now exists insofar as the home of his mother is concerned.* Now, if, regardless of that situation, it is still his right and privilege, having attained the age of 14 years, to nominate his guardian, why,

that is another matter * * *." (Emphasis added.)

The Court then directed that briefs be filed and stated the question for decision as "the right of the minor to arbitrarily nominate a guardian to whom the Court must give preference *over and above a natural parent*, because of the fact that the minor has attained the age of 14 years, as set forth in the code." (Emphasis added.) After considering this question the court denied the petition.

The court found (a) that the minor is of the age of 14 years, and (b) that he requested the appointment of his grandmother. *The question presented for decision is whether the force of those findings is destroyed by other findings addressed to the subject of necessity and convenience.* These other findings are: (c) that the minor "has been in the general physical custody of his mother under decree of divorce, and as modified, since on or about March 8, 1939 * * *"; (d) that he "has lived in his mother's home practically his entire lifetime and that his mother now lives in Ukiah * * *"; (e) that she "is a fit and proper person to have the care, custody, and control of said minor", and (f) "that said * * * home in Ukiah is a suitable home for said minor." The court made a general finding "That it is true that all the facts and circumstances of the matter herein submitted, as shown by the evidence, show no necessity or convenience for the appointment of a guardian * * *."

[1] The question before us calls for a careful examination of the statutory provisions dealing with guardianships since in such matters courts do not act in the exercise of their general equity powers. Such proceedings are special proceedings and the validity of orders made in guardianship matters must be determined from a consideration of the statutes themselves. In re Guardianship of Salter, 142 Cal. 412, 413, 76 P. 51. See also In re Britt, 176 Cal. 177, 181, 167 P. 863, 864, where it is said that the courts in such matters act under "the plain mandate of our guardianship laws."

Probate Code, § 1405 provides that "The superior court shall appoint a general

guardian of the * * * person or estate, of minors * * * *whenever necessary or convenient* * * *." (Emphasis added.)

Probate Code, § 1406 provides that "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. *If the child resides in this state and is over fourteen years of age, he may nominate his own guardian*, either of his own accord or within ten days after being duly cited by the court; *and such nominee must be appointed if approved by the court.* When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court." (Emphasis added.)

[2] In the leading case of *In re Guardianship and Estate of Kirkman*, 1914, 168 Cal. 688, 144 P. 745, the court said: "The whole scheme contemplates *the absolute right of the minor* to have a guardian of his own selection after he is 14 years of age, provided always he selects a person who is, in the judgment of the court, a suitable person to act as guardian. *The discretion of the court can be exercised only in the determination of the question whether the nominee is a 'suitable person.'*" (Emphasis added.)

In the case of *In re Meiklejohn's Estate*, 1915, 171 Cal. 247, 152 P. 734, 735, the court in following the *Kirkman* case said: "The only difference between that case and this is that in that case the guardian removed was not a parent of the minor, while in this case the guardian displaced was her father. *This relationship, however, is of no consequence*, since the statute gives the minor the authority to select a new guardian, and does not make such power dependent upon relationship." (Emphasis added.)

The rules of those two cases have never been modified. If parental relationship is

of no consequence, then these findings that the minor had been in the custody of his mother since 1939 and had lived in her home practically all his life, and that she is a fit and proper person to have his custody, are of no weight and lend no support to the court's determination "that the appointment of a guardian * * * is not necessary or convenient" and lend none to the order contained in the judgment, that the minor "forthwith return to the home of his mother in Ukiah and continue there with his schooling."

The language just quoted would seem to indicate that the court dealt with this case as an ordinary custody case where the question is simply, Which of two homes is the better for the welfare of the minor? or, Whether the custody should be changed?

During the hearing the court said: "If he has a fully qualified father and mother, or either one of them, who are taking care of him, it doesn't become *necessary* that a guardian be appointed" and: "I am trying to find out if there is any *necessity* or any reason, or something in the background, that prompts and makes *imperative* a change in the domicile of this minor to be warranted, *whether that is necessary.*" At the conclusion of the hearing he said "there is no love like a mother's love. For a minor child, I don't care whether it is a girl or boy * * * if the home is proper and the mother is a suitable mother and conducts herself as a mother and wife should, *that is a very strong reason that she should have the custody of her own flesh and blood.*" (Emphasis added.) These remarks likewise indicate that the problem before the court was treated as a contest over the custody of a child under 14. But it was quite different from that, since it involved the statutory right of *the child himself* to choose his own guardian regardless of his custody or status while under 14.

The rules of the *Kirkman* and *Meiklejohn* cases have been repeatedly followed. See *In re Guardianship of Estate of McSwain*, 176 Cal. 287, 168 P. 117; *Collins v. Superior Court*, 52 Cal.App. 579, 199 P. 352; *In re Guardianship of Kerr*, 29 Cal. App.2d 439, 85 P.2d 145; *In re Guardianship of Burket*, 58 Cal.App.2d 726, 137 P.

2d 475; In re Guardianship of Gianoli, 60 Cal.App.2d 504, 140 P.2d 987. Each of these cases dealt, as this case does, with the guardianship of the *person* of a minor, and in the McSwain, Burket and Gianoli cases it was urged, as it is now, that there was no showing of necessity or convenience. In the Gianoli case, where the girl's father opposed her nomination of her maternal aunt (and her husband) for the guardianship of her person, urging that no necessity existed, it was conceded that the father was a fit and proper person, but the court nevertheless appointed the nominees, and the Supreme Court denied a hearing.

The case of In re Guardianship of Person and Estate of Wise, 179 Cal. 423, 177 P. 277, 279 is not cited by either side. However, in that case the "necessary or convenient" provision receives considerable attention in connection with the section giving preference to parents in the appointment of guardians of *children under 14*.

There the mother of a 9 year old boy and his grand-aunt separately petitioned for guardianship of his person and estate. Both petitions were denied on the ground, inter alia, that there was no necessity for the appointment of *any* guardian because "the child was in a suitable and comfortable home" (that of his great-grandmother) and the court ordered that he remain therein, just as here the court ordered that Richard remain in his Ukiah home. In reversing the order the court said: "It is argued with much force * * * that this section [1747] vests in the court a wide discretion in determining what may be *necessary* or *convenient* for the child and its interests. This may be freely conceded, but that concession does not free us from the force of section 1751 * * * which provides that —'The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person.' * * * To allow such an order to stand would be to substitute the discretion of the court for the compulsion of the statute which gives preference to a qualified parent. * * * It is suggested * * *

Cal.Rep. 253-254 P.2d—59

that such an interpretation of section 1751 as this court has given would have the effect virtually to eliminate the words 'necessary or convenient' from section 1747. If that were its effect, there would be nothing novel in the dominance of section 1751, for we have seen that it was held in the second of the appeals in Re Mathews' Estate that the preferential parental right bestowed and declared by section 1751, unless forfeited by abandonment or some other disqualification, overcomes and controls the discretion which the court might otherwise enjoy under the terms of section 246 of the Civil Code * * *. But in the present proceeding we are bound to give the effect to section 1751 sanctioned by the authorities above cited, and others to which reference might be made, and we are compelled to hold that the finding of lack of necessity for the appointment of a guardian is not supported and justified by the evidence."

The opinion in the Britt case, *supra*, declares that "this court has been inflexible in the enforcement of the parental right * * * *under the plain mandate of our guardianship laws.*" (Emphasis added.) The right enforced in the Wise case under what the court there termed "the compulsion of the statute" was the right of a parent (as the statute then read) to guardianship of *a child under 14* (the statute contained that age condition). The present case involves a different right—that of the *child himself* to name his own guardian. The present right exists, to again quote the Britt case, "under the plain mandate of our guardianship laws", since § 1406 provides that "such nominee *must* be appointed if approved by the court." In the Wise case the determination of lack of necessity was based on the fact that the great-grandmother's home was a suitable one, which finding was held to be unsupported. Here a similar determination was based on the fact "that said minor's mother's home in Ukiah is a suitable home for said minor." Here it was also based on the fact that the mother was a fit and proper person and that she had had the custody of the minor while he was under 14, but these latter considerations (all relating to the mother's claims as a parent) must be ruled out if the

Meiklejohn case is to be followed. The reasoning of the Wise case seems to be applicable to the present case.

It is interesting to note—although not necessary to this discussion—that since the decision of *In re Guardianship and Estate of Kirkman* the legislature has definitely reduced the powers of judges with respect to nominations. Section 1749, Code Civ. Proc. then read: "If the guardian nominated by the minor is not approved by the court, or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years." When the Probate Code was enacted that provision was excluded.

The judge in his written opinion quoted from *In re Guardianship of Hann*, 100 Cal. App., 743, 281 P. 74, 75, where this court said: "The court was not bound to appoint a guardian simply because the minor nominated one. *Newton v. Janvrin*, 62 N.H. 440. The court, not the minor, is required to decide whether a guardianship is necessary or convenient." Respondent relies on that case, but it is apparent from that opinion that unusual circumstances existed there which made it wholly unlike most guardianship cases. Moreover, as pointed out in *Re Guardianship of Burket*, supra, [58 Cal.App.2d 726, 137 P.2d 477] (where also it was cited on the question of necessity): "No light from that case is available for the benefit of appellant. The evidence and proceedings of the trial were not before the appellate court. For that reason it was assumed that the evidence supported the decision."

The case of *In re Adoption of McDonnell*, 77 Cal.App.2d 805, 176 P.2d 778, cited by respondent, was a proceeding involving both the adoption and the guardianship of a baby and for that reason it is not in point. Nor is the case of *Greene v. Superior Court*, 37 Cal.2d 307, 231 P.2d 821, in point, since it involved the guardianship of children aged 5 and 7. It is true that it disapproved the *Collins*, *Kerr* and *Burket* cases, cited earlier herein, in so far as their hold-

ings on the jurisdictional point were concerned, but it did not shake in any way the authority of those cases on the efficacy or force of a nomination by a minor over 14.

The findings as originally drawn and filed were silent with respect to the fitness or suitability of the minor's nominee. Three weeks after the order, and over two weeks after the appeal was taken, amended findings and an amended order were filed. The only change was the addition of a finding "That * * * Angelina Kentera, grandmother of petitioner and the person designated by petitioner as the guardian of his person is a fit and proper person to have the care, custody and control of said minor." Respondent contends that the court had no jurisdiction to amend the findings after the appeal had been taken. It is not necessary to decide that question.

[3] We are satisfied that the determination that there was no necessity for the appointment of a guardian is not supported or justified by the evidence and that the findings do not support the order.

The order is reversed with the direction to the Superior Court to make findings and an order with respect to the suitability of the minor's nominee for appointment as guardian.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. The question involved in this case put plainly is: May every child upon reaching the age of fourteen years as a matter of right repudiate and cast off his parents and leave their family home if he can find any fit and proper person whom he prefers to his parents who will assume the duties of guardian of his person? My associates have held that our law compels just this. That way lies family anarchy.

No longer will any father or mother dare to exercise the normal and salutary control over little Willy or his sister which all of the inherited wisdom of our Christian civilization teaches us is their parental obligation, lest the recalcitrant child upon reaching the mature age of fourteen should exercise his absolute right to emancipate

himself completely from parental control by nominating a doting grandmother, a complaisant aunt or indeed a complete stranger to be his guardian. In the topsy-turvy world thus created the child shall rule over his parents and the millenium of the teenager has arrived.

No decided case compels this conclusion and the only case in which the precise question was raised, other than *In re Guardianship of Hamm*, 100 Cal.App. 743, 281 P. 74, hereinafter quoted from, *In re Guardianship of Estate of McSwain*, 176 Cal. 287, 168 P. 117, left it undecided as moot. In my judgment the opinion of my associates writes out of the code the words "necessary or convenient". Prob.Code sec. 1405. Where there is property the appointment of a guardian of the estate is obviously necessary or convenient and a minor over 14 is entitled to nominate and have appointed a fit and proper guardian of the *estate*. Where a guardian of the person has already been appointed the question of necessity and convenience is thereby established and on reaching 14 the minor is entitled to have substituted a fit and proper guardian of his own choice. Where the court finds that it is necessary or convenient it is required to appoint a fit and proper person nominated by a minor over fourteen as guardian of the person rather than the parents. A child on reaching age fourteen may elect one parent over the other as his guardian where the parents are separated. But that is as far as any of the cases have gone.

I cannot agree that every child over fourteen who would prefer some stranger to his parents is entitled to have his nominee appointed guardian of his person on the showing alone that the nominee is a fit and proper person. If the parents are fit and proper and there are no other controlling circumstances the appointment of a guardian of the person is in my view neither necessary nor convenient.

I agree with the statement of this court in *In re Guardianship of Hann*, *supra*, 100 Cal.App. 743, 746, 281 P. 74, 75: "It is provided in Code Civ.Proc. § 1747, [now Prob. C. sec. 1405] that the court may appoint a guardian for a minor 'when it appears

necessary or convenient.' The court was not bound to appoint a guardian simply because the minor nominated one. *Newton v. Janvrin*, 62 N.H. 440. The court, not the minor, is required to decide whether a guardianship is necessary or convenient."

I vote to affirm the order.



117 Cal.App.2d 81

ASP v. LOWRY et al.

Civ. 4612.

District Court of Appeal, Fourth District,
California.

March 27, 1953.

Financier's action against, *inter alia*, innocent purchaser from conditional sales contract buyer. The Superior Court, Kern County, Norman F. Main, J., rendered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that the evidence sustained the finding that the conditional sales contract buyer had been authorized by the conditional sales contract seller to sell the property subject to the agreement.

Affirmed.

1. Appeal and Error ◊931(1)

If there is any substantial evidence, even though conflicting, supporting trial court's finding, it is duty of reviewing court to consider it in most favorable aspect toward prevailing party and to give that party benefit of every inference that can be reasonably drawn in support of his claim.

2. Sales ◊480(4)

In financier's action against innocent purchaser from conditional sales contract buyer, evidence sustained finding that conditional sales contract seller had given conditional sales contract buyer express verbal authority to sell property.

3. Estoppel ◊75

Where reasonable person would be led to believe that conditional sales contract buyer was owner of property subject to con-

tract, and an innocent third party parts with value in reliance thereon, third party should be protected if conditional sales contract seller has been guilty of misplaced confidence amounting to negligence. Civ. Code, § 3543.

4. Estoppel ⇨72

Misplaced confidence may be held to be negligence within meaning of codified maxim that where one of two innocent parties must suffer by act of third, he by whose negligence it happened must be sufferer; and this is particularly so where true owner is estopped to assert his title against innocent third party. Civ. Code, § 3543.

5. Sales ⇨477(1)

Right given seller by conditional sales contract, to require his written consent to buyer's sale of property subject to that agreement, could be waived.

Musick & Burrell, James E. Ludlam, and Richard T. Morrow, Los Angeles, for appellant.

Maas & Nairn, Walter L. Maas, Jr., Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff, assignee of Barker Bros. Corporation, on April 6, 1951, brought this action against Sally E. Lowry and Paul J. Baker, to recover possession of certain merchandise sold to defendant Lowry under a conditional sales contract. Lowry filed bankruptcy proceedings. The court stayed all proceedings in this action against her. The trial proceeded against defendant Baker.

Defendant Lowry bought approximately \$7,000 worth of household furnishings and furnished her home in Bakersfield. Included among the items were floor coverings, drapes and curtains. She became delinquent in her payments on the contract and decided to sell her home. She listed it with an agent and stated she would like to sell the floor coverings, drapes and curtains with the home. The agent informed her that it would be necessary to obtain the consent of the Barker Bros. Corporation since they were being bought on contract.

She immediately contacted a Mr. Soderberg, who was an agent of the company. On May 18, 1950, she paid \$500 on her account. There is a conflict in the evidence as to what was said in this conversation between the parties. Both were too ill to attend the trial and it was stipulated their testimony would be that set forth in a certain deposition, memoranda, and letters signed by them.

The purport of defendant Lowry's testimony is that she told Soderberg she was ill and had to sell her home; that she was not able to keep the furnishings bought on contract; that she put the house on the market and asked if it was all right to offer for sale the floor coverings, drapes and curtains along with the house since they were designed for it; that Soderberg said she might do so if the money so obtained from them was turned over to Barker Bros. Corporation to apply on the contract; that he informed her that in all probability she would have to take a loss on them; that they did not discuss a price because she did not know what they would bring; that Mr. Soderberg was to let her know how much Barker Bros. Corporation would have to have to release it; that he never let her know; that a purchaser for the property (defendant Paul J. Baker) came along and bought the home, including the floor coverings, for \$20,000, and paid an additional \$800 out of escrow to defendant Lowry for the drapes and curtains; and that a bill of sale was given by Lowry to Baker for these items. It was stipulated that the floor coverings, draperies and curtains altogether, had a value of \$1,500, and that defendant Baker was an innocent purchaser without notice of Barker Bros. Corporation's claimed title.

The evidence produced by Soderberg is that in said conversation Mrs. Lowry expressed the desire to sell some of the furnishings listed in her contract of purchase; that he told her if Barker Bros. Corporation would be paid in full for those items at the time of sale or through escrow, she might sell them; that his memorandum made at the time indicated that she agreed to pay \$2,060 before she would be authorized to sell the floor coverings, curtains and drapes,

and that a sum approximating that amount would be paid. His notes indicate that he told defendant Lowry that she should pay in full for the floor coverings, drapes and curtains, and that she said she might want to return some furniture; that he told her she would have to obtain an estimate from Barker Bros. Corporation on depreciation if it was turned back; that she said if and when the house was sold she would pay five or six months' payments in advance on the contract and that she would contact the company about June 1, 1950. Subsequently, much of the furniture was repossessed under the contract.

After trial, the court found generally that the Barker Bros. Corporation was informed by Lowry that she proposed to sell the floor coverings, drapes and curtains, and that the company gave and imparted to her their express and unqualified authority to sell such merchandise; that such authority was given in reliance upon the promise of Lowry to pay to plaintiff's assignor any and all money she received out of such sale, but was not conditioned upon such payment actually being made; that in reliance upon such express authority Lowry did sell the property to Baker; that Baker paid her the reasonable value of the property and had no knowledge of any claim of the company to said property and at all times Baker was an innocent purchaser for value. The court concluded that the defendant Baker was the owner of and entitled to the possession of the property and that plaintiff had no right or interest therein. Judgment was entered accordingly.

It is plaintiff's contention that the evidence is insufficient to support the finding that there was any authority, express or implied, for Mrs. Lowry to sell any of the merchandise. In this connection it is argued that at most the evidence only shows that Mrs. Lowry contemplated the future sale of her house; that she might want to sell some of the merchandise covered by the contract of conditional sale if said arrangements could be made with Barker Bros. Corporation after she had found a purchaser for the house who might be interested in some of the furniture and furnishings; that in view of the provisions of

the contract of sale, i. e., that if the buyer shall fail to comply with any terms or conditions of the contract or sell said merchandise "without the written consent of the seller" the seller may, at its option, exercise certain remedies, defendant Lowry was precluded from relying upon an oral consent when a written consent was required; that to hold such authority could be given in another manner would necessitate a modification of the terms of the written contract; and that to hold this provision of the contract may be orally waived would require a modification of the contract which may be accomplished only by a contract in writing or by an executed oral agreement.

It is respondent's position that Barker Bros. Corporation, by its oral agreement, actions and conduct, orally agreed that defendant Lowry could sell the property involved and that when it was sold she would pay them the amount of the selling price on the contract of purchase; that the furnishings were sold to an innocent third party for a valuable consideration under her ostensible authority so to do, and that the Barker Bros. Corporation thereby waived the right to written authority and was estopped from asserting its title; that the innocent purchaser's rights in such case do not depend on actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner, which precludes it from disputing, as against the innocent purchaser, the existence of the title or power which, through negligence or mistaken confidence, it caused or allowed to appear to be vested in the party making the conveyance or sale, citing 10 Cal.Jur. p. 641, sec. 22; Sec. 3543, Civ.Code; and such cases as *J. G. Boswell Co. v. W. D. Felder & Co.*, 103 Cal.App.2d 767, 230 P.2d 386; *Phelps v. American Mortgage Co.*, 40 Cal.App.2d 361, 104 P.2d 880; and *California Standard Finance Corporation v. Riverside Finance Co.*, 111 Cal. App. 151, 295 P. 555.

[1-4] The rule we must apply is that if there is any substantial evidence, although conflicting, supporting the court's finding, it is the duty of the reviewing court to consider it in the most favorable aspect toward

the prevailing party and give that party the benefit of every inference that can be reasonably drawn in support of his claim. *Cope v. Goble*, 39 Cal.App.2d 448, 103 P.2d 598. Viewing the evidence in this light, it fully supports the court's finding that plaintiff's assignor did give defendant Lowry express verbal authority to sell the property in litigation to the purchaser of the Lowry home, who proved to be defendant Baker. Defendant Lowry did agree that, after the sale, she would turn over the proceeds thereof, whatever they might be, to apply on the contract. It was logical and obvious that Mrs. Lowry could not pay Barker Bros. Corporation the money representing the claimed value of the goods she sold to Baker, before she received the money from him. According to Mrs. Lowry's testimony, her right to sell did not depend upon a determination of the amount she should obtain from the sale of the furnishings. The fact of the company's mistaken confidence in Mrs. Lowry in failing to turn over those proceeds, would not necessarily revoke her right and power of sale where she was clothed with the indicia of ownership and had the apparent power of disposition. Where a reasonable person would be led to believe, as did defendant Baker, that she was the owner of the property, and where the innocent third party parts with value in reliance thereon, the third party should be protected where the true owner is guilty of misplaced confidence amounting to negligence. Misplaced confidence may be held to be negligence within the meaning of the maxim set forth in section 3543 of the Civil Code, that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer. This is particularly so where the true owner is estopped to assert its title against the innocent third party. *Western States Acceptance Corp. v. Bank of Italy*, 104 Cal.App. 19, 285 P. 340; *General Securities Corp. v. Reo Motor Car Co.*, 91 Cal.App. 16, 22, 266 P. 576; *Wendling Lumber Co. v. Glenwood Lumber Co.*, 54 Cal.App. 691, 202 P. 929; *Camerer v. California Sav. etc. Bank*, 4 Cal.2d 159, 172, 48 P.2d 39, 100 A.L.R. 667; and cases above cited by defendant.

[5] Plaintiff's claim that the company's right to retake the property could only be waived in writing is not tenable. There was no modification of the conditional sales agreement. The right to written consent to sell a portion of the furniture purchased under that agreement may be waived.

In *Bastanchury v. Times-Mirror Co.*, 68 Cal.App.2d 217, 156 P.2d 488, this court held that a waiver is the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances indicating an intent to waive, and that one may waive a right given by contract or advantage of law intended for his benefit. See, also, *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 P. 740; 6 Cal.Jur. p. 361, sec. 216, and cases cited.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



117 Cal.App.2d 109

**TURNER v. RALPH M. PAR-
SONS CO. et al.**
Civ. 19023.

District Court of Appeal, Second District,
Division 1, California.

March 31, 1953.

Rehearing Denied April 21, 1953.

Hearing Denied May 28, 1953.

Action against, *inter alia*, general contractor and subcontractor for installation of oil drum conveyor to recover for injuries sustained, by employee of firm for which conveyor was being installed, when oil drum fell from conveyor. From an order of the Superior Court, Los Angeles County, granting a non-suit, plaintiff appealed. The District Court of Appeal, Doran, J., held that the evidence in support of plaintiff's claim that the aforementioned defendants had been negligent, in failing to warn plaintiff or his employer of danger connected with manually operating conveyor before automatic feeding

device had been put in operation, was sufficient to take case to jury.

Reversed.

1. Appeal and Error ⇨927(3)

On most appeals it is duty of reviewing court to indulge every reasonable intendment in favor of sustaining trial court, but on appeal from order of nonsuit, appellate court must view evidence as though judgment had gone in favor of appellant, and order reversal if such judgment could be sustained.

2. Trial ⇨165

Granting of motion for nonsuit is warranted only when, disregarding conflicting evidence, giving to plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from evidence, result is determination that there is no evidence of sufficient substantiality to support verdict for plaintiff.

3. Negligence ⇨136(24)

In action against general contractor and subcontractor for installation of oil drum conveyor to recover for injuries sustained, by employee of firm for which conveyor was being installed, when oil drum fell from conveyor, evidence in support of plaintiff's claim that defendants had been negligent, in failing to warn plaintiff or his employer of danger connected with manually operating conveyor before automatic feeding device had been put in operation, was sufficient to take case to jury.

Trippet, Newcomer, Yoakum & Thomas, Henry F. Walker, Los Angeles, for appellant.

Betts, Ely & Loomis, Los Angeles, for respondent Parsons.

Hulen C. Callaway (of Tripp & Callaway), Los Angeles, for respondent A. F. Comstock.

DORAN, Justice.

Plaintiff herein sought to recover damages for personal injuries sustained when an oil drum or barrel fell from a 32-foot high tower of an elevator which was part

of a conveyor system, resulting in skull fractures and permanent injury. At the close of plaintiff's case motions for nonsuit in behalf of three defendants, the A. J. Bayer Company, the Ralph M. Parsons Company, and A. F. Comstock, were granted. The appeal was dismissed as to the respondent A. J. Bayer Company.

It appears that plaintiff's employer, the Shell Chemical Corporation, desired to install a system for transporting oil drums from one side of a railroad track up and over the track and down on the other side to a platform. The Ralph M. Parsons Company was the general contractor for the job, defendant Comstock was subcontractor for installation, and the defendant Bayer had manufactured the instrumentality in question. The rough or basic idea was that of Shell; the detailed design was prepared by Comstock or Bayer or by both. Neither the contract with Shell nor designs for the system call for any guard or housing on the elevator tower, the specification describing the hoist as "not enclosed". There is no claim that either Parsons or Comstock failed to comply with the contract or designs.

Work was begun on construction of the system in December, 1948. When the device was first tested on March 17, 1949, the automatic feeder device which conveyed the drums into the elevator shaft did not work properly, and two or three days before the date of plaintiff's accident, which occurred on March 25, 1949, the automatic feed was removed by employees of Bayer and Comstock at the request of Shell through Parsons, for fixing. In the absence of the automatic device, Shell employees were used to manually load the elevator, plaintiff being thus engaged when a drum fell from the top of the elevator. Photographs offered in evidence show guards placed on the front of the elevator shaft after plaintiff's accident.

The construction work had not been completed at the date of the accident. There was evidence that, as portions of the system were brought to the lot, these were put to use as speedily as possible before the entire system was assembled. At the

date of the accident, as already indicated, the apparatus was being used although because of certain defects in performance the the automatic feeder device could not be used. That there was knowledge of this use can hardly be doubted. Comstock was personally present on frequent occasions; Coger, Comstock's superintendent, spent nearly every day at the site, and testified to having knowledge that Shell employees were operating the conveyor.

Appellant's case is predicated on the claim that notwithstanding defendants' knowledge that the system was being manually operated by Shell employees, and appreciating the dangers connected therewith, the defendants neither "warned Shell or its employees not to do so", and took no steps by way of temporary guard or otherwise, "to prevent the drums, wobbling at the top of the elevator, from falling and injuring such an employee". Appellant does not claim that, as a part of the completed structure, defendants were obligated under the contract to install permanent guards on the elevator shaft.

The record discloses testimony by Comstock in reference to telling "Mr. Grundy (Shell's engineer) not to let any Shell employees work around the vicinity of the elevator", this conversation occurring two or three days before the accident. The statement was made, says Comstock, because "I figured that the elevator might become jammed if the automatic feeding device was not in operation. It had been removed. * * * And there might be some danger also".

Engineer Grundy denied receiving such warning and testified that when the difficulties with the automatic feeding device became apparent, "Mr. Comstock indicated that it would be satisfactory to pass the drums over the elevator mechanism, since it was operating in a quasi-satisfactory state and that repairs would be taken care of just as quickly as his foreman could get to them". The device was then being operated manually by Shell employees in view of Comstock and Grundy.

Parsons' construction superintendent, Kribs, testified to difficulties encountered

in the operation of the system, and that the cross-arms which carried the drums up the elevator, also called baskets or carriages, "at the top did sway a bit but a little grease eliminated that"; this treatment "brought your swaying to a minimum, no more than would be expected in a machine of that type".

[1] The rule in reference to matters of nonsuit is stated in *Raber v. Tumin*, 36 Cal. 2d 654, 656, 226 P.2d 574, 575, as follows: "while in most appeals it is the duty of the reviewing court to indulge every reasonable intendment in favor of sustaining the trial court, substantially the reverse is true when the appeal is from an order of nonsuit. In the latter case the appellate court must view the evidence as though judgment had gone in favor of the appellant, and order a reversal if such a judgment can be sustained".

[2] The granting of a motion for nonsuit is warranted "when, and only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff".

Much of the argument contained in the briefs has to do with the ultimate merits of the case, the liability or non-liability of the defendants. This appeal, however, is not from a judgment determining liability and is concerned only with the question whether the trial court was justified in taking the case from the jury and ordering a nonsuit. Whether the jury should ultimately find for plaintiff or defendants is beside the point. As hereinbefore indicated, the rules concerning the granting of nonsuits and the review of such orders, are well defined and are not questioned by the parties hereto. Under these rules every reasonable intendment in favor of plaintiff's case must be indulged in.

[3] In a case such as this, involving several defendants, it is not unusual for each defendant to attempt to place the blame on someone else. So, on the present

appeal, it is suggested that the fault, if any, was that of Shell, plaintiff's employer, or perhaps that of the plaintiff on the theory of assumption of risk. Due to the Workman's Compensation Act, Shell is not a party defendant. And even if Shell were to be deemed at fault, this would not necessarily relieve the defendants from liability. This question of fault and liability, under a favorable view of evidence offered by the plaintiff, required by the above rule, entitles plaintiff to a jury determination of the issue.

As stressed in appellant's brief, the apparatus had not been finally completed at the time of the accident. Comstock and Parsons had not yet finished the work called for by the contract; the obligation to carry on the project in a safe and proper manner and to complete the same, was still in force. Plaintiff's complaint contains the usual, general allegations of negligence "in designing and constructing the said roller conveyor system", rather than more specific charges of wrongdoing. More than one theory of liability may well be included in its phraseology. If the only point of possible liability lay in defendants' failure to install a permanent guard on the elevator shaft, defendants' argument that the contract with Shell did not require such installation, might have weight. This, however, is by no means the complete story.

Without either deciding or intimating that the defendants are or are not liable, a review of the record indicates that plaintiff was wrongfully deprived of the right to a jury determination. Construing the evidence in plaintiff's favor, the jury might conceivably have determined that the defendants, experts in construction and operation of such devices, must have known of the danger in question, which knowledge carried with it an obligation to warn those persons exposed to such danger, or to otherwise furnish protection while the apparatus was in process of construction.

The record discloses evidence to the effect that Comstock recognized that there might be some danger in the manual operation necessary because of the absence of the automatic feed device, and that a warning was given to Shell's engineer. This warning was denied and the engineer maintained that Comstock had indicated that it would be "satisfactory" to make use of the apparatus. The weight and credibility of this evidence was a matter of prime importance and particularly within the province of the jury to decide.

Other similar instances might be mentioned. There was, for example, evidence that upon reaching the top of the elevator shaft, the drums or barrels swayed to some extent and that this situation was known to the defendants. A jury might draw the not unreasonable inference that this swaying or wobbling not only constituted a present and recognizable danger but that it was the fault of the defendants and the actual cause of the drum falling on plaintiff. These factual issues were, by the trial court's order, withdrawn from the jury's consideration.

The parties herein had seen fit to demand a jury trial rather than to leave decision of the issues to a judge as trier of the facts. Obviously, the procedure involving the granting of a nonsuit was not designed nor intended to defeat the right to a jury trial. The cases indicate that nonsuits should be granted sparingly and only in those situations where there is rightfully no factual issue for a jury to decide. If the evidence is of such a nature that a judgment for plaintiff can on no theory be sustained, then a nonsuit is clearly proper. As hereinbefore indicated, the present case is not one of that nature, and plaintiff was entitled to the verdict of the jury.

The order granting a nonsuit is reversed.

WHITE, P. J., and DRAPEAU, J., concur.











